



FEDERAL REGISTER

Vol. 76

Friday,

No. 237

December 9, 2011

Pages 76873–77106

OFFICE OF THE FEDERAL REGISTER



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

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 28

Personnel Appeals Board; Procedural Rules

AGENCY: Government Accountability Office Personnel Appeals Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Government Accountability Office Personnel Appeals Board (the Board or PAB) is amending its regulations to reflect a change in law concerning grievance procedures. The amended rule provides a choice of forum to employees with prohibited personnel practice claims. We are taking this opportunity to change some specific terms in the regulations to ones more commonly used throughout the government.

DATES: This rule is effective December 9, 2011. Comments must be received by the Board on or before February 7, 2012.

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

Mail: Patricia Reardon-King, Clerk of the Board, Personnel Appeals Board, U.S. Government Accountability Office, Suite 560, Union Center Plaza II, 820 First St. NE., Washington, DC 20002; email: pab@gao.gov; or fax: (202) 512-7525.

FOR FURTHER INFORMATION CONTACT: Beth Don, Executive Director, or Susan Inzeo, Solicitor, (202) 512-6137.

SUPPLEMENTARY INFORMATION: The Government Accountability Office Personnel Appeals Board is authorized by Congress, pursuant to 31 U.S.C. 751-755, to hear and decide cases brought by GAO employees concerning various personnel matters including adverse or performance-based actions, claims of discrimination, alleged prohibited personnel practices, and labor-management relations. The Board also

exercises oversight authority over equal employment opportunity at the agency. The Board's procedural regulations applicable to GAO appear at 4 CFR parts 27 and 28. The Board is revising one section of these regulations to ensure consistency with current law.

The Board published section 28.2(c)(2) on November 23, 1993, effective January 1, 1994 (58 FR 61998, Nov. 23, 1993). The Board's regulation mirrored that of the Merit Systems Protection Board (MSPB) and conformed with 5 U.S.C. 7121. The regulations provided that bargaining unit employees could pursue prohibited personnel practice (PPP) claims at the Board or the MSPB, respectively, only if those claims involved discrimination, performance-based reduction in grade or removal, or an adverse action as defined in 5 U.S.C. 7512; an employee could choose either the administrative appeal route or the negotiated grievance procedure but not both. An individual with PPP claims beyond those specified in the PAB regulation or the earlier MSPB regulation did not have a choice of forum.

In 1994, Congress amended 5 U.S.C. 7121 by requiring that bargaining unit employees could elect to raise any PPP claim within the MSPB's jurisdiction either to the MSPB or through the parties' negotiated grievance procedures. Public Law 103-424, sec. 9(b), 108 Stat. 4361, 4365 (Oct. 29, 1994). The PAB now amends its regulations to ensure that GAO employees' rights are consistent with the statute. The amendment provides that a GAO employee who seeks to bring a PPP claim that is covered by a negotiated grievance procedure may elect either the negotiated grievance procedure or the procedure under PAB regulations. The special rule for such claims that involve allegations of discrimination remains unchanged.

The Board is making this amendment effective immediately upon publication, on an interim basis, to conform the regulation with the statutory requirement of 5 U.S.C. 7121. See *GAO Employee Organization, IFPTE Local 1921 v. GAO*, PAB Docket No. LMR 2001-02 (Aug. 24, 2011). At the same time, however, the Board is soliciting comments on the amendment. These comments will be considered fully before the final regulation is adopted.

On September 19, 2011, GAO issued revised Order 2351.1 regarding "Reduction in Force Procedures for the Government Accountability Office." This Order was previously titled "Workforce Restructuring Procedures for the Government Accountability Office." However, as stated in the revised Order, instead of "GAO-specific terms," the Order is now adopting "governmentwide reduction-in-force terminology—i.e., reduction in force (RIF) is used rather than workforce restructuring." In order to conform with GAO's revised Order, the Board is substituting "Reduction in Force" for the term "Workforce Restructuring Action," in the definition section 28.3. It also is substituting Reduction in Force throughout part 28.

The Board is also making two additional nonsubstantive corrections to the regulations in the Table of Contents for part 28 and in section 28.113.

List of Subjects in 4 CFR Part 28

Administrative practice and procedure, Claims, Government employees, Labor-management relations, Reduction in force.

For the reasons set forth in the preamble, 4 CFR part 28 is amended as follows:

PART 28—GOVERNMENT ACCOUNTABILITY OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING EMPLOYMENT PRACTICES AT THE GOVERNMENT ACCOUNTABILITY OFFICE

■ 1. The authority citation for part 28 continues to read as follows:

Authority: 31 U.S.C. 753.

■ 2. In part 28, revise all references to "Workforce Restructuring Action" to read "Reduction in Force", and revise all references to "WRA" to read "RIF".

■ 3. Amend § 28.2 by revising paragraph (c)(2), redesignating paragraph (c)(3) as paragraph (c)(4), adding new paragraphs (c)(3) and (d) to read as follows:

§ 28.2 Jurisdiction.

* * * * *

(c) * * *

(2) *Matters involving prohibited personnel practices.* If the negotiated grievance procedure permits the employee to grieve an appealable action involving a prohibited personnel

practice other than prohibited discrimination (as defined in § 28.95), such an action may be raised under either, but not both, of the following procedures:

(A) The Board's procedures; or

(B) The negotiated grievance procedure.

The employee will be deemed to have elected the Board's procedures if the employee files a timely charge with the Board's Office of General Counsel before filing a timely grievance.

(3) *Other matters.* If the negotiated grievance procedure permits the employee to grieve any matters which would otherwise be appealable to the Board, other than those listed in paragraphs (c)(1) or (c)(2) of this section, then those matters may only be raised under the negotiated grievance procedure and not before the Board.

* * * * *

(d) Except for actions involving prohibited discrimination (under § 28.95) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedure may be raised only under the Board's procedures.

■ 4. In § 28.12, revise the section heading to read as follows:

§ 28.12 General Counsel Procedures.

* * * * *

■ 5. In § 28.113, revise paragraph (a)(5) to read as follows:

§ 28.113 Contents of representation petitions.

(a) * * *

(5) A declaration by the signer of the petition, under penalties of the Criminal Code (18 U.S.C. 1001), that the petition's contents are true and correct, to the best of his or her knowledge and belief;

* * * * *

Steven H. Svartz,

Chair, Personnel Appeals Board, U.S. Government Accountability Office.

[FR Doc. 2011-31549 Filed 12-8-11; 8:45 am]

BILLING CODE 1610-02-P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580-AB07

Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). GIPSA is amending the regulations to clarify conditions for industry compliance with the P&S Act pursuant to the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). In response to comments and other public input received in response to the proposed rule published in the **Federal Register** on June 22, 2010, making necessary changes. The provisions finalized with this action will clarify conditions for industry compliance with the P&S Act. Other provisions listed in the June 22, 2010, proposed rule are not being finalized at this time.

DATES: This rule is effective February 7, 2012.

FOR FURTHER INFORMATION CONTACT:

Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250, (202) 720-7363, *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION: The supplemental information of this final rule is composed of four sections. Section I provides a background of the rulemaking. Section II provides a summary of provisions not being finalized by this action. Section III provides a summary of provisions being finalized. Section IV provides a summary of the comments received on the proposed rule and at the relevant USDA/Department of Justice (DOJ) Joint Competition workshops that occurred during the comment period and describes how sections of the proposed rule have been modified based on these comments. Section V provides the revised impact analyses including those required by Executive Orders 12866 and

13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

I. Background

The P&S Act, As Amended by the 2008 Farm Bill

The P&S Act was enacted in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers."¹ The P&S Act provides that "[t]he Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter."² The P&S Act also sets forth procedures for administratively adjudicating certain enforcement actions.³ Title XI of the 2008 Farm Bill requires the Secretary of Agriculture to issue a number of regulations under the P&S Act, 1921, as amended. Among these instructions, the 2008 Farm Bill directed the Secretary to identify criteria to be considered in determining:

- Whether an undue or unreasonable preference or advantage has occurred in violation of the Act;
- Whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
- When a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the Act;
- If a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract; and
- Whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

In addition to developing criteria, the 2008 Farm Bill provided that livestock and poultry contracts must specifically disclose the right of the contract producer or grower to decline the requirement to use arbitration to resolve any controversy that may arise under the livestock or poultry contract.

On June 22, 2010, GIPSA published a Notice of Proposed Rulemaking in the **Federal Register** that proposed language for implementing both the Farm Bill provisions described above and a number of discretionary provisions, including a ban on packer-to-packer

¹ *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974).

² *Id.* section 408.

³ *Id.* sections 203, 309, 411.

livestock sales, a requirement that dealers disclose their contracts, and more. Some of these provisions proved to be controversial, and the rule attracted more than 61,000 comments from the public (discussed below). As a result of information obtained from the public, GIPSA has reconsidered each of its proposed provisions. GIPSA has opted not to finalize some of those provisions at this time; others are finalized with changes. We will discuss in detail which provisions are finalized by this action, which are not, and the input we received from the public.

II. Summary of Provisions Not Being Finalized

Value-Added Production and Premiums

The proposed rule included several provisions related to the potential use of price premiums and related types of contracts such as marketing agreements in a manner that are potential violations of the P&S Act. However, comments identified a number of concerns raised by the proposed regulations related to price premiums and defining certain production arrangements. Specifically, many felt that, taken together, the proposed regulations would increase the potential for litigation thereby jeopardizing the continued use of these agreements. The rapid growth of value-added segments of the livestock industry based on alternative marketing agreements (e.g. breed certifications, source verification, production method certification) has been beneficial for many producers and supported by consumer demand. GIPSA did not intend to limit the use of such arrangements and we determined this final rule would not include sections relating to price premiums and marketing agreements. This includes subsection 201.211(b) of the proposed rule. Related definitions in the proposed rule (i.e., "Forward Contract," "Marketing Agreement," and "Production Contract," proposed in sections 201.2(q), (r) and (s)) are also not being finalized at this time as the sections with which the definitions were associated are not included in this final rule.

Recordkeeping

Section 201.94(b) of the proposed rule that would have required packers, swine contractors and live poultry dealers to retain records justifying differential pricing decisions is not included in this final rule. As with sections related to price premiums, many comments suggested this requirement would contribute to a potential unintended

consequence of eliminating or reducing the practice of offering price premiums.

While many comments indicated this requirement would have required the creation of new records, this was not the intention of the proposed rule. While this final rule does not contain the proposed changes regarding recordkeeping, this does not change the existing recordkeeping requirements. We expect covered entities to continue to comply with the existing requirements of 7 U.S.C. 221.

Packer-to-Packer Sales and Relationships With Dealers

Section 201.212 related to packer-to-packer sales and packer relationships with dealers will not be finalized. Although some comments supported inclusion of these provisions, many comments raised serious concerns about potential adverse effects on the marketplace, such as encouraging further vertical integration and reducing the number of dealers and other buyers. While this section will not be finalized, we expect covered packers and dealers to continue to comply with the related portions of the Act (7 U.S.C. 192c–g) and existing regulations (9 CFR 201.69–70).

Prohibitions and Requirements Related to Capital Investments

While section 201.217 of the proposed rule establishing specific requirements related to capital investments is not included in this final rule, the criteria required by the 2008 Farm Bill are being finalized, in modified form. Considering the variation that exists with respect to capital investments and payment terms in contracts, we believe stating criteria that the Secretary may use to determine whether certain terms in arrangements and contracts are in violation of the P&S Act is more appropriate. The associated definition of "Capital Investment" (proposed section 201.2(n)) will also not be included in this final rule.

Definition of Competitive Injury and Likelihood of Competitive Injury

Sections 201.2(t) and (u) of the proposed rule provided definitions for "competitive injury" and "likelihood of competitive injury" in an attempt to provide more clarity on the meaning of these terms. These definitions are not necessary for the purposes of this final rule and therefore are not included.

Applicability of Contracts

We believe this paragraph is unnecessary considering the sections related to price premiums and discounts are not included in the final rule. To avoid confusion over whether GIPSA

regulations cover transactions between non-subject entities, we are deleting this paragraph from this final rule.

Scope of Section 202(a) and (b)

Comments were sharply divided with respect to proposed provision 201.3(c) with respect to harm to competition. Those supporting the proposal pointed out it would provide legal relief for farmers and ranchers who suffer because of unfair actions, such as false weighing and retaliatory behavior, without having to show competitive harm. Opposing comments relied heavily on the fact that several of the United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element of a violation of sections 202(a) and (b)⁴ of the P&S Act.

Unfair, Unjustly Discriminatory, and Deceptive Practices or Devices

Section 201.210 of the proposed rule listed examples of conduct GIPSA considers to be unfair, unjustly discriminatory or deceptive practices or devices, in violation of section 202(a) of the P&S Act.

Undue or Unreasonable Preference or Advantage

Section 201.211 established criteria the Secretary may consider in determining if conduct would violate section 202(b) of the P&S Act. While many commenters provided examples of similarly situated poultry growers and livestock producers receiving different treatment, several comments asked for additional clarification about the language proposed and were concerned about the impacts of the provision on marketing arrangements and other beneficial contractual agreements.

Livestock and Poultry Contracts

Section 201.213 of the proposed rule required the submission and potential publication of sample contracts. Most supporting comments stated that implementation of this rule would assure fairness and market transparency which would allow farmers and ranchers the opportunity to make informed decisions, it would promote fair competition, and it would allow efficient and evenhanded enforcement of the P&S Act. Some comments expressed concern with the lack of clarity and the ambiguity of this section of the proposed rule.

⁴ All cases in question have ruled relative to section 202(a), while only one case has also referenced 202(b).

Tournament Systems

Section 201.214 of the proposed rule required live poultry dealers that pay poultry growers on a tournament system to pay all poultry growers raising and caring for the same type of poultry the same base pay, and that would prohibit paying poultry growers less than the base pay amount. The proposed provision also required that poultry growers be ranked in settlement groups with other poultry growers that raise and care for poultry in the same type of houses. Several comments were received indicating that the proposed provision needs to be revised.

III. Summary of Provisions Finalized by This Rule

The majority of the sections of the proposed rule that were required by the 2008 Farm Bill are being finalized with modifications. These sections include criteria regarding suspension of the delivery of birds (§ 201.215 of the proposal), additional capital investment (§ 201.216 of the proposal), breach of contract (§ 201.218 of the proposal), and arbitration (§ 201.219 of the proposal).

Suspension of the Delivery of Birds

This section indicates the various criteria the Secretary may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. These criteria include, but are not limited to, a written notice at least 90 days prior to suspension, written notice of the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume.

Additional Capital Investments

This section indicates the various criteria the Secretary may consider when determining whether a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act.

Breach of Contract

This section indicates the various criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. These criteria include, but are not limited to, the form and substance of the notice following the discovery of a breach of contract.

Arbitration

This section requires production contracts that require the use of arbitration to include language on the signature page that allows the producer or grower to decline arbitration. This section also includes the criteria the Secretary may consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process. To implement this provision, it is necessary to clearly identify the applicability of the regulations to live poultry dealers.

IV. Comments and Responses

The proposed rule published on June 22, 2010, (75 FR 35338) provided a 60-day comment period to end on August 23, 2010. In response to requests for an extension of time to file comments, on July 28, 2010, GIPSA extended the comment period to end on November 22, 2010 (75 FR 44163). GIPSA considered all comments postmarked or electronically submitted by November 22, 2010. Over 61,000 comments were received. The following discussion addresses written comments as well as comments received at two public meetings, on June 25, 2010, and August 27, 2010, that were conducted jointly by USDA and DOJ. Because two of these “Workshops on Competition in Agriculture” were held during the comment period for the proposed rule, the Secretary announced that any comments made in those forums would be considered comments on the rule. Only a portion of the sections of the proposed rule are being finalized at this time. The majority of the sections of the proposed rule that were required by the 2008 Farm Bill are being finalized with modifications. These sections include criteria regarding suspension of the delivery of birds (§ 201.215 of the proposal), additional capital investment (§ 201.216 of the proposal), breach of contract (§ 201.218 of the proposal), and arbitration (§ 201.219 of the proposal).

Definition—Principal Part of Performance

Summary of Comments: GIPSA received a few comments on this term suggesting some clarification be added. For example, commenters suggested that “principal part of performance” should be redefined to say “the forum for contentious proceedings (*i.e.*, arbitration or litigation) cannot be other than where the majority of the poultry or livestock are located.” An additional suggestion

stated that this definition should be revised to specifically apply to swine marketing agreements, swine producers, and packers. Commenters recommended the definition be divided into sections by contract type and species.

Agency Response: This term references the services provided under livestock and poultry contracts and are used in conjunction with the location where those services are rendered. These services involve the raising and caring for livestock or poultry and would be provided in the location where the livestock or poultry is located. Any “contentious proceedings,” however, concern the quantity or quality of the services provided by the poultry grower or livestock producer and not the location of the livestock or poultry. We determined no changes to the definition were needed to address the location related comments. Given the diverse and dynamic nature of the livestock industry, we are not limiting the definition to swine marketing agreements, swine producers, and packers, as suggested by the commenter.

Definition—Additional Capital Investment

Summary of Comments: Many comments suggested the definition for “additional capital investment” should specify how additional capital investment would be calculated. Some comments also suggested the threshold was set too low if applied to the total operation. Comments stated that if “combined” is meant to be a cumulative figure over years, then that should be explained. In addition, they stated the word “combined” should be redefined to specify “additional capital investment means \$25,000 or more * * * beyond the initial investment * * *”. Another comment suggested “additional capital investment” should provide for a percentage of the initial capital investment such as 10%, instead of a set amount of \$25,000.

Agency Response: With respect to the comments requesting more clarity, we have reduced the dollar amount from \$25,000 to \$12,500 and added the phrase “per structure.” These changes were included to make the definition more applicable across a range of sizes of operations since those investments could vary depending on the number of houses a poultry or swine production contract grower operates. Specifically, we reduced the dollar amount so it would be more in relation to additional investments on a per structure basis. We have also modified the definition to clarify that the dollar amount relates to the total aggregate investment “over the

life of the poultry growing arrangements or the swine production contracts.” With respect to the comment on defining additional capital investment as a percentage of the initial investment, we did not adopt this suggestion. We believe the dollar amount of the additional capital investment should stand alone and not be tied to the amount of the initial capital investment.

Definition—Suspension of Delivery of Birds

Summary of Comments: We received only a few comments on this definition. They presented some disagreement with the idea that a flock should be delivered before the next payment date. The comments expressed the belief that this was not practical, citing an example where a flock was picked up on a Thursday and under the terms of the contract, payment was due the next Thursday. In this example the commenter argued it would be highly unusual for the next flock to be delivered before that following Thursday and suggested some dealers might have to lengthen the payment period for the current flock.

Agency Response: Because the definition bases the payment date on section 410 of the P&S Act, which specifies a payment due date under poultry growing arrangements as the fifteenth day after the week in which the poultry was slaughtered, the example described by the commenter would not have required a notice of suspension of bird delivery under this rule. We made no changes to this definition based on the comments received.

Applicability to Live Poultry Dealers

Summary of Comments: Almost all of the comments related to the proposal to extend the regulations to all stages of a live poultry dealer’s production, including the hatcheries, were favorable. They felt that pullet and breeder growers needed the same protections as those growing broiler chickens. Opponents said the USDA had no legal authority to subject eggs to the P&S Act. Other comments also indicated the term “laying hen” was not typically used in the broiler or turkey industry and the term “pullets” usually referred to birds that would become broiler breeders.

Agency Response: Commenters are correct that the P&S Act provides USDA no authority over eggs. It is for this reason we specifically excluded hens that only produce table eggs from this provision. The proposal does not include table eggs but rather those poultry classes involved in producing birds for slaughter. In response to

comments on pullets, we are clarifying the exclusion by using the phrase “excluding egg-type pullets, hens that only produce table eggs, and breeder flocks for the egg industry.”

Effective Dates

Summary of Comments: In a comment to the rulemaking proposal one party noted the “Effective Dates” was “very curiously drafted” as it would leave open a comparison between a spot market transaction after the effective date of the final regulations with a sale transaction based upon a pre-effective date marketing agreement. That commenter also asked whether a packer must “justify” a price differential in such a case.

Agency Response: The final regulations will require no such justification. A spot market transaction negotiated today will be inherently different in form and substance from a marketing agreement transaction consummated today based on terms negotiated when the market agreement was signed and made effective. This will be true with or without this rulemaking. The effective dates listed in this final rule would not necessitate documentation for price differences between spot market- and marketing agreement-based transactions. We made no changes to the wording of this paragraph.

Suspension of Delivery of Birds

Summary of Comments: GIPSA received several comments in favor of this provision. The comments generally said that growers were struggling financially because there was too much time between flocks and too few flocks. One comment stated that growers need 90 days to make financial arrangements to mitigate the effects of a reduction in cash flow caused by a suspension of deliveries. This time could be used to adjust loan payments with banks or to arrange to grow poultry for another poultry company. In addition, many growers agreed this would cause a reduction in the use of extended layouts as a form of retaliation, usually with no notice, for arbitrary reasons or to force upgrades.

There were a few opposing comments from live poultry dealers, stating that forcing them to work with a terminated grower for 90 days would put their birds at risk. They argued that suspended growers have no incentive to do a good job with their last flock and may even abandon their operation putting the birds at risk. Also, growers who are suspended because of poor flock management would put the birds at risk and cause the live poultry dealer to

receive inferior product. An additional concern was for the safety of the live poultry dealer’s employees from physical threats following the suspension of deliveries.

Other comments opposed the rule saying it did not give live poultry dealers the flexibility they needed to adjust to market conditions. For example, live poultry dealers may need to suspend the delivery of birds when the demand for product suddenly falls. There are times when a business forecaster cannot know 90 days ahead of time that the company will need to curtail production. Certain grower-specific reasons would make it practically impossible to give 90 days’ suspension notice, they said.

One comment suggested the exact date of re-delivery following suspension may be impossible to determine. They said GIPSA should change the requirements for suspension of delivery notices to say the notices did not have to state the date deliveries would resume.

A commenter suggested bankruptcy be added to the list of emergency situations for which live poultry dealers might see a waiver of the notice requirement in subsection (c) of the proposed rule.

Agency Response: While those in general support of and in opposition to this provision spoke of bird delivery suspensions in the same context as grower contract terminations, this section applies only to extended layouts and not to terminations. Growers receiving a written suspension of delivery notice would still have a growing arrangement with the live poultry dealer and would expect to receive additional flocks. Additionally, this section is a list of criteria the Secretary may consider in determining whether reasonable notice of suspension of birds has been given; not a list of prohibitions.

With respect to concerns that providing a notice of suspension while the grower was in the midst of raising a flock would risk grower neglect or nonperformance, we feel poultry growing arrangements generally have other terms related to animal welfare or neglect that could be exercised to address this concern. Therefore, we decided not to adjust the section based on this comment. Similarly, threats against live poultry dealer employees can be addressed through other contract terms or reporting such actions to local law enforcement.

Some commenters suggested live poultry dealers could not plan 90 days in advance because of changes in the market. Considering the fact live poultry

dealers coordinate the production process from the hatchery to slaughter, we believe planning is generally possible under the 90-day timeframe. Within this timeframe, live poultry dealers would usually know with some certainty what their production needs were for the current flock under production. A 90-day notice period would obligate a live poultry dealer to place at most one additional flock after the current flock. Finally, the rule provides a criterion to consider in determining whether a live poultry dealer's ability to provide notice has been impacted by a variety of unforeseen emergency situations.

While we agree the exact date that flock deliveries will resume may not be known, this final rule only establishes some criteria to be considered, and does not impose a specific requirement. Additionally, the rule discusses the "anticipated date," which implies some level of uncertainty and adjustment if conditions change. We generally feel providing an idea about the length of the suspension is an important part of these criteria and included this in this final rule. With respect to bankruptcies as emergencies, there have been bankruptcies of live poultry dealers in recent years and we agree these events do create emergency situations. We included bankruptcy among the list of unforeseen emergency situations that the Secretary may consider when determining whether or not reasonable notice has been given for suspension of delivery of birds.

We made additional minor and non-substantive changes to the wording and ordering of some words within paragraphs in this section for clarity.

Additional Capital Investments Criteria

Summary of Comments: The comments on this section were mixed between support for the criteria and opposition. Supporters generally felt capital investment burdens were almost exclusively borne by the producers and growers and at the same time, they had little choice about whether or not to make the investments. These commenters felt the criteria provided a framework for establishing a more equitable balance. Comments opposed to this section generally expressed concern the criteria could result in not being able to terminate long-term contracts with poor producers or growers. Some comments also indicated the need to differentiate between capital investments that are required to repair or maintain a facility, which should be considered as capital investments, and those that are an upgrade or to implement new technology.

GIPSA also received some comments on specific criteria within the section. The first criterion involved consideration of whether growers had discretion in deciding against making capital investments. Comments in support of this provision believed it would provide growers and producers the ability to negotiate reasonable contract terms for animal production including the ability not to be forced to upgrade or change equipment without having input. Supportive comments also claimed this was necessary because upgrades were usually required by the companies although the grower or producer is the one who paid for them. Comments opposed to this criterion argued it would hinder growers or producers from making necessary improvements such as insurance requirements or mandatory capital investments. Comments also noted typical production contracts include insurance requirements and require insurance to be used to reconstruct and repair facilities in the event of a fire or tornado or other natural damage. Under the proposal, these standard provisions may be unfair practices because the grower or producer cannot elect to keep the insurance proceeds.

Comments related to the paragraph on retaliation or coercion were only supportive. The comments said this rule was necessary to protect growers and producers from forced upgrades, retaliation or fear of losing their production contracts or poultry growing arrangements. Several commenters stated they had been or knew growers or producers who were being threatened with reduced placements, pay reductions, or contract revocation if they did not make upgrades. There were a few comments related to the criteria about capital investments required within 12 months of a planned significant reduction or end of operations that stated the proposed rule confused swine contractors with packers. Many comments from producers and growers supported this section because they made expensive upgrades only to see a decrease in the size of placements or to see the processing facility shut down. One grower stated he was required to retrofit his houses to grow bigger birds. The live poultry dealer declared bankruptcy a short time later and the grower did not get chickens for several months.

Two comments questioned the need for a waiver for natural disasters. They said such events should not give packers, swine contractors or live poultry dealers opportunity to require upgrades that go beyond necessary repairs. The comments also questioned

why the waiver would only apply to live poultry dealers.

A comment in support of the criteria related to whether some growers or producers are required to make capital investments that other similarly situated growers or producers do not have to make claimed a particular firm required some growers to make more new capital investments to their facilities than was required of others. A few comments were against this criteria stating the phrase "similarly situated" was not defined. Another comment said that to require all poultry growers or swine production contract growers to make the same additional capital investment is not always possible. There will be circumstances that support requiring additional capital investments of only some growers or producers but not all, even if the growers or producers are otherwise similarly situated.

We received numerous comments in support of the criteria related to the age of prior upgrades or capital investments and whether recent upgrades had been completed. Comments from growers and producers expressed concern with having to make frequent upgrades, receiving no additional compensation for upgrades, and being given no choice about making the upgrades or not. Some expressed the belief that the criteria would discourage packers, swine contractors and live poultry dealers from demanding often unnecessary upgrades which tended to keep poultry growers and livestock producers in debt. One comment recounted being required to make changes to their poultry houses only a short time after the houses had been built according to company specifications. Two comments argued the provision was unintelligible and it provided no standards for determining whether additional capital investments constituted an unfair practice.

Almost every comment received concerning the criteria related to whether a grower or producer can be expected to recoup a required capital investment was favorable. Comments by growers and producers argued that any added compensation or enhanced efficiencies that might result from additional capital investments did not cover the cost of the investments. One comment stated that the wording regarding recouping the investment was vague and would invite litigation. Another comment said this criterion should be deleted because it was redundant or in conflict with a paragraph in the proposed Capital Investment Prohibitions (proposed section 201.217).

We received a small number of comments on the criterion which would

have the Secretary examine the amount of time a grower was given to make a required capital investment. All of the comments supported this criterion. Those commenting said that when the same capital investment was required of all growers, resources and equipment would be in short supply and expensive due to the increased demand. Growers therefore need a reasonable amount of time to make the required capital investment.

Agency Response: With regard to comments that the criteria could eliminate the ability to terminate poor growers or producers, we note that the section consists of criteria and not specific requirements. Additionally, other terms within poultry growing arrangements and swine production contracts provide for ways to terminate based on non-performance and provide incentives to improve performance. We decided to include this section in this final rule with some suggestions.

Some commenters suggest that the criterion addressing the provision of discretion to growers or producers would prevent any requirement for additional capital investments or even contract terms that require insurance proceeds to be used to rebuild. We believe these comments ignore the fact that this section provides criteria and not prohibitions. In the 2008 Farm Bill, Congress directed the Secretary to establish criteria and not specific prohibitions. This criterion is only a factor the Secretary may consider to evaluate whether a firm's investment requirement practices violate the P&S Act. With regard to comments that capital investments should not include maintenance and repair costs, we note that this distinction was made as part of the definition of "additional capital investment."

With respect to the comments regarding a waiver due to natural disasters, we replaced the waiver provision with criterion and thereafter merged it with the criterion related to significantly reducing or ending operations. This will allow the Secretary to take into account whether a packer, swine contractor or live poultry dealer proffered justification, such as a catastrophic or natural disaster, or other emergency, when a poultry grower or swine production contract grower was required to make additional capital investments over the life of the production contracts or growing arrangements. We also added bankruptcy as a possible justification to be considered. A related comment questioned why a waiver would only apply to live poultry dealers. In the modified section, these justifications

would not be limited to live poultry dealers.

With respect to the comment on the meaning of the phrase "similarly situated," we believe the meaning is plain and does not require a definition within regulation. In determining whether two or more growers are "similarly situated," the Secretary will consider whether poultry raised is of the same type, facilities are similar, and if the houses are in the same geographic area, among other factors.

With respect to comments on the criterion related to the age of and whether recent upgrades had been made, which felt the criteria was too vague to identify what practices were prohibited, we disagree. Since the criteria only provide factors that the Secretary may consider, these are not meant to be bright-line prohibitions. The Secretary will determine on a case-by-case basis whether the facts related to any applicable criterion are a violation of the P&S Act. The only change made to the wording of this criterion as a result of comments was to include the phrase "the number of" before the phrase "recent upgrades or capital investments."

With respect to the comment suggesting that criterion related to recouping a capital investment was redundant with part of the proposed section 201.217, we note section 201.217 was not included in this final rule. Therefore this criterion was not removed. In addition to the above modifications to proposed paragraphs in this section, this final rule includes an additional criterion as a new paragraph (h) on whether required equipment changes were for previously approved and functioning equipment. This criterion is based on section 201.217(c) of the proposed rule that we felt was better included in this section as a criterion. The proposed paragraph required packers, swine contractors and live poultry dealers to provide adequate compensation incentives to poultry growers and swine production contract growers when requiring equipment changes on previously approved equipment, provided that equipment was in good working order.

Several comments on proposed section 201.217(c) said that GIPSA failed to define what constituted "adequate compensation incentives" and "good working order." The comments said that this would cause disputes between the parties to poultry growing arrangements and livestock production contracts. It was also argued that the paragraph would preclude even necessary upgrades if a company could not afford to provide funding. Some said

that discouraging technological advances would put the United States at a comparative disadvantage with other competing countries by decreasing efficiency and providing disincentives for innovation, including those that could improve food safety. Although there were many comments received in favor of this paragraph, many of them requested GIPSA define adequate compensation as the full cost of the upgrade at the time the upgrade was required.

Regarding the discussion of adequate compensation incentives, we feel this would place too large a financial burden on packers, swine contractors and live poultry dealers. By moving this paragraph from § 201.217 to § 201.216, we changed this provision from a requirement to that of a criterion the Secretary would consider to determine whether, in a particular instance, requiring a grower to make additional capital investments is a violation of the P&S Act. Based on the comments received, we feel this is the appropriate function for this provision. With regard to the capital investment criteria (§ 201.216 in the proposed rule), we feel using these criteria to determine whether certain arrangements are a violation of the P&S Act is more appropriate given the variation that exists with respect to capital investments and payment terms in contracts.

We made non-substantive wording changes to the introductory paragraph for this section to emphasize there were several criteria listed.

Reasonable Period of Time To Remedy a Breach of Contract

Summary of Comments: The 2008 Farm Bill required the Secretary to establish criteria the Secretary would use to determine if a reasonable period of time has been afforded to remedy a breach of contract that could lead to termination of a growing relationship. The majority of the comments supported the proposed section and felt that the list of criteria was reasonable. Several parties commented that the regulation did not allow processors to immediately terminate a growing agreement if the grower failed to comply with the processor's internal food safety or animal welfare requirements. Processors could be at risk for product liability suits, recalls, adverse press and damage to reputations if required to allow a grower to operate following a breach involving food safety or animal welfare standards.

We received many comments on the paragraph related to providing reasonable time to rebut an allegation

that there was a breach of contract. Many of the comments argued against allowing growers time to provide rebuttals to significant breaches. Typical examples of significant breaches included those affecting animal welfare, abuse or food safety. Several comments said describing a sufficient amount of time for rebuttal as being “generally 14 days” was too vague and should be eliminated or explained further.

There were a few comments that stated certain paragraphs were vague or unclear and that the section should be rewritten so it would be more precise and less confusing.

Agency Response: With regard to the comments on animal welfare and food safety, we agree with the concerns raised by these comments. As a result, we added a sentence to the introductory paragraph which allows the terms of a livestock contract or poultry growing arrangement to control the actions of a packer, swine contractor or live poultry dealer when food safety or welfare of animals is at stake.

With respect to the commenter that felt the term “generally 14 days” in proposed section 201.218(d) needed revision, we agree and changed the wording to “adequate time” for rebuttal from the date of the breach notice. Since this section is criteria and not specific requirements, setting an exact time also did not seem appropriate.

With respect to the general comments regarding the need for better clarity and suggested revisions to make the paragraphs more precise, we agree. We made a number of changes to wording within criteria to make their meaning more clear. Additionally, several criteria either seemed redundant (e.g. the criterion related to arbitration) or duplicative of other criteria (e.g. criteria regarding notice within 90 days of breach) were not included in this final rule.

Arbitration

Summary of Comments: Almost all the comments on this section were supportive. Comments from growers and producers felt this was an important provision to protect their rights. Two comments expressed concern that live poultry dealers may terminate their relationship with growers that opted-out of arbitration when the live poultry dealers need to decrease production. Several comments expressed general opposition to the entire section and that anyone who did not like the arbitration terms in a contract should simply not enter into the contract instead of having a right to opt-out. One commenter identified the criterion related to whether arbitration procedures comply

with the terms of the Federal Arbitration Act as an unnecessary addition to the rule. There were several comments on the provision that said failure to sign either the arbitration acceptance or declination statement voided the contract. Comments from two parties recommended that in the alternative, the rule should state failure to sign one of the elections meant the grower was opting-out of arbitration without voiding the contract. One other party suggested that if neither election is made the required arbitration clause portion of the contract was void.

Agency Response: With regard to comments concerning growers or producers being subject to retaliation for exercising their right to opt-out, we agree with this concern. We also point out that terminating relationships with growers because they exercised their right to opt-out of required arbitration under § 201.219 would be an unlawful practice. With regard to general comments against the right to opt-out of arbitration, we point out this provision was included in the 2008 Farm Bill.

This provision implements section 210 of the P&S Act added by the 2008 Farm Bill. We have not included the criterion related to the Federal Arbitration Act in this final rule. We have concluded that if terms in a contract violate the Federal Arbitration Act, the remedies provided under that statute are better suited to address the issue than the P&S Act. With regard to the comments on failure to select the option to decline or to be bound by the arbitration terms, we tended to agree with the comments that voiding the entire contract was not necessary. We have modified the provision to say a failure to sign either of the “Right to Decline Arbitration” statements will be treated as if the contract producer or grower declined to accept the required arbitration clause in the contract.

While the comments generally did not focus on the specific arbitration criteria, we made a few changes to improve clarity. For example, one criterion said GIPSA would examine the extent to which impartial and unbiased neutrals would be used as arbitrators in deciding if contract producers and growers were allowed to participate fully in the arbitration process. In practice it is often the case that each party to the dispute names a non-neutral arbitrator to serve on an arbitration panel to hear and decide the dispute. Often, use of non-neutral arbitrators is necessary so that the arbitrators are qualified and have appropriate foundational knowledge of the industry to understand the facts of the case so a proper ruling can be made. The naming of a non-neutral arbitrator

by a party to the arbitration process does not necessarily restrict a contract producer or grower from participating fully in the process. For these reasons, we removed this criterion. As another example, we combined the provision about the cost of arbitration with that of whether there are reasonable time limits in the arbitration process.

Regulatory Impact Analysis

Summary of Comments: Thirty-seven comments were received on GIPSA’s compliance with the analytical requirements of Executive Order 12866. Many of the comments favoring the proposed changes pointed to what they viewed as the deleterious effects of increased concentration on competition. For example, a number of commenters referred to declining farm prices and the declining farm share of the retail value of meat and poultry as indications that increased concentration had adversely affected producers. However, few comments provided numerical estimates of the economic benefits of the proposal.

Three comments, consisting of over 1,000 pages, expressed concern that the economic impacts of the proposed rule would be economically significant and submitted evidence that the proposed provisions might have costs of more than \$1 billion per year. Comments also suggested the rule would hurt innovation and food safety and increase costs and prices to consumers. Commenters noted that for the cattle and hog industries adjustment costs would be related to the shifting away from the use of marketing arrangement forms of procurement and contracts in favor of the spot market and for poultry would entail overall losses of production efficiency in the conversion of factor inputs to product output. In the study prepared for the National Meat Association by Informa Economics, 75 percent of the economic costs associated with the proposed rule were associated with, in their view, relieving plaintiffs from the burden of proving competitive injury.⁵

The Informa study estimated the aggregate impact of the June 22, 2010, proposed GIPSA rule for the U.S. meat and poultry industry at \$1.64 billion (Table 1). The Informa study further estimated the value of lost production based on their estimated on-going and adjustment costs. The value of lost production totaled almost \$1.1 billion or

⁵ Informa Economics, Inc. “An Estimate of the Economic Impact of GIPSA’s Proposed Rules,” prepared for the National Meat submitted as Appendix C to the National Cattlemen’s Beef Association and Appendix D of the National Pork Producers Council comment submissions (henceforth referred to as the Informa Study).

about 66 percent of the total estimated costs. The estimates differ because the total on-going and adjustment costs

represent the cost to each industry before markets adjust to the changes in output. The value of lost industry

production represents the cost to each industry after markets adjust to changes in output.

TABLE 1—INFORMA STUDY—ADJUSTMENT COST AND INDUSTRY OUTPUT EFFECTS, JUNE 22, 2010 PROPOSED RULE

Sector	Million \$					Lost production as a percentage of total Informa costs
	Total Informa costs	Efficiency costs	Quality and demand costs	Total efficiency and quality and demand costs	Value of lost industry production	
Beef	879.8	401.9	377.7	779.6	591	67
Pork	401.4	176.7	82.2	258.9	246	61
Poultry	361.6	302.2	0.0	302.2	236	65
Turkey	na	na	na	na	14	na
Total	1,642.8	880.8	459.9	1,340.7	1,087	66

na = not applicable.

Agency Response: This final rule contains several significant changes based on the comments received during the comment period for the June 22, 2010 proposed rule. Many of the proposed provisions identified by commenters and in the Informa analysis as having the largest effect in the market are not included in this final rule.

We have considered all the analyses and information provided in comments as we completed the analysis for this final rule, but in some cases it was of limited use and refinement of estimates was difficult. For example, though the Informa study provided some insight into understanding the costs and benefits associated with many of the major proposed rule changes, it also has limitations. As detailed in the Informa study, “* * * it is important to recognize that it was impossible to structure the interview process in a way that provided a pure random sample and thus the information gleaned from the surveys should not be used to make statistical inferences about industry populations in a strict sense.”⁶

It is also not clear whether those responding to the Informa survey based their input on the estimated cost associated with the proposed rule or a “worst case” scenario. As discussed by *Gresenz et al.*, without a history of claims on which to base a prediction, it is difficult to accurately estimate the potential threat.⁷ *Gresenz et al.* further notes that individuals are likely to over-estimate the likelihood that plaintiffs will win cases and decision makers may over-react to the small possibility of

having to pay large penalties. To the extent this tendency to over-react to the small possibility of having to pay large penalties is reflected in the Informa study estimates, the Informa study costs over-estimate the costs associated with the proposed rule. Similarly, the estimates of the economic costs provided by Elam^[3] are potentially an over-estimate of the true costs because of the significant changes to the proposed rule.

V. Executive Orders 12866, 13563 and Other Analyses

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, 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 determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

Need for Regulation

As discussed previously, Title XI of the 2008 Farm Bill requires the Secretary of Agriculture to issue a number of regulations under the P&S Act, 1921, as amended. Among these instructions, the 2008 Farm Bill directed the Secretary to identify criteria to be considered in determining:

- Whether an undue or unreasonable preference or advantage has occurred in violation of the Act;
- Whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
- When a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the Act;
- If a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract; and
- Whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

In addition to developing criteria, the 2008 Farm Bill provided that livestock and poultry contracts must specifically disclose the right of the contract producer or grower to decline the requirement to use arbitration to resolve any controversy that may arise under the livestock or poultry contract.

This rulemaking is necessary to fulfill statutory requirements.

The Use of Contracts in the Pork and Poultry Industry

Formal contractual arrangements cover a considerable share of U.S. poultry and livestock production. Contracting can minimize transaction costs, induce firms to make optimal investments in relationship specific asset and create production efficiency gains. Agricultural contracts can also lead to improvements in efficiency throughout the supply chain for

⁶ Informa Economics, Inc. “An Estimate of the Economic Impact of GIPSA’s Proposed Rules,” p. 4.

⁷ Gresenz, Carole Roan, Deborah H. Hensler, David M. Studdard, Bonnie Dombey-Moore, and Nicholas M. Pace (1998). “A Flood of Litigation? Predicting the Consequences of Changing Legal Remedies Available to ERISA Beneficiaries.” RAND Issue Paper, IP-198.

^[3] Elam, Dr. Thomas E. “Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.” FarmEcon LLC (November 16, 2010).

products by providing farmers with incentives to deliver products consumers want and produce products

in ways that reduce processing costs and, ultimately, retail prices.⁸

TABLE 2—SHARE OF COMMODITY PRODUCTION UNDER CONTRACT, BY COMMODITY

Commodity	Share of production under contract (percent)				
	1991–93	1996–97	2001–02	2005	2008
Cattle	na	17.2	21.0	17.6	29.4
Hogs	na	34.2	62.5	76.2	68.1
Poultry and eggs	88.7	83.8	92.3	94.2	89.9

na = Data not available for commodity detail.

Source: USDA, Economic Resource Service using data from USDA's Agricultural Resource Management Survey, 1996–2008 (all versions); and USDA's Farm Costs and Returns Survey, 1991–93.

In general, contracts are used more widely in pork and poultry production compared to cattle production. For example, in 2008 contracts covered 29 percent of cattle production. In comparison, contracts covered about 90 percent of poultry production and about 68 percent of hog production. While both hog and poultry operations use contracts extensively, there are important distinctions between the two industries. As discussed by MacDonald and Korb⁹ (2011), hog contract enterprises are usually part of larger, diversified farming businesses, with the hog segment providing a relatively small share of the farm income. The farmers typically have a range of alternative outlets for contract hog production, and farm diversification provides a range of alternative uses for their own time. Farm households that engage in contract hog production have relatively high incomes compared with other households—both farm and nonfarm.

In contrast, contract broiler enterprises are likely to be part of

smaller and less diversified farm businesses, and many broiler operations have only a single live poultry dealer in their area. As a result, their farm businesses are much more dependent on contract production, and their income from contract production is much more dependent on a single live poultry dealer. Operators of broiler farms have lower household incomes, on average, than operators of hog farms, and they depend far more on off-farm employment and income.

GIPSA maintains data on cattle, hogs, and sheep (collectively referred to as 'livestock') slaughterers and live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 140 live poultry dealers (all but 16 are also poultry slaughterers and would be considered poultry integrators) that would be subject to the final rule. The Census of Agriculture (Census) indicates there are 727 swine contractors. An important factor in determining the economic effect of the regulations is the number of contracts held by a firm.

Poultry/swine growers enter into a contract with one live poultry dealer/swine contractor, whereas a live poultry dealer/swine contractor may have a number of contracts with many growers. GIPSA records for 2007 indicated there were 20,637 poultry growing arrangements (contracts) of which 13,216, or 64 percent, were held by the largest 6 live poultry dealers, and 95 percent (19,605) were held by the largest 21 live poultry dealers. By comparison, there were 8,995 contract swine producers. Although there is a significant amount of concentration in the poultry and livestock industries (Table 3), the literature has typically not shown that buyers are able to exercise significant amounts of market power against sellers nationally. As shown in Table 3, the concentration of the four largest hog slaughterers rose from 34 percent in 1980 to a high of 64 percent in 2003 and has remained relatively stable since then.

TABLE 3—FOUR-FIRM CONCENTRATION IN SELECTED LIVESTOCK AND POULTRY SLAUGHTER, 1980–2009

Year	Percent of slaughter from four largest firms			
	Steers and heifers	Hogs	Broilers	Turkeys
1980	36	34	.....	.....
1995	81	46	.....	.....
2000	81	56	.....	.....
2001	80	57	.....	.....
2002	79	55	.....	.....
2003	80	64	.....	.....
2004	79	64	.....	.....
2005	80	64	.....	.....
2006	81	61	.....	.....
2007	80	65	57	51
2008	79	65	57	51
2009	81	63	53	58

Source: USDA, Grain Inspection, Packers and Stockyards Administration, Packers and Stockyards Program, 2010 Annual Report.

⁸ A comprehensive study of the benefits and costs associated with contract marketing was conducted by RTI International (RTI). The study did not examine poultry production. See RTI International.

2007. GIPSA Livestock and Meat Marketing Study. Prepared for Grain Inspection, Packers and Stockyard Administration. U.S. Department of Agriculture. Contract No. 53–32KW–4–028.

⁹ MacDonald, James M. and Penni Korb, USDA Economic Research Service. "Agricultural Contracting Update: Contracts in 2008." Info. Bulletin No. 72, Feb. 2011.

Though the four firm concentration for the poultry industry is relatively lower than other industries, the poultry industry has been almost completely vertically integrated for several decades.¹⁰ As a result, the use of spot markets for poultry is virtually nonexistent. Concentration in broiler and turkey slaughter has trended upwards since 2000. In 2009, the four largest broiler slaughterers posted a 4 percent decline to 53 percent of the market share compared to 57 percent in 2008. The four largest turkey slaughterers posted a noticeable increase of 7 percent to control of 58 percent of the market share in comparison to 2008 at 51 percent.

The data in Table 3 are estimates of national concentration, but the relevant economic markets for livestock may be regional or local, and concentration in relevant economic markets is generally higher than national measures indicate. For example, while poultry markets may appear to be the least concentrated in terms of the four-firm concentration ratios presented in Table 3, markets for poultry growers are much more localized than markets for fed cattle or hogs, and local concentration in poultry markets, in part due to the limited range in transporting live birds compared to hogs or cattle, is much greater than in hog and other livestock markets.

Insight into the need for the specific provisions specified by Congress in the 2008 Farm Bill can be found in the testimony provided at the joint USDA–DOJ hearing held on competition in the poultry industry on May 10, 2010 in Normal, Alabama. Additionally, the need for the provisions can be highlighted by examining data GIPSA collects on poultry industry contract compliance which GIPSA initiated in fiscal year 2009. These compliance reviews involve both determining whether the live poultry dealer is complying with applicable regulations such as sufficient notice of termination and checking whether a sample of payments made under the terms of the contract were made properly. The firms reviewed in the sample are drawn randomly and with a sample size so that a 90 percent confidence level holds when inference is made about the overall industry compliance based on the sample compliance rate. In 2009, the overall industry compliance rate for livestock dealers, markets, and packers over four areas (financial payments, trade practices, records retention and contract terms) was 79.6 percent. This rate compares to a 60.0 percent rate for contract compliance in the poultry industry.

Provisions of the Final Rule

As discussed earlier in the preamble, we are finalizing proposed provisions that are required by the 2008 Farm Bill. Below we provide a short summary of each provision.

Suspension of Delivery of Birds

Section 201.215 of this final rule establishes the criteria the Secretary may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. These criteria include, but are not limited to, a written notice at least 90 days prior to suspension, written notice of the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume.

Additional Capital Investments Criteria

Section 201.216 of this final rule provides the criteria the Secretary may consider when determining whether a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act.

Reasonable Period To Remedy Breach of Contract

Section 201.217 of this final rule provides the criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. These criteria include, but are not limited to, the form and substance of the notice following the discovery of a breach of contract.

Arbitration

Section 201.218 of this final rule requires production contracts that require the use of arbitration to include language on the signature page that allows the producer or grower to decline arbitration. Section 201.218 also includes the criteria the Secretary may consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process.

Economic Assessment

Benefits

In the June 22, 2010 proposed rule, we asserted that the proposed rule

would have benefits but they are not quantified; however, we discuss below the qualitative benefits that we believe are associated with the final rule. In addition to the benefits expected from the various provisions as outlined below, this action fulfills the mandates specified in Title XI of the 2008 Farm Bill.

Suspension of Delivery of Birds

These new criteria may benefit poultry growers by allowing them to make informed decisions on the future use of resources. Adequate notice of suspension would give growers sufficient time to consider other options for their poultry houses and for keeping up with loan payments, and would help to address perceived equity concerns between dealers and growers.

Additional Capital Investments Criteria, Breach of Contract, and Arbitration

To the extent that market power exists and affects contracting, these criteria will provide greater parity in contractual relations between producers and the packer, swine contractor or live poultry dealer. A fundamental decision facing both growers and integrators or processors is given an uncertain future, how much capital should be invested and what percentage of the risk should be borne by the grower and the integrator or processor. To the extent integrators or processors have market power, they can shift more risk on the grower. The relatively large investment in poultry growing facilities makes it difficult financially for growers to exit the industry once they enter into the contract and contract compensation rates may be below the grower's initial expectations. Additionally, poultry growers are also restricted to a limited number of markets, frequently a single live poultry dealer, due to the limitations on transporting live poultry. Similarly, the breach of contract criteria may result in the packer, swine contractor, or live poultry dealer opting to provide adequate notice to a grower or provide sufficient time to remedy the breach. Finally, the arbitration provisions are expected to facilitate poultry growers, livestock producers, and swine production contract growers' access to an effective arbitration process.

Costs

In conducting the cost-benefit analysis two comments submitted for the proposed rule were used to develop initial cost estimates. These comments are: "An Estimate of the Economic Impact of GIPSA's Proposed Rules," by Informa Economics, Inc.¹¹ and

“Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact,” by Thomas E. Elam, President, FarmEcon LLC.¹² The data from the two comments were combined into a single data set to form industry wide average cost estimates (neither study cited quantifiable benefits). The average cost data constructed from the two comments, while useful, had two limitations for the current analysis. First, the cost data had to be allocated across the provisions. The procedure to allocate costs across provisions was to identify the market failure the provisions were attempting to mitigate as well as the potential costs of specific provisions and to assign costs based on these two factors. Second, the reported cost data, even if accurately allocated across provisions, was for the original proposed rule whereas the provisions in the final rule were modified based on submitted comments to reduce, and in some cases substantially reduce the single greatest cost, which was the cost that could potentially arise due to the potential for litigation or administrative action.

Litigation costs were considered to have two cost components costs related to adjustments in the industry to avoid potential litigation and additional attorney fee costs. The industry adjustment cost varied between the livestock and poultry sectors. Within the cattle and hog industries comments suggested the adjustment costs would arise from the reduction in market contracts with a corresponding increase in the marketing of livestock on the spot market. The adjustment costs reported

in the comments that are associated with these changes were related to percentage point decrease in market contracts associated with the cattle and hog industries. In order to arrive at the percentage point reduction in market arrangement usage due to perceived threat of litigation in either industry, data on consumer and producer surplus costs from reductions in marketing arrangements were utilized. These data are reported in the 2006 GIPSA Livestock and Meat Marketing study conducted by RTI.¹³ Associated with this surplus data were data in the report on retail and farm prices, and quantities produced and consumed. This data was used to obtain a cost measured in consumer and producer surplus terms related to a unit percentage point reduction in marketing contract usage. This unit cost data was then used to determine the percentage point reduction implied by the species specific industry adjustment costs. For example the \$9.6 million adjustment cost for Section 201.216 in hogs implies a 0.09 percentage point reduction in the use of marketing contracts in the hog industry.

The method utilized to obtain the percent reduction, or efficiency loss, in live bird production implied by the industry adjustment cost reported by commenters used a poultry demand equation constructed from elasticity data reported by USDA’s Economic Research Service.¹⁴ Numeric analysis was used on the poultry demand equation while assuming a perfectly inelastic supply to solve for the quantity per capita consumption level that

yielded a consumer surplus cost equivalent to the industry adjustment cost. The resulting per capita reduction in quantity demanded at the retail level was translated into live production using 2009 population levels and a poultry yield per live bird rate of 0.74 computed from data obtained from the National Agricultural Statistics Service.¹⁵ The cost is assumed to be absorbed by poultry processors. As example the \$45.2 million adjustment cost (table 4) implies a loss in farm level production efficiency of 0.4 percentage points.

For the provisions in the final rule, industry adjustment costs were a relatively large cost in two of the four provisions: Section 201.216 (Additional capital investment criteria) and Section 201.217 (Reasonable period to remedy a breach of contract). For example, contrasting the total costs of Section 201.215 (Suspension of delivery of birds) with Section 201.216, the respective costs estimated from the average costs reported by the comments range from less than \$100,000 for Section 201.215 compared to \$46.8 million for Section 201.216 (Table 3). While our allocation of the representative adjustment cost data from the Informa and Elam studies provides one cost estimate for the provisions, due to the limitations in the studies mentioned above, GIPSA expects these provision estimates to be upper cost limits. The basis for estimating a lower limit cost is explained in more detail below after the discussion of the other costs in Table 4.

TABLE 4—USDA FINAL RULE COSTS (\$ MILLION) BY SECTION AND SPECIES

	Hog-pork (\$M)	Poultry (\$M)	Total (\$M)
Section 201.215 Suspension of Delivery of Birds			
Adjustment	0	0	0
Legal	0	0	0
Administrative	0	**	**
Total	0	**	**
Section 201.216 Additional Capital Investment Criteria			
Adjustment *	5.6–9.6	3.7–45.2	9.3–54.8
Legal	0.2	0.7	0.9
Administrative	0.4	0.9	1.3
Total	6.2–10.2	5.3–46.8	11.5–57.0
Section 201.217 Reasonable Period to Remedy Breach of Contract			
Adjustment	5.0–6.0	2.8–7.0	7.8–13.0

¹² Elam, Dr. Thomas E. “Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact.” FarmEcon LLC (November 16, 2010).

¹³ RTI International. 2007. GIPSA Livestock and Meat Marketing Study. Prepared for Grain

Inspection, Packers and Stockyard Administration. U.S. Department of Agriculture. Contract No. 53–32KW–4–028.

¹⁴ Elasticity data is located at the USDA–ERS Web site at: <http://www.ers.usda.gov/Data/Elasticities/>.

¹⁵ NASS Agricultural Statistics Board. Poultry—Production and Value 2009 Summary April 2010 and 2010 Agricultural Statistics Annual, Chapter VIII Dairy and Poultry Statistics.

TABLE 4—USDA FINAL RULE COSTS (\$ MILLION) BY SECTION AND SPECIES—Continued

	Hog-pork (\$M)	Poultry (\$M)	Total (\$M)
Legal	0.1	0.1	0.2
Administrative	0.1	0.2	0.2
Total	5.2–6.2	3.0–7.2	8.2–13.4
Section 201.218 Arbitration			
Adjustment	0.2	1.3	1.5
Legal	0	**	**
Administrative	**	**	**
Total	0.2	1.4	1.6
Overall total	11.5–16.6	9.8–55.5	21.3–72.1

* Table note: For provision 201.216 and 201.217, the adjustment costs are reported as ranges. The upper bound was derived from costs allocated from the weighted average costs obtained from the combined Informa and Elam comments. The lower bound estimates were developed from changes in marketing agreement usage in the hog case and in the poultry case from reduced levels of production efficiency.

** Represent estimates of less than \$100,000.

In addition to industry adjustment costs, the total cost in Table 4 includes administrative costs and estimated legal fees associated with those provisions that had relative large adjustment costs. In the case of Section 201.215, the total cost is comprised entirely of administrative costs. The administrative cost itemization is described in more detail in the Paperwork Reduction section.

Legal fees were developed from data for cases filed under the P&S Act from 1926 to 2010 on the number of decisions by year; the court in which the decision was reached; and the type case, *i.e.*, financial, trade practice, or competition. A 10-year moving average estimate of annual legal fee cost incurred from these cases was used to derive an annual legal fee cost of \$11.7 million. This fee was doubled and allocated across the species-provision categories using initially the same proportion as the proportions generated from the allocation of the adjustment costs in the average comment cost data. Final amounts were adjusted based on the perceived risk of litigation that a provision-species category might entail. For example, Section 201.215 (Suspension of delivery of birds) was considered to have low liability based on its similarity with the earlier GIPSA regulation published in the **Federal Register** on Dec. 3, 2009, Vol. 74, pg. 63277 regarding poultry contract terms and written notice to poultry growers regarding production contracts.

Experience with implementation of the regulations published on Dec. 3, 2009, and the absence of reports by regulated industry participants and measurable cost effects provides an alternate basis from which to project industry adjustment costs. Based on any significant reductions in marketing

contract usage from past regulation affecting hog contracts, such as the swine contract library, and the mentioned poultry regulations for Section 201.216 and Section 201.217, a minimal percent reduction in marketing contract usage was established for the case of hogs and a similar percent reduction in production farm level efficiency was established for poultry and then the imputed costs were calculated using the reverse procedure described above. We assume a 0.01 percentage point reduction in contract usage and farm poultry production efficiency for Section 201.216 and a 0.001 percentage point reduction for Section 201.217. The associated adjustment costs imputed by the reductions for Section 201.216 are \$5.6 million for hogs and \$3.7 million for poultry. For Section 201.217 the imputed adjustment costs for hogs are \$5.0 million and \$2.8 million for poultry.

These values provide ranges on the adjustment cost estimates for Section 201.216 of \$5.6 million to \$9.6 million for hogs and \$3.7 million to \$45.2 million for poultry. For Section 201.217 the adjustment costs range from \$5.0 million to \$6.0 million for hogs and \$2.8 million to \$7.0 million for poultry. Summing over all costs and provisions of the final rule for hogs, the final cost estimate is expected to range between \$11.5 million to \$16.6 million. Similarly for poultry, the estimated total cost is expected to range between \$9.8 million and \$55.5 million. The overall final rule is expected to have a final cost ranging between \$21.3 million and \$72.1 million.

The range associated the adjustment costs reflect the variety of actions regulated entities could take in response to the criteria being finalized. Some

entities may choose to take little or no action in response to the finalization of the criteria. In these instances, the more entities that choose this option, the lower the net cost to the industry. Conversely, some entities may choose to impose multiple changes in their business practices to limit their vulnerability to complaint. The more entities that choose this option, the higher the net cost to the industry, although the net cost is expected to be within the range stated in Table 4.

Impact on Small Businesses

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), GIPSA has considered the economic impact of this action on small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS). The affected entities and corresponding size thresholds under the rule that would be defined as a small business are: cattle producers (NAICS 12111); hog producers and swine contractors (NAICS 112210); and broiler and turkey producers (NAICS 112320 and 112330) are considered small businesses if their sales are less than \$750,000 per year. Live poultry dealers (NAICS 311615), and hog and cattle slaughterers (NAICS 311611) are considered small businesses if they have fewer than 500 employees. The only section of the final rule that applies to the beef industry is the section related to arbitration (§ 201.218) and this only applies to a small segment (< 5%) of the industry that utilizes production

contracts. So the final rule would not have any impact on livestock auctions or marketing agencies, which are typically small businesses. The regulatory impact analysis found the overall impact from this section and the final rule as a whole on the beef industry to be very small. Based on this estimate, we also expect the impact on small businesses in the beef industry to not be significant. As detailed in the regulatory impact analysis, almost all of the cost associated with the rule relate to the pork and poultry industries, so we focus on those two sectors for this analysis. The Census of Agriculture (Census) indicates there are 727 swine contractors. The Census provides the number of head sold by size classes for these entities, but not value of sales. To estimate the size by the SBA classification, the average value per head for sales of all swine operations is multiplied by production values for firms in the Census size classes for swine contractors. The estimates reveal about 300 entities had sales of less than \$750,000 in 2007 and would have been classified as small businesses. Additionally, there were 8,995 hog producers with swine contracts; about half of these producers would have been classified as small businesses.

GIPSA also maintains data on cattle, hogs, and sheep (collectively referred to as 'livestock') slaughterers and live poultry dealers from the annual reports these firms file with GIPSA. Currently, there are 140 live poultry dealers (all but 16 are also poultry slaughterers and would be considered poultry integrators) that would be subject to the proposed rule. According to U.S. Census data on County Business Patterns, there were 64 poultry slaughter firms had more than 500 employees in 2006. The difference yields approximately 75 poultry slaughters/integrators that have fewer than 500 employees and would be considered as small businesses that would be subject to the final regulation.

GIPSA records for 2007 indicated there were 20,637 poultry growing arrangements (contracts) and 19,605 poultry growers holding the other side of the poultry growing arrangement. All of these growers are small businesses by SBA's definitions.

Section 201.215 Suspension of Delivery of Birds

In the 2008 Farm Bill, Congress required the Secretary establish criteria that he may consider when determining whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement. This 2008 Farm

Bill provision is implemented through § 201.215 of the final rule. This regulation establishes some criteria to be considered by the Secretary, and does not impose specific requirements or prohibitions on either large or small businesses. Under a poultry growing arrangement, a live poultry dealer has discretion on whether it will perform under the agreement (*i.e.*, whether it will place poultry on a poultry grower's farm). The poultry grower, however, must raise and care for poultry placed on his or her farm by the live poultry dealer as prescribed or be in breach of the contract. Poultry growers have reported to GIPSA that there have been instances in which a live poultry dealer has failed to place poultry on a poultry grower's farm for an extended period of time without notifying the poultry grower of the reasons for or the anticipated length of delay in placing additional poultry. Without sufficient information, a poultry grower is unable to protect his or her financial interests and make informed business decisions.

GIPSA considered making notification of suspension of birds a requirement, but that is not what the 2008 Farm Bill mandated. GIPSA also considered criteria with various notification time periods between as little as 30 days and as great as 180 days. GIPSA considered the effects of this range of days on small live poultry dealers and small growers and believes that during the normal course of the poultry production cycle, a live poultry dealer should generally know at least 90 days in advance that it will suspend delivery of poultry to a poultry grower. Providing insufficient notification of suspension of delivery would not give poultry growers, most of which are small family-owned businesses, sufficient time to consider other options for their poultry houses and for keeping up with loan payments, some of which are government guaranteed loans. We believe establishing criteria to consider when determining whether live poultry dealers have provided sufficient notice of their intention to suspend delivery of poultry to poultry growers may result in greater parity in contractual relations between the grower and the live poultry dealer.

Finally, this section lists criteria the Secretary may consider when determining if a violation of the P&S Act has occurred and not requirements.

Section 201.216 Additional Capital Investments Criteria

In the 2008 Farm Bill, Congress required the Secretary to establish criteria that may be considered when USDA is determining whether a

requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the P&S Act. While some live poultry dealers/swine contractors may be considered as small businesses, there are disproportionately more poultry/swine growers that are smaller businesses. After evaluating all the alternatives identified, the option being finalized was deemed the least burdensome on small entities while fulfilling the mandate of the 2008 Farm Bill. GIPSA believes the provisions of new § 201.216 could be useful to small poultry/swine growers when they are faced with deciding whether to make financial investments in their business operations as a requirement to entering into a contractual obligation with a live poultry dealer/swine contractor. Again, as directed by Congress this regulation establishes some of the criteria that may be considered by the Secretary regarding additional capital investments, and does not impose specific requirements or prohibitions on large or small businesses.

Section 201.217 Reasonable Period of Time To Remedy a Breach of Contract

In the 2008 Farm Bill, Congress required the Secretary to establish criteria that may be considered when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable period of time for a poultry/swine grower to remedy a breach of contract that could lead to termination of a production contract. GIPSA believes § 201.217 will benefit small poultry/swine growers because it could result in live poultry dealers providing them with adequate time to remedy a breach of contract. We believe establishing criteria to consider when determining whether a packer, swine contractor or live poultry dealer has provided a reasonable period of time to remedy a breach of contract may result in greater parity in contractual relations between them and the poultry/swine grower. After evaluating all the alternatives identified, the option being finalized was deemed the least burdensome on small entities while fulfilling the mandate of the 2008 Farm Bill. It should be noted the majority of the comments received on § 201.217 were supportive of the regulation and felt the proposed list of criteria was reasonable. This regulation establishes some of the criteria the Secretary may consider when determining if a packer, swine contractor, or live poultry dealer has provided a reasonable time for a poultry/swine grower to remedy a breach of contract and does not impose

specific requirements or prohibitions. Additionally, this section satisfies the requirements of the 2008 Farm Bill.

Section 201.218 Arbitration

The 2008 Farm Bill requires that livestock contracts and poultry growing arrangements contain an option for poultry growers and livestock producers to accept or reject arbitration to settle disputes. The 2008 Farm Bill also directed the Secretary to establish criteria to consider when determining if the arbitration process provided in a contract provides a meaningful opportunity for the poultry growers, swine production contract growers, or livestock producers to participate fully in the arbitration process. By establishing a list of some of the criteria the Secretary may consider when determining if a contract's arbitration provisions violate the P&S Act, the final rule should help ensure that any arbitration terms are fair to both parties to the contract. Fairness is especially important when one party to a contract is significantly smaller and may have limited alternatives such as is typically the case for cattle producers, poultry growers, and swine production contract growers. We believe establishing criteria to consider when determining whether growers and producers have been provided a meaningful opportunity to participate in the arbitration process may result in greater parity in contractual relations between them and the packer, swine contractor or live poultry dealer.

The effect of the final regulations on all small businesses described in the analysis is expected not to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Within this final rule, we provide a succinct statement of the need for the rule; a summary of significant issues raised by commenters and an assessment of those comments; changes made as a result of such comments, including changes to minimize significant, negative economic impacts; and estimates of the number of small businesses. We have, therefore, complied with the Regulatory Flexibility Act.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect, although in some instances they merely reiterate GIPSA's previous interpretation of the P&S Act. Section 414 of the P&S Act (7 U.S.C. 228c) addresses the issue of preemption.¹⁶ There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this final rule. Nothing in this final rule is intended to interfere with a person's right to enforce liability against any person subject to the P&S Act under authority granted in section 308 of the P&S Act.

Executive Order 13175

This final rule has been reviewed with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. GIPSA offered opportunities to meet with representatives from Tribal Governments during the comment period for the proposed rule, June 22–November 22, 2010 with specific opportunities in Rapid City, SD on October 28th, 2010 and Oklahoma City, OK on November 3rd, 2010. All tribal headquarters were invited to participate in these venues however, no tribe participated in the venues for consultation. GIPSA has received no specific indication that the rule will have a direct or substantial effect on tribes and has received no other requests for consultation as of the date of this publication. Should GIPSA receive any future requests for consultation, such requests will be addressed as they arise.

Paperwork Reduction Act

This final rule is being issued in accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Upon OMB approval this package will be merged with 0580–0015. The costs detailed below were reflected in the regulatory impact analysis' total costs for the final rule and were derived from both that analysis and the comments received on the proposed rule. Specifically, the proposed rule discussed the paperwork burden on section-by-section basis. Only the burden associated with those

sections being finalized at this time were included in the analysis below. Further, the information in the proposed rule was amended as result of comments received in response to the proposed rule.

The hours involved in conducting tasks associated with the final rule were estimated using GIPSA expertise in administering the P&S Act to develop the time required to maintain records, complete forms, submit required information, for management review, and a legal review for possible changes in contracts or business practices. Estimates are based on GIPSA's experience reviewing business records in the normal course of enforcing the P&S Act, and its work with data that is similar in type and complexity to that to be reported. General cost and time parameters used across more than one rule provision are detailed in the table below.

TABLE 5—GENERAL PARAMETERS USED FOR ESTIMATES

Parameter	Value
Admin. assistant salary (\$/yr)	55,000
Manager salary (\$/yr)	75,000
Legal salary (\$/yr)	80,000
Wage full cost, admin. asst. (\$/hr) ...	34
Wage full cost, manager (\$/hr)	46
Wage full cost, legal (\$/hr)	49
Live poultry dealer firms (#)	199
Swine contractor	727
Poultry producer and hatchery agreements (#)	22,200
Swine production agreements (#)	8,995
Settlements per year per poultry agreement (#)	5
Swine packer plants with 35 packers (#)	55

The administrative assistant annual salary is from information obtained on average hourly earnings from the U.S. Bureau of Labor Statistics, Table B–4 (release date 8–7–09), under the other services line with added expenses outside of salary. Management salary calculations are based on a \$75,000 annual salary. Legal salary calculations are based on an average corporate attorney with an \$80,000 annual salary. All salaries are adjusted by a factor of 1.27 to account for benefits and placed on an hourly basis as \$/hour = (salary/year × 1.27 for benefits)/(40 hours/week × 52 weeks/year). Specific administrative costs by provision were calculated as described below. The total

Act or regulations thereunder: Provided further, That this section shall not preclude a State from enforcing State law or regulations with respect to any packer not subject to this Act or the Act of July 12, 1943.

¹⁶ Section 414. Federal preemption of State and local requirements.—No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding

provisions under the Act of July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), and prompt payment provisions of section 409 of this Act, respectively: Provided, That this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this Act, which is not in conflict with the

annual administrative cost associated with the final rule is estimated at \$1.6 million (table 6).

TABLE 6—USDA ESTIMATED ADMINISTRATIVE COSTS, BY SECTION OF FINAL RULE, BY SPECIES

Section	Million \$		
	Pork	Poultry	Total
201.215 Suspension of delivery of birds	0.0	*	*
201.216 Additional capital investments criteria	0.4	0.9	1.3
201.217 Reasonable period to remedy a breach of contract	*	0.2	0.2
201.218 Arbitration	*	*	*
Total	0.4	1.2	1.6

* Defined as less than \$100,000. Specific administrative costs by provision were calculated as described below.

Section 201.215 Suspension of Delivery of Birds

One of the criteria the Secretary may consider in determining if a live poultry dealer has provided reasonable notice of the suspension of birds to a poultry grower is whether written notice of the suspension of birds was provided. The additional information burden of providing written notice of suspension of birds is based on 4,440 notices delivered per year = (22,200 contracts × 20 percent) and an estimated \$75,480 industry cost per year = (4,440 notices × 0.50 hours to provide notice × administrative assistant wage rate of \$34 per hour).

Section 201.216 Additional Capital Investment Criteria

Live poultry dealers and swine contractors may choose to undertake a review of their contracts in response to the list of some of the criteria the Secretary may consider in determining whether an additional capital investment requirement in their poultry growing arrangement or production contract constitutes a violation of the P&S Act. The cost of such a review includes an estimate of 0.20 proportion of the agreements expiring, or requiring review per year. This yields 6,239 contracts reviewed per year = (22,200 poultry + 8,995 swine production agreements) × 0.20. With the cost of contract review being based on 37,434 hours total burden = 6,239 contracts × 6 hour/contract to yield \$1,272,756 for the cost of review = 37,434 hours × \$34/ hour administrative assistant wage. The additional administrative cost for live poultry dealers is estimated at about \$900,000 compared to \$367,000 for swine contractors. These costs are expected to be incurred annually.

Section 201.217 Reasonable Period of Time To Remedy a Breach of Contract

One of the criteria the Secretary may consider in determining if a packer,

swine contractor or live poultry dealer has provided a poultry grower or swine production contract grower reasonable time to remedy a breach of contract that could lead to contract termination is whether written notice of the breach was provided. The estimate of the burden to provide such written notice is based on 31,195 poultry growers and swine contracts affected. This yields 6,239 notices per year = 20 percent of the contracts as the annual rate of contract breaches for a per year cost of \$212,126 per year cost = (time burden of 1 hour to provide notice × 6,239 notices × \$34 per hour administrative assistant wage rate). The additional administrative cost for live poultry dealers is estimated at about \$150,000 per year compared to \$61,000 per year for swine contractors.

Section 201.218 Arbitration

One of the criteria the Secretary may consider in determining if the arbitration process provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process, if that is the dispute resolution mechanism they have chosen in the agreement or contract, is whether the right of the contract producer or grower to use arbitration is conspicuously stated in the contract. The estimate of the burden to provide such a statement in all contracts is based on 31,195 poultry growers and swine contracts affected. Assuming that all contracts are new, amended, altered, modified, renewed, or extended over a five year period, the total would be \$265,158 = (time burden of 0.25 hour to provide notice × 31,195 contract × \$34 per hour administrative assistant wage rate). The annual average cost would be \$53,032 with the additional cost for live poultry dealers estimated at about \$38,000 per year compared to \$15,000 per year for swine contractors. It is assumed that such language would eventually become part of the contract

template and this cost would go down over time.

E-Government Act Compliance

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

List of Subjects in 9 CFR Part 201

Confidential business information, Reporting and recordkeeping requirements, Contracts, Poultry, Livestock, Arbitration.

For the reasons set forth in the preamble, we amend 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 is revised to read as follows:

Authority: 7 U.S.C. 181–229, 229c.

■ 2. In § 201.2, add reserved paragraph (l) and paragraphs (m) through (o) to read as follows:

§ 201.2 Terms defined.

* * * * *

(l) [Reserved]

(m) *Principal part of performance* means the raising of, and caring for livestock or poultry, when used in connection with a livestock or poultry production contract.

(n) *Additional capital investment* means a combined amount of \$12,500 or more per structure paid by a poultry grower or swine production contract grower over the life of the poultry growing arrangement or swine production contract beyond the initial investment for facilities used to grow, raise and care for poultry or swine. Such term includes the total cost of upgrades to the structure, upgrades of equipment

located in and around each structure, goods and professional services that are directly attributable to the additional capital investment. The term does not include costs of maintenance or repair.

(o) *Suspension of delivery of birds* means the failure of a live poultry dealer to deliver a new poultry flock before the date payment is due to a poultry grower for the previous flock under section 410 of the Act.

§§ 201.3 and 201.4 [Redesignated as §§ 201.4 and 201.5]

■ 3. Sections 201.3 and 201.4 are redesignated as §§ 201.4 and 201.5 respectively.

■ 4. A new § 201.3 is added to read as follows:

§ 201.3 Applicability of regulations in this part.

(a) *Applicability to live poultry dealers.* The regulations in this part when applicable to live poultry dealers shall apply to all stages of a live poultry dealer's poultry production, including pullets, laying hens, breeders and broilers, excluding egg-type pullets, hens that only produce table eggs, and breeder flocks for the egg industry.

(b) *Effective dates.* The regulations in this part, when governing or affecting contracts, shall apply to any poultry growing arrangement, swine production contract, or any other livestock or poultry contract entered into, amended, altered, modified, renewed or extended after February 7, 2012.

■ 5. Add reserved §§ 201.213 and 201.214 and §§ 201.215 through 201.218 to read as follows:

Sec.	
201.213	[Reserved]
201.214	[Reserved]
201.215	Suspension of delivery of birds.
201.216	Additional capital investments criteria.
201.217	Reasonable period of time to remedy a breach of contract.
201.218	Arbitration.
*	*
*	*
*	*
*	*

§ 201.213 [Reserved]

§ 201.214 [Reserved]

§ 201.215 Suspension of delivery of birds.

The Secretary may consider various criteria when determining whether or not reasonable notice has been given by a live poultry dealer to a poultry grower for suspension of delivery of birds. These criteria include, but are not limited to:

(a) Whether a live poultry dealer provides a poultry grower written notice at least 90 days prior to the date it intends to suspend delivery of birds under a poultry growing arrangement;

(b) Whether the written notice adequately states the reason for the suspension of delivery, the length of the suspension of delivery, and the anticipated date the delivery of birds will resume; and

(c) Whether a catastrophic or natural disaster, or other emergency, such as an unforeseen bankruptcy, has occurred that has prevented a live poultry dealer from providing reasonable notice.

§ 201.216 Additional capital investments criteria.

The Secretary may consider various criteria in determining whether a requirement that a poultry grower or swine production contract grower make additional capital investments over the life of a production contract or growing arrangement constitutes a violation of the Act. These criteria include, but are not limited to:

(a) Whether a packer, swine contractor or live poultry dealer failed to give a poultry grower or swine production contract grower discretion to decide against the additional capital investment requirement;

(b) Whether the additional capital investment is the result of coercion, retaliation or threats of coercion or retaliation by the packer, swine contractor or live poultry dealer;

(c) Whether the packer, swine contractor or live poultry dealer intends or does substantially reduce or end operations at the slaughter plant or processing facility or intends or does substantially reduce or end production operations within 12 months of requiring the additional capital investment, absent the occurrence of a catastrophic or natural disaster, or other emergency, such as unforeseen bankruptcy;

(d) Whether the packer, swine contractor, or live poultry dealer required some poultry growers or swine production contract growers to make additional capital investments, but did not require other similarly situated poultry growers or swine production contract growers to make the same additional capital investments;

(e) The age and number of recent upgrades to, or capital investments in, the poultry grower's or swine production contract grower's operations;

(f) Whether the cost of the required additional capital investments can reasonably be expected to be recouped by the poultry grower or swine production contract grower;

(g) Whether a reasonable time period to implement the required additional capital investments is provided to the poultry grower or swine production contract grower; and

(h) Whether equipment changes are required with respect to equipment previously approved and accepted by the packer, swine contractor, or live poultry dealer, if existing equipment is functioning as it was intended to function unless the packer, swine contractor, or live poultry dealer provides adequate compensation incentives to the poultry grower or swine production contract grower.

§ 201.217 Reasonable period of time to remedy a breach of contract.

The Secretary may consider various criteria when determining whether a packer, swine contractor or live poultry dealer has provided a poultry grower or swine production contract grower a reasonable period of time to remedy a breach of contract that could lead to contract termination. These criteria do not limit a packer, swine contractor or live poultry dealer's rights under a contract or agreement where food safety or animal welfare is concerned. These criteria, include, but are not limited to:

(a) Whether the packer, swine contractor or live poultry dealer provided written notice of the breach of contract to the poultry grower or swine production contract grower upon initial discovery of that breach of contract if the packer, swine contractor or live poultry dealer intends to take an adverse action, including termination of a contract, against the poultry grower or swine production contract grower based on that breach of contract by the poultry grower or swine production contract grower;

(b) Whether the notice in paragraph (a) of this section includes the following:

(1) A description of the act or omission believed to constitute a breach of contract, including identification of the section of the contract believed to have been breached;

(2) The date of the breach;

(3) The means by which the poultry grower or swine production contract grower can satisfactorily remedy the breach, if possible, based on the nature of the breach; and

(4) A date that provides a reasonable time, based on the nature of the breach, by which the breach must be remedied.

(c) Whether the packer, swine contractor or live poultry dealer took into account the poultry grower's or swine production contract grower's ongoing responsibilities related to the raising and handling of the poultry or swine under their care when establishing the date by which a breach should be remedied; and

(d) Whether the poultry grower or swine production contract grower was

afforded adequate time from the date of the notice of the alleged breach to rebut the allegation of a breach.

§ 201.218 Arbitration.

(a) In any livestock or poultry production contract that requires the use of arbitration the following language must appear on the signature page of the contract in bold conspicuous print:

“Right to Decline Arbitration. A poultry grower, livestock producer or swine production contract grower has the right to decline to be bound by the arbitration provisions set forth in this agreement. A poultry grower, livestock producer or swine production contract grower shall indicate whether or not it desires to be bound by the arbitration provisions by signing one of the following statements; failure to choose an option will be treated as if the poultry grower, livestock producer or swine production contract grower declined to be bound by the arbitration provisions set forth in this Agreement:

I decline to be bound by the arbitration provisions set forth in this Agreement

I accept the arbitration provisions as set forth in this Agreement _____”

(b) The Secretary may consider various criteria when determining whether the arbitration process provided in a production contract provides a meaningful opportunity for the poultry grower, livestock producer, or swine production contract grower to participate fully in the arbitration process. These criteria include, but are not limited to:

(1) Whether the contract discloses sufficient information in bold, conspicuous print describing all the costs of arbitration to be paid by the poultry grower, swine production contract grower, or livestock producer, and the arbitration process and any limitations on legal rights and remedies in such a manner as to allow the poultry grower, livestock producer or swine production contract grower to make an informed decision on whether to elect arbitration for dispute resolution;

(2) Whether provisions in the entire arbitration process governing the costs and time limits are reasonable;

(3) Whether the poultry grower, livestock producer, or swine production contract grower is provided access to and opportunity to engage in reasonable discovery of information held by the packer, swine contractor or live poultry dealer;

(4) Whether arbitration is required to be used to resolve only disputes relevant to the contractual obligations of the parties; and

(5) Whether a reasoned, written opinion based on applicable law, legal principles and precedent for the award is required to be provided to the parties.

J. Dudley Butler,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 2011–31618 Filed 12–8–11; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317 and 381

[Docket No. FSIS–2005–0018]

Nutrition Labeling of Single-Ingredient Products and Ground or Chopped Meat and Poultry Products; Delay of Effective Date and Correction

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule; delay of effective date and correction.

SUMMARY: The Food Safety and Inspection Service (FSIS) is delaying the effective date of the final regulations that require nutrition labeling of the major cuts of single-ingredient, raw meat and poultry products and ground or chopped meat and poultry products that were published in the **Federal Register** on December 29, 2010. The original effective date of these regulations was January 1, 2012. FSIS is taking this action in response to a request from eight trade associations. The trade associations requested that FSIS exercise enforcement discretion for a six month period following the January 1, 2012, effective date of the final rule. However, FSIS has concluded that a two month delay in the effective date will allow industry sufficient time to comply with the requirements of the final rule. The new effective date of the final rule is March 1, 2012.

FSIS is also making a correction to the final rule to clarify an amendatory instruction.

DATES: The effective date of the rule amending 9 CFR parts 317 and 381 published at 75 FR 82148, December 29, 2010, is delayed until March 1, 2012. The effective date of the correction to the rule published at 75 FR 82148, December 29, 2010, is March 1, 2012.

FOR FURTHER INFORMATION CONTACT: Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Division, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, (301) 504–0878.

SUPPLEMENTARY INFORMATION:

Background

On December 29, 2010, FSIS published the final rule, “Nutrition Labeling of Single-Ingredient Products and Ground or Chopped Meat and Poultry Products” in the **Federal Register** (75 FR 82148) that, among other things, amended the Federal meat and poultry products inspection regulations to require nutrition labeling of the major cuts of single-ingredient, raw meat and poultry products identified in §§ 317.344 and 381.444 that are not ground or chopped, except for certain exemptions. For these products, the final rule requires that nutrition information be provided on the label or at point-of-purchase (POP) (e.g., by sign or brochure), unless an exemption applies. The final rule also amended FSIS’s regulations to require nutrition labels on all ground or chopped meat and poultry products, with or without added seasonings, unless an exemption applies. In addition, the final rule provided that when a ground or chopped product does not meet the regulatory criteria to be labeled “low fat,” a lean percentage statement may be included on the label or in labeling as long as a statement of the fat percentage that meets the specified criteria also is displayed on the label or in labeling. The required statement of fat percentage must be contiguous to, in lettering of the same color, size, and type as, and on the same color background as, the statement of lean percentage. The final rule also provided several exemptions from the nutrition labeling requirements.

Outreach: In the preamble to the final rule, FSIS stated that it would conduct meetings and webinars on the final rule and would provide additional information and guidance as needed. FSIS also stated its intention to make nutrition labeling materials that can be used at the POP of the major cuts and additional examples of acceptable labels for ground products available on the Agency’s Web site six months prior to the effective date. Since the final rule was published, FSIS has posted on its Web site the final POP materials and examples of nutrition facts panels for ground or chopped products and has conducted webinars on the final rule. In addition, the Agency has conducted many other education and outreach activities to assist retailers and Federal establishments in complying with the requirements of the final rule, such as posting a PowerPoint presentation on its Web site that gives an overview of the requirements of the final rule, presenting information and answering

questions on the requirements of the final rule at numerous meetings, posting questions and answers on its Web site, and responding to numerous questions from stakeholders about the regulations through askFSIS at <http://askfsis.custhelp.com/>.

Request for Enforcement Discretion

FSIS received a letter dated August 12, 2011 from eight trade associations (the American Lamb Board, the American Meat Institute, the Food Marketing Institute, the National Cattlemen's Beef Association, the National Chicken Council, the National Grocer's Association, the National Pork Board, and the National Turkey Federation), which requested that FSIS exercise enforcement discretion for a six month period following the January 1, 2012, effective date of the final rule. The letter cited the Agency's 1–2 month delay in making POP and nutrition facts panel materials available on FSIS's Web site and in conducting the FSIS webinars as the basis for the enforcement discretion. As a result of FSIS's delay in providing this information to retailers, the trade associations stated that it would be difficult for retailers to have systems in place (e.g., tens of thousands of scales across the industry will have to be replaced or updated with new software) and training of tens of thousands of employees completed by the January 1, 2012, effective date. The trade associations also stated that it would be difficult for Federal establishments to redesign thousands of labels and have them approved by FSIS by the January 1, 2012, effective date.

Because of the 1–2 month delay in making the FSIS POP materials and nutrition facts panel examples available on FSIS's Web site and in beginning the FSIS webinars, FSIS has decided to delay the effective date of the final rule until March 1, 2012. The 2 month delay will ensure that industry has sufficient time to comply with the final rule and be in full compliance with the final rule on March 1, 2012.

FSIS determined that a 6 month delay in the effective date is not warranted. The request did not provide any support to justify a 6 month delay in the effective date. Even if, as the letter stated, a delay in FSIS label approval exists, a 2 month delay in the effective date would allow the Agency enough time to approve the new or redesigned nutrition labels submitted by official establishments by March 1, 2012, provided the labels are submitted by January 1, 2012. As described above under "Outreach," since the final rule was published, FSIS has conducted

many education and outreach activities to assist retailers and Federal establishments in complying with the requirements of the final rule. FSIS will continue to conduct these education and outreach activities to assist compliance by March 1, 2012.

Need for Correction

FSIS is making a correction to amendment 17f on page 82167 of the final regulations published on Wednesday, December 29, 2010, to clarify that language is being added to the end of the first sentence in § 381.500(d)(1), not at the end of the second sentence.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at http://www.fsis.usda.gov/News_&_Events/Email_Subscription/. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

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Correction

In FR Doc. 2010–32485 appearing on page 82148 in the **Federal Register** of Wednesday, December 29, 2010, the following corrections are made:

§ 381.500 [Corrected]

■ 1. On page 82167, in the third column, in Part 381 Poultry Products Inspection Regulations, in amendment 17f, the instruction "Amending paragraph (d)(1) by removing the period at the end of the sentence, and by adding the following to the end of the sentence: 'except that this exemption does not apply to the major cuts of single-ingredient, raw poultry products identified in § 381.444.'" is corrected to read "Amending paragraph (d)(1) by removing the period at the end of the first sentence, and by adding the following to the end of the first sentence: ', except that this exemption does not apply to the major cuts of single-ingredient, raw poultry products identified in § 381.444.'".

Done in Washington, DC, on December 5, 2011.

Alfred V. Almanza,
Administrator.

[FR Doc. 2011–31625 Filed 12–8–11; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0010; Airspace Docket No. 11–AAL–1]

Amendment of Federal Airways; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; announcement of effective date.

SUMMARY: This action announces the effective date of a final rule published in the **Federal Register** of April 28, 2011 that amends Federal airways in Alaska.

The FAA subsequently published a rule in the **Federal Register** of June 16, 2011 that delayed the effective date until further notice. An amendment, published in the **Federal Register** of October 20, 2011, further modified the rule. This action is the result of satisfactory flight inspections for the Federal airways affected by the relocation of the Anchorage VHF Omnidirectional Range (VOR).

DATES: Effective date 0901 UTC. This announcement is effective February 9, 2012. The effective date of FR Doc. 2011-10240, published on April 28, 2011 (FR 76 23687), delayed by FR Doc. 2011-14711, published on June 16, 2011, and amended by FR Doc. 2011-27118, published October 20, 2011 (FR 76 65106) is February 9, 2012. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace, Regulations and ATC Procedures Group, Office of Mission Support Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; *telephone:* (202) 267-8783.

SUPPLEMENTARY INFORMATION:

Background

Federal Register Document FAA-2011-0010, Airspace Docket No. 11-AAL-1, published on April 28, 2011 (76 FR 23687), amends all Federal airways affected by the relocation of the Anchorage VOR navigation aid effective June 30, 2011. Due to a failed flight inspection, the FAA subsequently published in the **Federal Register** of June 16, 2011 a rule delaying the effective date from June 30, 2011, until further notice (76 FR 35097). Upon further inspection, the FAA removed two Federal airways in an amendment published in the **Federal Register** of October 20, (76 FR 65106). Two Federal airways were removed to be reworked as a separate rulemaking action. Satisfactory flight inspection results for the remaining Federal airways contained in the rule, as delayed and amended, have been accomplished the effective date is now established.

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. Therefore, this regulation (1) is not a significant regulatory action under Executive Order 12866; (2) is not a

“significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies federal airways in Alaska.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

PART 71—AMENDED

Announcement of Effective Date

■ The effective date of Airspace Docket No. 11-AAL-1, published on April 28, 2011 (76 FR 23687), delayed on June 16, 2011 (76 FR 35097), and amended on October 20, 2011 (76 FR 65106) is hereby established as February 9, 2012.

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

Issued in Washington, DC, on November 30, 2011.

Gary A. Norek,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2011-31461 Filed 12-8-11; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 730, 734, 736, 742, 744, and 745

[Docket No. 111031662-1691-01]

RIN 0694-AF44

Updated Statements of Legal Authority To Reflect Continuation of Emergency Declared in Executive Order 12938

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule updates the Code of Federal Regulations (CFR) legal authority citations for the Export Administration Regulations (EAR) to replace citations to the President’s Notice of November 4, 2010, *Continuation of Emergency Regarding Weapons of Mass Destruction*, with citations to the President’s Notice of November 9, 2011 on the same subject. BIS is making these changes to keep the CFR’s legal authority citations for the EAR current.

DATES: *Effective Date:* December 9, 2011.

ADDRESSES: Comments concerning this rule should be sent to publiccomments@bis.doc.gov, or to Regulatory Policy Division, Bureau of Industry and Security, Room H2099B, U.S. Department of Commerce, Washington, DC 20230. Please refer to regulatory identification number (RIN) 0694-AF44 in all comments, and in the subject line of email comments.

FOR FURTHER INFORMATION CONTACT: William Arvin, Regulatory Policy Division, Bureau of Industry and Security, *telephone:* (202) 482-2440.

SUPPLEMENTARY INFORMATION:

Background

In Executive Order 12938 of November 14, 1994 (59 FR 59099, 3 CFR, 1994 Comp., p. 950), the President declared a national emergency with respect to the unusual and extraordinary threat to the national security, foreign policy and economy of the United States posed by the proliferation of nuclear, biological and chemical weapons and the means of delivering such weapons. That emergency has been continued in effect through successive annual presidential notices. The authority for parts 730, 734, 736, 742, 744 and 745 of the EAR (15 CFR parts 730, 734, 736, 742, 744 and 745) rests in part on E.O. 12938, as amended, and on the successive annual notices continuing the emergency. This rule revises the authority citations in those parts of the

CFR to cite the notice of November 9, 2011, which is the most recent such annual Presidential notice, and to remove the citation to the notice of November 4, 2010 on the same topic.

BIS is making these revisions so that title 15 of the CFR will cite the current authority for the parts mentioned above. This rule is purely procedural, and makes no changes other than to revise CFR authority citations paragraphs. It does not change the text of any section of the EAR, nor does it alter any right, obligation or prohibition that applies to any person under the EAR.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This rule does not impose any regulatory burden on the public and is consistent with the goals of Executive Order 13563. This rule has been determined not to be a significant rule for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule does not involve any collection of information.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. The Department finds that there is good cause under 5 U.S.C. 553(b)(3)(B) to waive the provisions of the Administrative Procedure Act requiring prior notice and the opportunity for public comment because they are unnecessary. This rule only updates legal authority citations and is nondiscretionary. This rule does not alter any right, obligation or prohibition that applies to any person under the EAR. Because these revisions are not substantive changes, it is unnecessary to provide notice and opportunity for public comment. In addition, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) is not applicable because this rule is not a substantive rule. Because neither the Administrative Procedure Act nor any other law

requires that notice of proposed rulemaking and an opportunity for public comment be given for this rule, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research, Science and technology.

15 CFR Part 736

Exports.

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 745

Administrative practice and procedure, Chemicals, Exports, Foreign trade, Reporting and recordkeeping requirements.

Accordingly, the EAR (15 CFR parts 730–774) is amended as follows:

PART 730—[AMENDED]

■ 1. The authority citation for 15 CFR part 730 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of January 13, 2011, 76 FR 3009

(January 18, 2011); Notice of August 12, 2011, 76 FR 50661 (August 16, 2011); Notice of November 9, 2011, 76 FR 70319 (November 10, 2011).

PART 734—[AMENDED]

■ 2. The authority citation for 15 CFR part 734 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011); Notice of November 9, 2011, 76 FR 70319 (November 10, 2011).

PART 736—[AMENDED]

■ 3. The authority citation for 15 CFR part 736 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 2151 note; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p. 168; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011); Notice of November 9, 2011, 76 FR 70319 (November 10, 2011).

PART 742—[AMENDED]

■ 4. The authority citation for 15 CFR part 742 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011); Notice of November 9, 2011, 76 FR 70319 (November 10, 2011).

PART 744—[AMENDED]

■ 5. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of January 13, 2011, 76 FR 3009

(January 18, 2011); Notice of August 12, 2011, 76 FR 50661 (August 16, 2011); Notice of November 9, 2011, 76 FR 70319 (November 10, 2011).

PART 745—[AMENDED]

■ 6. The authority citation for 15 CFR part 745 is revised to read as follows:

Authority: 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Notice of November 9, 2011, 76 FR 70319 (November 10, 2011).

Dated: December 5, 2011.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2011–31687 Filed 12–8–11; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

[Docket No. FDA–2011–N–0003]

New Animal Drugs for Use in Animal Feeds; Tilmicosin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Elanco Animal Health, a division of Eli Lilly & Co. The supplemental NADA provides for use of tilmicosin Type C medicated feeds by veterinary feed directive for the control of bovine respiratory disease in groups of beef and nonlactating dairy cattle.

DATES: This rule is effective December 9, 2011.

FOR FURTHER INFORMATION CONTACT:

Cindy L. Burnsteel, Center for Veterinary Medicine (HFV–130), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, (240) 276–8341, email: cindy.burnsteel@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, a division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed a supplement to NADA 141–064 for PULMOTIL 90 (tilmicosin phosphate) Type A medicated article. The supplemental NADA provides for the use of tilmicosin Type C medicated feeds by veterinary feed directive for the control of bovine respiratory disease

(BRD) associated with *Mannheimia haemolytica*, *Pasteurella multocida*, and *Histophilus somni* in groups of beef and nonlactating dairy cattle where active BRD has been diagnosed in at least 10 percent of the animals in the group. The supplemental NADA is approved as of August 19, 2011, and 21 CFR 558.4 and 558.618 are amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this supplemental approval qualifies for 3 years of marketing exclusivity beginning on the date of approval.

The Agency has carefully considered the potential environmental impact of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. FDA's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Division of Dockets Management (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

§ 558.4 [Amended]

■ 2. In paragraph (d) of § 558.4, in the "Category II" table, in the "Type B maximum (100x)" column, in the entry for "Tilmicosin", remove "18.2 g/lb

(4.0%)" and in its place add "37.9 g/lb (8.35%)".

■ 3. In § 558.618, revise paragraphs (a), (c), and (e) to read as follows:

§ 558.618 Tilmicosin.

(a) *Specifications.* Type A medicated article containing 90.7 grams (g) per pound tilmicosin as tilmicosin phosphate (200 g per kilogram).

* * * * *

(c) *Special considerations*—(1) Tilmicosin medicated feeds are restricted to use under a veterinary feed directive (VFD). See § 558.6 of this chapter for required label statements and other limitations.

(2) VFDs for tilmicosin phosphate shall not be refilled.

(3) Labeling of tilmicosin Type B or Type C medicated feeds must bear the following warnings:

(i) Do not allow horses or other equines access to feeds containing tilmicosin.

(ii) Use of antibacterial drugs in the absence of a susceptible bacterial infection is unlikely to provide benefit to treated animals and may increase the risk of the development of drug-resistant pathogenic bacteria.

(4) Special considerations for use of tilmicosin medicated swine feeds include the following:

(i) The expiration date of VFDs for tilmicosin must not exceed 90 days from the time of issuance.

(ii) Labeling of tilmicosin Type B or Type C medicated feeds for swine must bear the following warning: "Do not use in any feeds containing bentonite. Bentonite in feeds may affect the efficacy of tilmicosin."

(iii) Feed containing tilmicosin shall not be fed to pigs for more than 21 days during each phase of production without ceasing administration for reevaluation of antimicrobial use by a licensed veterinarian before reinitiating a further course of therapy with an appropriate antimicrobial.

(5) Special consideration for use of tilmicosin medicated cattle feeds include the following:

(i) The expiration date of VFDs for cattle must not exceed 45 days from the time of issuance.

(ii) Labeling of tilmicosin Type B or Type C medicated feeds for cattle must bear the following warning: "Do not use in any feeds containing bentonite, cottonseed meal, or cottonseed hulls. Bentonite, cottonseed meal, or cottonseed hulls in feeds may affect the efficacy of tilmicosin."

(iii) To assure both food safety and responsible use in cattle, administration of feed containing tilmicosin to cattle

experiencing an outbreak of BRD must be initiated during the first 45 days of the production period, shall not exceed a single 14-consecutive-day treatment, should not occur concurrent with or following administration of an injectable macrolide, and should not

occur within 3 days following administration of a nonmacrolide injectable BRD therapy. Tilmicosin medicated feed treatment has not been evaluated in cattle with severe clinical disease. Cattle with severe clinical illness should be evaluated for

individual treatment with an alternative non-macrolide therapy.

* * * * *

(e) *Conditions of use.* It is used in feed as follows:

Tilmicosin phosphate in grams/ton	Indications for use	Limitations	Sponsor
(1) 181 to 363	Swine: For the control of swine respiratory disease associated with <i>Actinobacillus pleuropneumoniae</i> and <i>Pasteurella multocida</i> .	Feed continuously as the sole ration for 21-day period, beginning approximately 7 days before an anticipated disease outbreak. The safety of tilmicosin has not been established in male swine intended for breeding purposes. Swine intended for human consumption must not be slaughtered within 7 days of the last treatment with this drug product.	000986
(2) 568 to 757	Cattle: For the control of bovine respiratory disease (BRD) associated with <i>Mannheimia haemolytica</i> , <i>Pasteurella multocida</i> , and <i>Histophilus somni</i> in groups of beef and nonlactating dairy cattle, where active BRD has been diagnosed in at least 10 percent of the animals in the group.	Feed continuously for 14 days to provide 12.5 milligrams/kilogram/head/day. The safety of tilmicosin has not been established in cattle intended for breeding purposes. This drug product is not approved for use in female dairy cattle 20 months of age or older. Use in these cattle may cause drug residues in milk. This drug product is not approved for use in calves intended to be processed for veal. A withdrawal period has not been established in preruminating calves. Cattle intended for human consumption must not be slaughtered within 28 days of the last treatment with this drug product.	000986

Dated: December 5, 2011.

Bernadette Dunham,
Director, Center for Veterinary Medicine.

[FR Doc. 2011-31613 Filed 12-8-11; 8:45 am]

BILLING CODE 4160-01-P

FOR FURTHER INFORMATION CONTACT:

Quyen P. Huynh at (202) 622-3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On August 10, 1995, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published final regulations under Treas. Reg. § 1.881-3 relating to conduit financing arrangements pursuant to the authority granted by section 7701(l) of the Internal Revenue Code (the conduit financing regulations). See TD 8611 (1995-37 IRB 20; 60 FR 40997). On December 22, 2008, the Treasury Department and the IRS published in the **Federal Register** (73 FR 246) a notice of proposed rulemaking (REG-113462-08) that proposed amending § 1.881-3(a)(2)(i)(C) of the conduit financing regulations to treat an entity disregarded as an entity separate from its owner for U.S. tax purposes as a person for purposes of determining whether a conduit financing arrangement exists. The proposed regulations were proposed to be effective as of the date final regulations are published in the **Federal Register**. In addition, the preamble to the proposed regulations requested comments on whether “hybrid instruments” (instruments treated as debt for foreign law purposes and equity for U.S.

purposes) should constitute *per se* “financing transactions” under § 1.881-3(a)(2)(ii)(A) and part of a “financing arrangement” within the meaning of § 1.881-3(a)(2)(i)(A), or whether, at a minimum, certain hybrid instruments should be so treated, depending on specific factors or criteria.

Only one comment letter responding to the notice of proposed rulemaking was received. No public hearing was requested or held. After consideration of the comment, this Treasury decision adopts the proposed regulations with minor edits to *Example 3* and to clarify that the effective date of the final regulations also applies to new *Example 3*.

Explanation and Summary of Comment

The comment supported the proposed regulations and their interpretation of the term “person” to include a business entity that is disregarded as an entity separate from its single member owner under § 301.7701-1 through § 301.7701-3. The comment stated that to disregard an entity that is “regarded” for purposes of claiming treaty benefits would be inconsistent with the policy and purpose of the anti-conduit financing regulations.

As relates to hybrid instruments, the comment did not support either approach raised in the preamble to the proposed regulations, expressing both policy and administrative concerns with

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9562]

RIN 1545-BH77

Conduit Financing Arrangements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations relating to conduit financing arrangements. The final regulations apply to multiple-party financing arrangements that are effected through disregarded entities, and are necessary in order to determine which of those arrangements should be recharacterized as a conduit financing arrangement.

DATES: *Effective Date:* These regulations are effective on December 9, 2011.

Applicability Date: These regulations apply to payments made on or after December 9, 2011.

each. The comment stated that any specific abuses that the Treasury Department and the IRS were concerned about could be better addressed by a more targeted rule that described the specific transactions and limited the application of the regulations to those transactions. In light of the wide array of considerations raised, the Treasury Department and the IRS have decided to continue to study the area and not to provide any specific rules on hybrid instruments as part of this regulation package. Accordingly, these regulations are finalized without change, except to clarify that the effective date of the final regulations also applies to new *Example 3* and to make minor edits to *Example 3*. The Treasury Department and the IRS continue to solicit comments on the treatment of hybrid instruments in financing transactions.

No inference should be drawn from any provision of these final regulations as to the treatment of financing transactions entered into with disregarded entities before the effective date of these final regulations or involving hybrid instruments.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Quyen P. Huynh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.881–3 is amended by:

■ 1. Removing the language “district director” throughout this section and adding “director of field operations” in its place.

■ 2. Removing the language “§ 1.1441–3(j)” throughout this section and adding “§ 1.1441–3(g)” in its place.

■ 3. Removing the language “§ 1.1441–7(d)” throughout this section and adding “§ 1.1441–7(f)” in its place.

■ 4. In the last sentence of paragraph (a)(3)(ii)(B), removing the second “financed” and adding “financing” in its place.

■ 5. Removing the parenthetical language “(or a similar interest in a partnership or trust)” in paragraphs (a)(2)(ii)(A)(2) and (a)(2)(ii)(B)(1) and adding “(or a similar interest in a partnership, trust, or other person)” in its place.

■ 6. Adding a new paragraph (a)(2)(i)(C).

■ 7. In paragraph (e), redesignating *Examples 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25* as *Examples 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26*, respectively.

■ 8. Adding a new *Example 3* in paragraph (e).

■ 9. Revising the paragraph heading and adding a new sentence at the end of paragraph (f).

The revisions and additions read as follows:

§ 1.881–3 Conduit financing arrangements.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(C) *Treatment of disregarded entities.*

For purposes of this section, the term person includes a business entity that is disregarded as an entity separate from its single member owner under § 301.7701–1 through § 301.7701–3.

* * * * *

(e) *Examples.* * * *

Example 3. Participation of a disregarded intermediate entity. The facts are the same as in *Example 2*, except that FS is an entity that is disregarded as an entity separate from its owner, FP, under § 301.7701–3. Under paragraph (a)(2)(i)(C) of this section, FS is a person and, therefore, may itself be an intermediate entity that is linked by financing transactions to other persons in a financing arrangement. The DS note held by FS and the FS note held by FP are financing transactions within the meaning of paragraph

(a)(2)(ii) of this section, and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section.

* * * * *

(f) *Effective/applicability date.* * * * Paragraph (a)(2)(i)(C) and *Example 3* of paragraph (e) of this section apply to payments made on or after December 9, 2011.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: November 29, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–31672 Filed 12–8–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 8

[Docket No. USCG–2011–0745]

RIN 1625–AB79

International Anti-Fouling System Certificate

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending its vessel inspection regulations to add the International Anti-fouling System (IAFS) Certificate to the list of certificates a recognized classification society may issue on behalf of the Coast Guard. This action is being taken in response to recently enacted legislation implementing the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001. This final rule will enable recognized classification societies to apply to the Coast Guard for authorization to issue IAFS Certificates to vessel owners on behalf of the Coast Guard.

DATES: This final rule is effective January 9, 2012.

ADDRESSES: Comments and material received from the public, if any, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0745 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the

Internet by going to <http://www.regulations.gov>, inserting USCG–2011–0745 in the “Keyword” box, and then clicking “Search.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email CDR Ryan Allain, Environmental Standards Division, Coast Guard; telephone (202) 372–1430, email Ryan.D.Allain@uscg.mil. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

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I. Abbreviations

- CFR Code of Federal Regulations
- DHS Department of Homeland Security
- FR **Federal Register**
- IAFS International Anti-fouling System
- NAICS North American Industry Classification System
- NPRM Notice of proposed rulemaking
- § Section
- U.S.C. United States Code

II. Regulatory History

On September 1, 2011, we published a notice of proposed rulemaking (NPRM) entitled “International Anti-fouling System Certificate” in the **Federal Register** (76 FR 54419). We did not receive any comments on the NPRM. No public meeting was requested and none was held.

III. Basis and Purpose

The Coast Guard is amending 46 CFR 8.320(b) by adding the International Anti-fouling System (IAFS) Certificate to the current list of international convention certificates included in that paragraph. Adding the IAFS Certificate to § 8.320(b) will allow the Coast Guard to authorize recognized classification societies to issue IAFS Certificates. Authorization will be based on the Coast Guard’s review of applicable class

rules and applicable classification society procedures. See 46 CFR 8.320(a). For successful applicants, the Coast Guard will then enter into a written agreement with a recognized classification society authorized to issue international convention certificates. The agreement will define the scope, terms, conditions, and requirements of that delegation. See 46 CFR 8.320(c).

IV. Background

The Coast Guard Authorization Act of 2010 at Title X, Public Law 111–281, 124 Stat. 3023, 33 U.S.C. 3801 to 3857 (Oct. 15, 2010), directs the Secretary of Homeland Security to administer and enforce the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001 (Convention). The Secretary has delegated to the Commandant of the Coast Guard her authority under 33 U.S.C. 3803, 3805, 3821–3823, 3842(a), 3852(a)–(e), and 3855 to implement, administer, and enforce the Convention. Section 1021 of Title X (33 U.S.C. 3821) and Regulation 2 of Annex 4 of the Convention call for U.S. Government officials, or an organization identified by the United States, to issue IAFS Certificates to ships whose anti-fouling systems fully comply with the Convention.

Under the Convention, an “anti-fouling system” is defined as a coating, paint, surface treatment, surface, or device that is used on a ship to control or prevent attachment of unwanted organisms. The Convention is currently focused on reducing pollution caused by organotin compounds used in anti-fouling systems.

Since the mid-1990s, under authority of 46 U.S.C. 3103, 3306, 3316 and 3703, and regulations in 46 CFR part 8, the Coast Guard has authorized recognized classification societies to issue international certificates to vessels. The United States currently recognizes six classification societies for purposes of issuing international certificates: the American Bureau of Shipping (ABS, United States), Det Norske Veritas (DNV, Norway), Lloyd’s Register (LR, Great Britain), Germanischer Lloyd (GL, Germany), Bureau Veritas (BV, France), and RINA, S.p.A. (RINA, Italy).

The list of international certificates the Coast Guard may authorize a recognized classification society to issue appears in 46 CFR 8.320. That list currently includes 12 certificates, but does not include the IAFS Certificate.

V. Discussion of Comments and Changes

We received no comments on the NPRM and we made no changes in the

regulatory text in going from the proposed rule to this final rule.

VI. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 14 of these statutes or executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the 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 not been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, this final rule has not been reviewed by the Office of Management and Budget. A regulatory assessment follows:

Under the authority of 46 U.S.C. 3103, 3306, 3316, and 3703, the Coast Guard amends 46 CFR 8.320, to enable the Coast Guard to delegate the activity of issuing IAFS Certificates to a recognized classification society which would act on behalf of the Coast Guard. The intent of this final rule is only to allow for the delegation of IAFS Certification to recognized class societies; it does not impose mandatory actions on the U.S. maritime industry.

We received no comments and found no additional information or data that would cause us to change our regulatory assessment in the “Regulatory Planning and Review” section of the NPRM. We, therefore, have adopted the regulatory assessment of the NPRM as final.

This final rule initiates the process that will allow recognized classification societies to issue IAFS Certificates on behalf of the Coast Guard. Any recognized classification society that wishes to issue IAFS Certificates on the Coast Guard’s behalf will be required to request a delegation of authority from the Coast Guard pursuant to the procedures in 46 CFR part 8. In response, the Coast Guard will evaluate the application, and review the applicant’s applicable class rules and applicable classification society procedures, before deciding whether to

issue a delegation of authority to the applicant.

Although requesting the delegation of authority to conduct IAFS surveys, inspections, and certifications is voluntary, classification societies will incur minor costs associated with this process. The Coast Guard will also incur costs associated with the evaluation of these requests and the issuance of delegations of authority to recognized classification societies.

The Coast Guard expects that this final rule will potentially affect six classification societies which may request a delegation of authority to issue IAFS Certificates. The Coast Guard used OMB-approved collections of information (1625-0101, 1625-0095, 1625-0093, and 1625-0041) to estimate the costs and burden.

The Coast Guard anticipates that each classification society will take about 5.25 hours to review the rulemaking requirements and prepare the delegation request. The total one-time cost for all six classification societies is expected to be \$2,800 (rounded).

In addition, the Coast Guard will incur a one-time cost to review and approve the requests for delegation from each of the classification societies. Based on the OMB-approved collections of information discussed above, the Coast Guard will take about 5 hours to review, approve, and issue an order to delegate authority. The Coast Guard will incur a total one-time cost of \$2,200 (rounded) based on OMB-approved collection of information estimates.

The total one-time cost of this rule is expected to be \$5,000 (non-discounted) for classification societies and the Government combined.

This final rule will result in several benefits to the U.S. maritime industry. First, it will result in a reduction of potential wait time for IAFS Certificates. In the absence of delegation of authority to classification societies, vessel owners and operators would experience delays while the Coast Guard processes and issues IAFS Certificates. Combined with the Coast Guard's other activities and responsibilities, such a process would result in an unnecessary and burdensome wait for vessels. By issuing delegation of authority to classification societies, the Coast Guard will not have to redirect resources that would be used for other missions, resulting in a more efficient use of Government resources. Finally, this final rule will mitigate potential consequences to U.S.-flagged vessels due to non-compliance with the Convention, including costly vessel detentions in foreign ports.

B. Small Entities

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

Classification societies affected by this rule are classified under one of the following North American Industry Classification System (NAICS) 6-digit codes for water transportation: 488330—Navigation Services to Shipping, 488390—Other Support Activities for Water Transportation, or 541611—Administrative Management and General Management Consulting Services.

The Coast Guard did not find any classification societies directly affected by this rule that are small businesses or governments with populations of less than 50,000. The predominant U.S. classification society is the American Bureau of Shipping (ABS). ABS is a privately owned non-profit organization that is dominant in its field (Source: 2011 Hoovers, http://www.hoovers.com/company/American_Bureau_of_Shipping_Inc/rfsksji-1.html). Based on publicly available information, ABS has more than 3,000 employees and an annual revenue of more than \$800 million (Source: 2011 Bloomberg, <http://investing.businessweek.com/research/stocks/private/person.asp?personId=28915205&privcapId=4217113&previousCapId=764755&previousTitle=ABS%20Group%20of%20Companies,%20Inc>). We do not consider ABS to be a small entity under the Regulatory Flexibility Act. The other classification societies affected by this rule are foreign owned and operated.

The Coast Guard expects that this final rule will not have a significant economic impact on a substantial number of small entities. As described in section VI.A. of this preamble, "Regulatory Planning and Review," the anticipated cost of this rule, per class society, is less than \$500. This rule is not mandatory, and classification societies, regardless of size, will choose to participate only if the benefits are greater than the costs.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic

impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), the Coast Guard wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If this final rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult CDR Ryan Allain, Environmental Standards Division, Coast Guard, telephone (202) 372-1430 or email ryan.d.allain@uscg.mil. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

D. Collection of Information

This final rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) because the Coast Guard expects that the number of applications will be less than 10 in any given year.

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. It is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled, now, that all of the categories covered in 46 U.S.C. 3306, 3703, 7101, and 8101 (design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels) are within the field foreclosed from regulation by the States. (See the decision of the Supreme Court in the consolidated cases of *United States v. Locke* and *Intertanko v. Locke*, 529 U.S. 89, 120 S. Ct. 1135 (March 6, 2000).) We have evaluated this rule under E.O. 13132 and have determined that it is preemptive of state law or regulation since Congress intended the Coast Guard to regulate the issuance of international certificates that demonstrate compliance with international conventions requiring antifouling systems aboard U.S. flagged vessels certificated for international voyages, including certificates issued by recognized classification societies. Because States may not promulgate

rules within this category, preemption is not an issue under Executive Order 13132.

F. Unfunded Mandates Reform Act

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

G. Taking of Private Property

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

H. Civil Justice Reform

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

I. Protection of Children

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

J. Indian Tribal Governments

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

K. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 13211 and is not likely to have a significant adverse effect

on the supply, distribution, or use of energy.

L. Technical Standards

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

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

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraphs (34)(b) and (d), of the Instruction, and under section 6(b) of the “Appendix to National Environmental Policy Act: Coast Guard Procedures for Categorical Exclusions, Notice of Final Agency Policy” (67 FR 48243, July 23, 2002). This rule involves the delegation of authority, the inspection and documentation of vessels, and congressionally-mandated regulations designed to improve or protect the environment. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 46 CFR Part 8

Administrative practice and procedure, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Vessels.

For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 8 as follows:

PART 8—VESSEL INSPECTION ALTERNATIVES

■ 1. The authority citation for part 8 is revised to read as follows:

Authority: 33 U.S.C. 3803 and 3821; 46 U.S.C. 3103, 3306, 3316, 3703; Department of Homeland Security Delegation No. 0170.1 and Aug. 8, 2011 Delegation of Authority, Anti-Fouling Systems.

■ 2. Amend § 8.320 as follows:

■ a. In paragraph (b)(11), remove the word “and”;

■ b. In paragraph (b)(12), remove the symbol “.” and add, in its place, the text “; and”; and

■ c. Add paragraph (b)(13) to read as follows:

§ 8.320 Classification society authorization to issue international certificates.

* * * * *

(b) * * *

(13) International Anti-fouling System Certificate.

* * * * *

Dated: December 5, 2011.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2011–31595 Filed 12–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2005–54; Correction; FAR Case 2011–014; Docket 2011–0014; Sequence 1]

RIN 9000–AM11

Federal Acquisition Regulation; Correction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final rule which was published in the **Federal Register** of Wednesday, November 2, 2011 (76 FR 68039). The final rule amended the Federal Acquisition Regulation (FAR) to revise the definitions of “Caribbean Basin country” and “designated country” due to the change in status of the islands that comprised the Netherlands Antilles.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202, for clarification of content. Contact the Regulatory Secretariat, at 1275 First Street NE., Washington, DC 20417, or (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-54; Correction.

SUPPLEMENTARY INFORMATION:

Background

DoD, GSA, and NASA published a final rule, FAR Case 2011-014, Successor Entities to the Netherlands Antilles, in the **Federal Register** of Wednesday, November 2, 2011 (76 FR 68039). The rule amended the Federal Acquisition Regulation (FAR) by revising the definitions of “Caribbean Basin country” and “designated country” due to the change in status of the islands that comprised the Netherlands Antilles.

Need for Correction

As published, the regulations contain technical errors in the promulgated rule.

List of Subjects in 48 CFR Part 52

Government procurement.

Accordingly, 48 CFR part 52 is corrected by making the following correcting amendments:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 52.212-5 by—

- a. Revising paragraph (b)(39); and
- b. Removing from paragraph (b)(40) “(Aug 09)” and adding “(Nov 2011)” in its place.

The revised text reads as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

(b) * * *

___ (39)(i) 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act (June 2009) (41 U.S.C. 10a-10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note, 19 U.S.C. 3805 note, Pub. L. 108-77, 108-78, 108-286, 108-302, 109-53, 109-169, 109-283, and 110-138).

___ (ii) Alternate I (Jan 2004) of 52.225-3.

___ (iii) Alternate II (Jan 2004) of 52.225-3.

* * * * *

Dated: December 5, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2011-31654 Filed 12-8-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 110210132-1275-02]

RIN 0648-XA842

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; inseason retention limit adjustment.

SUMMARY: NMFS has determined that the Atlantic tunas General category daily retention limit of Atlantic bluefin tuna (BFT) should be adjusted for the January 2012 subquota period, based on consideration of the regulatory determination criteria regarding inseason adjustments. This action applies to Atlantic tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat category permitted vessels (when fishing commercially for BFT).

DATES: Effective January 1, 2012, through March 31, 2012.

FOR FURTHER INFORMATION CONTACT: Tom Warren or Sarah McLaughlin, (978) 281-9260.

SUPPLEMENTARY INFORMATION:

Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, per the allocations established in the 2006 Consolidated HMS Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and subsequent rulemakings.

The 2012 BFT fishing year, which is managed on a calendar year basis and subject to an annual calendar year quota, begins January 1, 2012. Starting on January 1, 2012, the General category daily retention limit (§ 635.23(a)(2)) reverts back to the default retention limit of one large medium or giant BFT (measuring 73 inches (185 cm) CFL) or greater per vessel per day/trip under the regulations unless otherwise provided. This default retention limit applies to General category permitted vessels and HMS Charter/Headboat category permitted vessels (when fishing commercially for BFT).

Each of the General category time periods (January, June-August, September, October-November, and December) is allocated a portion of the annual General category quota, thereby ensuring extended fishing opportunities throughout the fishing season, particularly in years when catch rates are high. For the 2011 fishing year to date, NMFS adjusted the General category limit from the default level of one large medium or giant BFT as follows: Two large medium or giant BFT for January (75 FR 79309, December 20, 2010); three large medium or giant BFT for June through August (76 FR 32086, June 3, 2011); three large medium or giant BFT for September through November 5, 2011 (76 FR 52886, August 24, 2011); and two large medium or giant BFT for November 6 through December 31, 2011 (76 FR 69137, November 8, 2011). The November 6, 2011, adjustment to a limit of two large medium or giant BFT was in conjunction with an inseason quota transfer of 50 mt from the Reserve category to the General category.

The 2010 ICCAT recommendation regarding western BFT management resulted in baseline U.S. quotas for both 2011 and 2012 of 923.7 mt (not including a 25-mt allocation that the United States uses to account for bycatch of BFT in pelagic longline fisheries in the Northeast Distant Gear Restricted Area (NED)). Consistent with the allocation scheme established in the Consolidated HMS FMP, the baseline 2012 General category share would be 435.1 mt, and the baseline 2012 January General category subquota would be 23.1 mt.

In order to implement the ICCAT recommendation for 2012, NMFS is planning to publish proposed quota specifications in the beginning of 2012 to set BFT quotas for each of the established domestic fishing categories. Until the 2012 quota specifications are finalized (most likely in the spring of 2012), the January General category baseline quota of 23.1 mt (established

for 2011) remains in effect. In the meantime, the General category BFT fishery remains active into the winter, with landings reported in November and December.

Adjustment of General Category Daily Retention Limits

Under current regulations (50 CFR 635.23(a)(4)), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of five per vessel based on consideration of the criteria provided under § 635.27(a)(8), which include: The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; the catches of the particular category quota to date and the likelihood of closure of that segment of the fishery if no adjustment is made; the projected ability of the vessels fishing under the particular category quota to harvest the additional amount of BFT before the end of the fishing year; the estimated amounts by which quotas for other gear categories of the fishery might be exceeded; effects of the adjustment on BFT rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of BFT; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and a review of dealer reports, daily landing trends, and the availability of the BFT on the fishing grounds. A recent regulatory amendment (76 FR 74003, November 30, 2011), increased the maximum possible daily retention limit to 5 fish. Although the default end of the January subquota period is January 31, 2012, the regulatory amendment also extends the allowable duration of the January subquota period until the January subquota has been harvested or March 31, 2012, whichever comes first.

NMFS has considered the set of criteria cited above and their applicability to the General category BFT retention limit for the January 2012 General category fishery. A principal consideration is the objective of providing opportunities to harvest the full January subquota, without exceeding it based upon the Consolidated HMS FMP goal: "Consistent with other objectives of this FMP, to manage Atlantic HMS fisheries for continuing optimum yield so as to provide the greatest overall benefit to the Nation, particularly with respect to food production, providing recreational

opportunities, preserving traditional fisheries, and taking into account the protection of marine ecosystems". The January subquota has been underharvested in recent years. Under the two fish limit that applied during January 2011, January landings were 34 percent of the subquota (7.9 mt out of the baseline January subquota of 23.1 mt). Similarly, during the 2010 January subquota period, under a two fish limit, 11 percent of the baseline January subquota was harvested (2.7 mt out of the baseline January subquota of 23.8 mt). Based upon the ICCAT recommended quota, the baseline 2012 General category January subquota would also be 23.1 mt. Therefore, based on these criteria, NMFS has determined that the General category retention limit should be increased from the one fish default limit. Accordingly, NMFS increases the General category retention limit to two large medium or giant BFT, measuring 73 inches CFL or greater, per vessel per day/trip, effective January 1, 2012, through March 31, 2012, or until the January subquota is harvested, whichever comes first.

Although NMFS has the authority to set the daily retention limit higher than two BFT, under a relatively high limit (and fish availability), the rate of harvest of the January subquota could be accelerated and result in a relatively short fishing season. A short fishing season may preclude or reduce fishing opportunities for some individuals or geographic areas. Therefore, in order to maintain an equitable distribution of fishing opportunities, a retention limit closer to the low end of the allowable range of retention limits (i.e., two fish) is warranted. A potential ancillary benefit from a subquota period that is open for an extended duration is that any scientific information (including biological samples) collected from BFT may be from fish collected over a broader temporal and geographic range than currently sampled. Lastly, fishery participants have supported this retention limit in prior seasons.

This General category retention limit is effective in all areas, except for the Gulf of Mexico, and applies to those vessels permitted in the General category as well as to those HMS Charter/Headboat permitted vessels fishing commercially for BFT. Regardless of the duration of a fishing trip, the daily retention limit applies upon landing. For example, whether a vessel fishing under the General category limit takes a two-day trip or makes two trips in one day, the daily limit of two fish may not be exceeded upon landing.

This adjustment is intended to provide a reasonable opportunity to harvest the U.S. quota of BFT without exceeding it, while maintaining an equitable distribution of fishing opportunities, to help achieve optimum yield in the General category BFT fishery, to collect a broad range of data for stock monitoring purposes, and to be consistent with the objectives of the Consolidated HMS FMP.

Monitoring and Reporting

NMFS selected the daily retention limit for January 2012 after examining an array of data as it pertains to the determination criteria. These data included, but were not limited to, current and previous catch and effort rates, quota availability, previous public comments on inseason management measures, and stock status. NMFS will continue to monitor the BFT fishery closely through the mandatory dealer landing reports, which NMFS requires to be submitted within 24 hours of a dealer receiving BFT. Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that future adjustments to the retention limit are necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas.

Closure of the General category or subsequent adjustments to the daily retention limit, if any, will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (888) 872-8862 or (978) 281-9260, or access www.hmspermits.gov, for updates on quota monitoring and retention limit adjustments.

Classification

The Assistant Administrator for NMFS (AA) finds that it is impracticable and contrary to the public interest to provide prior notice of, and an opportunity for public comment on, this action for the following reasons:

The regulations implementing the Consolidated HMS FMP provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. Affording prior notice and opportunity for public comment to implement these retention limits is impracticable as it would preclude NMFS from acting promptly to allow harvest of BFT that are available on the fishing grounds. Analysis of available data shows that the General category BFT retention limits may be increased

with minimal risks of exceeding the ICCAT-allocated quota.

Delays in increasing these retention limits would adversely affect those General and Charter/Headboat category vessels that would otherwise have an opportunity to harvest more than the default retention limit of one BFT per day and may exacerbate the problem of low catch rates and quota rollovers. Limited opportunities to harvest the respective quotas may have negative social and economic impacts for U.S. fishermen that depend upon catching the available quota within the time periods designated in the Consolidated HMS FMP. Adjustment of the retention limit needs to be effective January 1, 2012, to minimize any unnecessary disruption in fishing patterns and for the impacted sectors to benefit from the adjustments so as to not preclude fishing opportunities for fishermen who have access to the fishery only during this time period. Therefore, the AA finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment. For these reasons, there is good cause under 5 U.S.C. 553(d) to waive the 30-day delay in effectiveness.

This action is being taken under 50 CFR 635.23(a)(4) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: December 6, 2011.

Steven Thur,

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

[FR Doc. 2011-31677 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521-0640-02]

RIN 0648-XA857

Fisheries of the Exclusive Economic Zone Off Alaska; Sculpins in the Bering Sea 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; apportionment of reserves; request for comments.

SUMMARY: NMFS apportions amounts of the non-specified reserve to the initial total allowable catch of sculpins in the

Bering Sea subarea of the Bering Sea and Aleutian Islands management area. This action is necessary to allow fishing operations to continue. It is intended to promote the goals and objectives of the fishery management plan for the Bering Sea and Aleutian Islands management area.

DATES: Effective December 6, 2011 through 2400 hrs, Alaska local time, December 31, 2011. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, December 21, 2011.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2011-0283, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter NOAA-NMFS-2011-0283 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the "Submit a Comment" icon on that line.

- **Mail:** Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

- **Fax:** Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to (907) 586-7557.

- **Hand delivery to the Federal Building:** Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept

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

FOR FURTHER INFORMATION CONTACT: Mary Furuness, (907) 586-7228.

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

The 2011 initial total allowable catch (ITAC) of sculpins in the Bering Sea subarea was established as 4,420 metric tons (mt) by the final 2011 and 2012 harvest specifications for groundfish of the BSAI (76 FR 11139, March 1, 2011). In accordance with § 679.20(a)(3) the Regional Administrator, Alaska Region, NMFS, has reviewed the most current available data and finds that the ITAC for sculpins in the Bering Sea subarea needs to be supplemented from the non-specified reserve in order to promote efficiency in the utilization of fishery resources in the BSAI and allow fishing operations to continue.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish 780 mt to the sculpins ITAC in the Bering Sea subarea. This apportionment is consistent with § 679.20(b)(1)(i) and does not result in overfishing of a target species because the revised ITAC is equal to or less than the specifications of the acceptable biological catch in the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011).

The harvest specification for the 2011 sculpins ITAC included in the harvest specifications for groundfish in the BSAI is revised as follows: 5,200 mt for sculpins in the Bering Sea subarea.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and

§ 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the sculpins fishery in the Bering Sea subarea. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 30, 2011.

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

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see ADDRESSES) until December 21, 2011.

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

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

Dated: December 5, 2011.

Steven Thur,

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

[FR Doc. 2011-31674 Filed 12-6-11; 4:15 pm]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521-0640-02]

RIN 0648-XA858

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod 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; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of Pacific cod total allowable catch (TAC) from catcher

vessels using trawl gear and jig gear sectors to American Fisheries Act (AFA) trawl catcher/processors and catcher/processors using hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the 2011 TAC of Pacific cod to be harvested.

DATES: Effective December 9, 2011, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, (907) 586-7228.

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

The C season apportionment of the 2011 Pacific cod TAC specified for vessels using trawl gear in the BSAI is 5,458 metric tons (mt) for the period 1200 hrs, A.l.t., June 10, 2011, through 1200 hrs, A.l.t., November 1, 2011, as established by the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011) and subsequent reallocation (76 FR 54137, August 31, 2011).

The Administrator, Alaska Region, NMFS (Regional Administrator) has determined that trawl catcher vessels will not be able to harvest 2,500 mt of the C season apportionment of the 2011 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(9). The Regional Administrator has determined that the projected unharvested amount is unlikely to be harvested by any of the other sectors described in § 679.20(a)(7)(iii)(A). On October 24, 2011, NMFS prohibited directed fishing for Pacific cod by vessels using pot gear in the BSAI to limit incidental catch of octopus (76 FR 66655, October 27, 2011). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions from the C season trawl catcher vessel apportionment 1,750 mt of Pacific cod to the B season apportionment for AFA trawl catcher/processors apportionment and 750 mt to the B season apportionment for catcher/processors using hook-and-line gear.

The C season apportionment of the 2011 Pacific cod TAC specified for jig gear in the BSAI is 570 mt for the period 1200 hrs, A.l.t., August 31, 2011, through 1200 hrs, A.l.t., December 31,

2011, as established by the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011).

The Regional Administrator has determined that the jig gear sector will not be able to harvest 370 mt of the C season apportionment of the 2011 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(1). The Regional Administrator has determined that the projected unharvested amount is unlikely to be harvested by any of the other sectors described in § 679.20(a)(7)(iii)(A). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions from the C season jig gear apportionment 370 mt of Pacific cod to the B season apportionment for catcher/processors using hook-and-line gear.

The harvest specifications for Pacific cod included in the final 2011 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011) are revised as follows: 2,958 mt for catcher vessels using trawl gear and 200 mt for jig gear to the C season apportionments and 2,920 mt for AFA trawl catcher/processors and 49,499 mt for catcher/processors using hook-and-line gear to the B season apportionments.

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 reallocation of Pacific cod specified from trawl catcher vessels and jig gear to AFA trawl catcher/processors and catcher/processors using hook-and-line gear. Since fisheries are currently open, it is important to immediately inform the industry as to the revised allocations. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 1, 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 is exempt from review under Executive Order 12866.

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

Dated: December 6, 2011.

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

[FR Doc. 2011-31675 Filed 12-6-11; 4:15 pm]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 76, No. 237

Friday, December 9, 2011

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

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1700

RIN 0572-AC23

Extension of Comment Period for Proposed Rulemaking on Substantially Underserved Trust Areas (SUTA)

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of extension of public comment period.

SUMMARY: The Rural Utilities Service (RUS) is extending until January 17, 2012, the period for public comment on the proposal to issue regulations in order to provide loans and grants to facilitate the construction, acquisition, or improvement of infrastructure projects in Substantially Underserved Trust Areas (SUTA).

DATES: Comments must be received by January 17, 2012, to ensure full consideration.

ADDRESSES: Submit comments by either of the following methods:

- *Federal eRulemaking Portal* at <http://www.regulations.gov>. Follow instructions for submitting comments for Docket ID RUS-11-AGENCY-0004.

- *Postal Mail/Commercial Delivery:* Please send your comment addressed to Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Avenue, STOP 1522, Room 5159, Washington, DC 20250-1522.

Additional information about the Agency and its programs is available on the Internet at <http://www.rurdev.usda.gov>.

FOR FURTHER INFORMATION CONTACT:

Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue SW., STOP 1510, Room 5135-S, Washington, DC 20250-1590.

Telephone number: (202) 720-9542, Facsimile: (202) 720-1725.

SUPPLEMENTARY INFORMATION: On October 14, 2011, at 76 FR 63846, RUS published a proposed rule to issue regulations in order to provide loans and grants to facilitate the construction, acquisition, or improvement of infrastructure projects in Substantially Underserved Trust Areas (SUTA). The RUS loan, loan guarantee and grant programs act as a catalyst for economic and community development. By financing improvements to rural electric, water and waste, and telecom and broadband infrastructure, RUS also plays a big role in improving other measures of quality of life in rural America, including public health and safety, environmental protection, conservation, and cultural and historic preservation.

The 2008 Farm Bill (Pub. L. 110-246, codified at 7 U.S.C. 906f) authorized the Substantially Underserved Trust Area (SUTA) initiative. The SUTA initiative gives the Secretary of Agriculture certain discretionary authorities relating to financial assistance terms and conditions that can enhance the financing possibilities in areas that are underserved by certain RUS electric, water and waste, and telecom and broadband programs.

The proposed rule invited the public to submit comments by December 13, 2011. The RUS is now extending the period for submission of public comments until January 17, 2012.

Dated: November 5, 2011.

James R. Newby,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2011-31575 Filed 12-8-2011; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket ID OCC-2011-0019]

RIN 1557-AD36

Alternatives to the Use of External Credit Ratings in the Regulations of the OCC

AGENCY: Office of the Comptroller of the Currency, Department of the Treasury.

ACTION: Notice of proposed rulemaking; correcting amendment.

SUMMARY: This notice of proposed rulemaking makes technical corrections to the notice of proposed rulemaking concerning alternatives to the use of external credit ratings that was published on November 29, 2011 to correct a mischaracterization of section 939(d) of the Dodd-Frank Act.

FOR FURTHER INFORMATION CONTACT: Carl Kaminski, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874-5090, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

On November 29, 2011, the Office of the Comptroller of the Currency (OCC) published a notice of proposed rulemaking (NPRM) seeking comment on a proposal to revise its regulations pertaining to investment securities, securities offerings, and foreign bank capital equivalency deposits to replace references to credit ratings with alternative standards of creditworthiness.¹ The OCC also sought comment on proposed amendments to its regulations pertaining to financial subsidiaries of national banks to better reflect the language of the underlying statute, as amended by section 939(d) of the Dodd-Frank Act.

The National Bank Act currently permits a national bank that is one of the 100 largest insured banks to control a financial subsidiary, directly or indirectly, or to hold an interest in a financial subsidiary only if the bank has at least one issue of outstanding debt rated in one of the top three investment grade categories by a nationally recognized statistical rating organization (NRSRO).² A national bank that is one of the second 50 largest insured banks may either satisfy this requirement or may satisfy such other criteria as the Secretary of the Treasury and the Federal Reserve Board may establish jointly by regulation. This creditworthiness requirement does not apply to national banks that are not among the largest 100 insured banks.

Section 939(d) of the Dodd-Frank Act amended the creditworthiness requirement to remove the reference to nationally recognized statistical rating organization (NRSRO) ratings and to

¹ 76 FR 73626 (November 29, 2011).

² 12 U.S.C. 24a.

make other revisions to the provision. Thus, effective on July 21, 2012, a national bank that is one of the 100 largest insured banks may control a financial subsidiary, directly or indirectly, or hold an interest in a financial subsidiary only if the bank has not fewer than one issue of outstanding debt that meets such standards of creditworthiness or other criteria as the Secretary of the Treasury and the Federal Reserve Board may jointly establish.

The proposed revisions to the OCC's rules at 12 CFR 5.39 in the November 29 NPRM inaccurately characterized the creditworthiness requirement, leaving the erroneous impression that only a national bank that is among the 100 largest insured banks could control or hold an interest in financial subsidiary. This notice makes a technical correction to the regulatory text in the NPRM so that the characterization of the Dodd-Frank Act amendment is accurate. As is the case under current law, the creditworthiness requirement does not apply to an insured depository institution that is not among the largest 100 insured depository institutions and therefore does not affect the ability of such an institution to control or hold an interest in a financial subsidiary. The technical correction made in this notice also does not affect the content or substance of the alternative standards of creditworthiness in the November 29 NPRM or in the supervisory guidance that was published at the same time.

Regulatory Analysis

A. Paperwork Reduction Act

The November 29 notice of proposed rulemaking would amend several regulations for which the OCC currently has approved collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520) (OMB Control Nos. 1557–0014; 1557–0190; 1557–0120; 1557–0205). Neither the amendments in the November 29 proposal, nor this revision to it, introduce any new collections of information into the rules, nor do they amend the rules in a way that substantively modifies the collections of information that OMB has previously approved. Therefore, no additional OMB PRA approval is required at this time.

B. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act,³ (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies that

the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include banks with assets less than or equal to \$175 million) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

The November 29 proposal would affect all 578 small national banks and all 288 small federally chartered savings associations.⁴ However, because banks have long been expected to maintain a risk management process to ensure that credit risk is effectively identified, measured, monitored, and controlled, most if not all of the institutions affected by the proposed rule already engage in appropriate risk management activity. Although the proposed rule will affect a substantial number of small banks and federally chartered savings associations, it will not have a significant effect on a substantial number of those institutions. Therefore, the OCC certifies that the proposed rule would not have a significant impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (UMRA) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more (adjusted annually for inflation) in any one year. If a budgetary impact statement is required, section 205 of the UMRA also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that its proposed rule would not result in expenditures by state, local, and tribal governments, or by the private sector, of \$100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 5

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons stated in the preamble, the Office of the Comptroller of the Currency is proposing to amend

Part 5 of chapter I of Title 12, Code of Federal Regulations as follows:

PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

2. The authority citation for part 5 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 93a, 215a–2, 215a–3, 481, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

3. In section 5.39, revise paragraphs (g)(3) through (4) and (j)(2) to read as follows:

§ 5.39 Financial subsidiaries.

* * * * *

(g) * * *

(3) If the national bank is one of the 100 largest insured banks, determined on the basis of the bank's consolidated total assets at the end of the calendar year, the bank has not fewer than one issue of outstanding debt that meets such standards of creditworthiness or other criteria as the Secretary of the Treasury and the Federal Reserve Board may jointly establish pursuant to Section 5136A of title LXII of the Revised Statutes (12 U.S.C. 24a).

(4) Paragraph (g)(3) does not apply if the financial subsidiary is engaged solely in activities in an agency capacity.

* * * * *

(j) * * *

(2) *Eligible debt requirement.* A national bank that does not continue to meet the qualification requirement set forth in paragraph (g)(3) of this section, applicable where the bank's financial subsidiary is engaged in activities other than solely in an agency capacity, may not directly or through a subsidiary, purchase or acquire any additional equity capital of any such financial subsidiary until the bank meets the requirement in paragraph (g)(3) of this section. For purposes of this paragraph (j)(2), the term "equity capital" includes, in addition to any equity investment, any debt instrument issued by the financial subsidiary if the instrument qualifies as capital of the subsidiary under Federal or state law, regulation, or interpretation applicable to the subsidiary.

* * * * *

Dated: December 2, 2011.

By the Office of the Comptroller of the Currency.

Julie L. Williams,

First Senior Deputy Comptroller and Chief Counsel.

[FR Doc. 2011–31574 Filed 12–8–11; 8:45 am]

BILLING CODE 4810–33–P

³ 5 U.S.C. 605(b).

⁴ All totals are as of June 30, 2011.

SMALL BUSINESS ADMINISTRATION**13 CFR Part 107**

RIN 3245-AG32

Small Business Investment Companies—Early Stage SBICs**AGENCY:** U.S. Small Business Administration.**ACTION:** Proposed rule.

SUMMARY: In this proposed rule, the U.S. Small Business Administration (SBA) is defining a new sub-category of small business investment companies (SBICs) which will focus on making equity investments in early stage small businesses. By licensing and providing SBA leverage to these “Early Stage SBICs,” SBA seeks to expand entrepreneurs’ access to capital and encourage innovation as part of President Obama’s Start-Up America Initiative launched on January 31, 2011. This proposed rule also sets forth regulations applicable to Early Stage SBICs with respect to licensing, capital requirements, non-SBA borrowing, examination fees, leverage eligibility, distributions, and capital impairment. In addition, this proposed rule makes certain technical changes to SBA regulations.

DATES: Comments must be received on or before February 7, 2012.

ADDRESSES: You may submit comments, identified by RIN 3245-AG32, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Sean Greene, Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

SBA will post all comments to this proposed rule without change on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the information to Carol Fendler, Investment Division, 409 Third Street SW., Washington, DC 20416. Highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Carol Fendler, Investment Division, (202) 205-7559 or sbic@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

On January 31, 2011, President Obama announced the “Start-Up America Initiative” to encourage American innovation and job creation by promoting high-growth entrepreneurship across the country with new initiatives to help encourage private sector investment in job-creating startups and small firms, accelerate research, and address barriers to success for entrepreneurs and small businesses. The SBIC program will play a key role in accomplishing these goals by expanding access to capital for early stage businesses.

Early stage businesses face difficult challenges accessing capital, particularly those without the necessary assets or cash flow for traditional bank funding. Although the venture capital industry provided over \$22 billion in financings to U.S. businesses in calendar year 2010, this represented over a 23% decline from 2007. Less than a third of these financing dollars went to early stage or start-up businesses. Of the financings that went to early stage and start-up, over two-thirds went to businesses located in three states: California, Massachusetts, and New York. (Source: ThomsonOne VentureXpert) As a result, less than 10% of U.S. venture financing dollars went to early stage and start-up businesses not in those three states. SBA will seek to expand access to capital for early stage small businesses throughout the United States by allocating from its current debenture authorization up to \$200 million per year (up to \$1 billion total over five years) beginning in FY 2012 to Early Stage SBICs.

SBA has not typically provided leverage in the form of SBA-guaranteed debentures to SBICs that plan to provide early stage venture capital financing to small businesses. The standard debenture is generally appropriate for investments in small businesses that generate sufficient cash flow to pay interest and/or dividends, so that SBICs in turn can make semi-annual interest payments on their debentures. Investments in early stage companies, which typically cannot make current interest or dividend payments, do not fit naturally with the structure of debenture leverage.

Furthermore, early stage companies have inherently higher risk; although they can offer potentially higher returns than later stage equity or mezzanine debt investments, the returns are much more volatile. Because the debenture program is required by law to operate at zero cost to taxpayers, the Early Stage SBIC initiative contemplates a number

of strategies to mitigate risk and limit the initiative’s impact on leverage fees, although fee increases will still be necessary. First, SBA intends to limit the amount of debenture leverage available to Early Stage SBICs to a small percentage of SBA’s overall portfolio. Second, SBA is proposing several new regulatory provisions to reduce the risk that an Early Stage SBIC will default on its leverage and to improve SBA’s recovery prospects when a default does occur. Third, SBA intends to act immediately to declare an event of default when an Early Stage SBIC has a condition of Capital Impairment and to exercise all available remedies, including acceleration of the Early Stage SBIC’s leverage, if the default is not cured within the allotted time (see existing §§ 107.1830 and § 107.1810(f) and (g)). SBA is not proposing to change the current maximum permitted Capital Impairment Percentages set forth in § 107.1830 and expects that, for most Early Stage SBICs, the applicable percentage would be 70 percent.

Once the Early Stage initiative has been implemented, the actual performance of Early Stage SBICs would become a factor in the annual adjustment of leverage fees to maintain the overall debenture program at zero taxpayer cost.

To provide Early Stage SBICs with added flexibility, SBA expects to make two forms of leverage available to them: a debenture that requires quarterly interest payments throughout its term, and a debenture that is issued at a discount and does not require interest payments during the first five years of its term. Both debentures would have a 10-year maturity and would be subject to the SBA leverage fee structure currently in effect, including a 3 percent origination fee and an annual charge that is adjusted at the beginning of each fiscal year and applied to new leverage commitments issued in that year.

II. Section by Section Analysis**A. Early Stage Initiative Provisions**

Section 107.50—Definitions. To implement the Early Stage initiative, SBA proposes to add the defined term “Early Stage SBIC” and revise the existing defined term “Payment Date”.

Early Stage SBIC

The regulatory definition of Early Stage SBIC has several key points. First, an Early Stage SBIC must be organized as a limited partnership. Although the current regulations permit other forms of organization, the vast majority of existing SBICs are limited partnerships. SBA believes that having a degree of

uniformity in organizational structure will facilitate a more efficient licensing process for Early Stage SBICs.

Second, the definition makes clear that the “Early Stage SBIC” designation would apply only to SBICs licensed pursuant to the new provisions in this rule. The SBIC program currently includes, and SBA continues to license, SBICs that make at least some early stage investments. With few exceptions, these funds are either: (1) “Non-leveraged” SBICs, which use only private investor capital to make investments, (2) older SBICs that used SBA leverage in the form of participating securities, which are no longer available, or (3) SBICs using debenture leverage that make a few early stage investments as part of their portfolio. Such SBICs are excluded from the “Early Stage SBIC” definition.

Third, an Early Stage SBIC must invest at least 50 percent of its financing dollars in small businesses that are classified as “early stage” at the time of the SBIC’s initial investment. SBA believes that the 50 percent threshold indicates a significant focus, while still giving SBICs flexibility in developing their portfolios. Since a key goal of the Early Stage initiative is to promote the growth of early stage businesses, any follow-on investments in a portfolio company that was “early stage” at the time of the SBIC’s initial investment would count towards the 50 percent requirement.

Fourth, a small business would be considered “early stage” if it has not yet achieved positive cash flow from operations in any full fiscal year. A start-up company with no prior operating history may qualify under this definition. The venture capital industry employs various definitions of “early stage”, most of which describe a business with or without revenues that is not yet profitable or generating positive cash flow. SBA chose to define early stage companies based on operating cash flow because it is less vulnerable to manipulation or distortion than other measures and because the availability of adequate cash is crucial to a business’s ability to survive. Although definitions of “early stage” sometimes include the number of years the company has been in business, SBA did not include age as a factor. Many companies develop slowly over a number of years before they are positioned to grow significantly, and SBA believes that the definition should not exclude such companies.

Payment Date

SBA is proposing special distribution rules (see proposed § 107.1180) for Early

Stage SBICs which would require Early Stage SBICs to make mandatory prepayments of outstanding debentures at the same time they make distributions to their private limited partners. The proposed revision of the “Payment Date” definition in § 107.50 would designate March 1, June 1, September 1, and December 1 of each year as the dates on which debenture prepayments can be made and required interest payments will be due.

Section 107.210—Minimum capital requirements for Licensees. Proposed § 107.210(a)(3) would require an Early Stage SBIC to have at least \$20 million of Regulatory Capital (consisting of paid-in capital contributions from private investors plus binding capital commitments from Institutional Investors, as defined in existing § 107.50). In comparison, the minimum Regulatory Capital is \$5 million for other debenture SBICs and \$10 million for participating securities SBICs. SBA considered a number of factors in setting the \$20 million threshold. First, Early Stage SBICs will have access to at most one “tier” of leverage (a one-to-one match between leverage and private capital), while most other SBICs have access to at least two tiers. Second, historical data show that SBA has experienced higher loss rates on smaller SBICs, with performance statistics improving as private capital approaches \$20 million. Third, SBA attaches high importance to the market validation evidenced by the ability of an Early Stage SBIC’s management team to raise funds from private investors. Although SBA believes the overall \$40 million in total capital (private capital plus leverage) is appropriate to manage fund risk, SBA requests public input on the \$20 million private capital minimum.

The proposed rule does not require an Early Stage SBIC applicant to have \$20 million of Regulatory Capital at the time of application, only at the time of licensing and thereafter. However, the time available for additional fundraising after submission of an application may be limited, and SBA may require evidence of fundraising progress at the time of application. SBA expects to provide further details regarding the Early Stage SBIC application process via **Federal Register** notice prior to accepting Early Stage SBIC applications.

Section 107.300—License application form and fee. This section includes a technical correction and clarification, as well as a proposed substantive change. The current regulation refers to SBA Form 415, an old SBIC license application form. This outdated reference would be replaced by the correct reference to current SBA Forms

2181 (the license application) and 2182 (exhibits to the license application). The proposed rule would also clarify that the licensing fee is non-refundable, consistent with longstanding SBA policy. Finally, because Early Stage SBICs would require special processing, proposed § 107.300(d) would require such applicants to pay an additional licensing fee of \$10,000, bringing their total licensing fee to \$25,000.

Section 107.305—Evaluation of license applicants. Proposed § 107.305 discusses the factors used by SBA to evaluate applicants to the SBIC program, including applicants for an Early Stage SBIC license, which are grouped in four broad categories: Management qualifications, performance of managers’ prior investments, the applicant’s proposed investment strategy, and the applicant’s proposed organizational structure and fund economics. Although this section would be a new addition to the regulations, it does not represent a change in SBA’s licensing criteria. Rather, it would improve public access to useful information about the SBIC program by including it in the regulations along with the other requirements for obtaining an SBIC license (minimum private capital requirements, management-ownership diversity, *etc.*). SBA may still issue further guidance to potential applicants in other formats, as needed. SBA requests input from the public on these evaluation criteria.

Section 107.310—When and how to apply for licensing as an Early Stage SBIC. Because SBA plans to commit only \$200 million of leverage per year to Early Stage SBICs, demand may exceed supply. Under proposed § 107.310, SBA would not license two Early Stage SBICs under common control if both would have SBA leverage or leverage commitments outstanding at the same time. For example, the same managers could not receive two licenses at the same time or in close proximity, but could seek a second license after their first fund had repaid all of its leverage and did not intend to seek any more. By limiting the amount of leverage in the hands of one owner or management group, this restriction would improve diversification of SBA’s overall Early Stage SBIC portfolio. In addition, the proposed section provides that SBA would accept Early Stage SBIC applications only during specified periods, which would be announced by **Federal Register** notice. By creating periodic application windows, SBA will be able to gauge the overall demand for leverage and allocate the available funds among all successful applicants. Up to

a maximum of \$50 million per fund, SBA intends to make one full tier of leverage available to each licensed Early Stage SBIC (unless the SBIC requests less) and will stop licensing new funds when the aggregate private capital of existing licensees is sufficient to utilize all of the leverage (up to \$1 billion in total) allocated to the Early Stage initiative. Depending on demand, SBA may need to commit leverage to Early Stage SBICs in tranches spread over several years, rather than providing a full one-tier commitment at the time of licensing.

Section 107.320—Evaluation of Early Stage SBICs. Proposed § 107.320 states that SBA would evaluate Early Stage SBIC applicants using the same set of factors applicable to SBIC applicants in general, as set forth in proposed § 107.305. This does not mean that a successful debenture SBIC applicant and a successful Early Stage SBIC applicant would look similar. Rather, it means that each applicant's investment strategy must be appropriate for the type of SBA leverage it intends to use, and each applicant's management team must have a successful investment track record that is relevant to its strategy. Early Stage applicants will need to demonstrate superior qualifications in the key areas identified in the proposed rule. SBA will not relax licensing standards to achieve numerical licensing goals or ensure that the full amount allocated to the Early Stage initiative is used.

Proposed § 107.320(a) and (b) would add two selection criteria specific to Early Stage SBICs. For risk management purposes, SBA considers it important to have adequate diversification of Early Stage SBICs with respect to "vintage year" (the year in which an investment fund draws its initial capital from investors). Because of the cyclical nature of venture capital, vintage year has a major impact on the return expectations of a fund and excessive concentration in a single year could substantially increase program risk. Therefore, SBA will reserve the right, when licensing Early Stage SBICs, to maintain diversification across vintage years.

Similarly, SBA will reserve the right to maintain diversification of Early Stage SBICs with respect to geographic location. SBA's primary concern in terms of geography is to ensure that the Early Stage initiative includes assistance to small businesses located in areas outside the traditional hubs for venture capital investment.

SBA expects that the Early Stage licensing process, like the standard SBIC licensing process, will have two

phases: (1) An initial review focused primarily on management qualifications and planned investment strategy, for which applicants submit a Management Assessment Questionnaire (MAQ); and (2) a licensing phase requiring submission of a complete license application, including the licensing fee, organizational documents for the proposed SBIC, principals' fingerprints and personal history statements that will be used to perform criminal history checks, and evidence that the applicant has raised sufficient private capital to carry out its business plan. Applicants who submit a MAQ in the first phase progress to the second phase only if SBA issues a "green light" letter inviting them to do so. In the standard licensing process, the green light letter is valid for 18 months, allowing the applicant time to raise private capital and prepare the full application. In the interests of making capital available to early stage small businesses as quickly as possible, SBA expects to have a more compressed licensing process for Early Stage SBICs. Although applicants may be able to continue their fundraising activities for a limited time after submitting an application, SBA anticipates that they will be required to show substantial progress towards their targeted private capital by the application deadline. After this rule has been finalized, SBA intends to publish a **Federal Register** notice with further details regarding licensing of Early Stage SBICs, including the period during which applications will be accepted.

Section 107.565—Restrictions on third-party debt of Early Stage SBICs. Proposed new § 107.565 would apply to any non-SBA debt of an Early Stage SBIC. Current § 107.550 requires an SBIC with outstanding leverage to obtain SBA's prior written approval of any secured third party debt, but no approval is required for unsecured debt. The proposed rule would require an Early Stage SBIC to obtain SBA approval to have, incur or refinance any third-party debt, even if it is unsecured. SBA believes this is a prudent restriction for Early Stage SBICs because of their higher risk profile. Even debt that is unsecured increases SBA's credit risk because SBA leverage is never senior to the claims of other unsecured creditors: The first \$10 million of SBA leverage is generally subordinated to other unsecured debt of an SBIC, and leverage above \$10 million is pari passu with other unsecured debt.

Section 107.585—Voluntary decrease in Licensee's Regulatory Capital. The current regulation permits an SBIC to reduce its Regulatory Capital by as much as two percent in any fiscal year.

Any reduction in excess of two percent requires SBA's prior written approval. A reduction in Regulatory Capital typically occurs when an SBIC returns capital to its investors. SBA is proposing special distribution rules for Early Stage SBICs to mitigate the additional risk associated with early stage investing (see proposed § 107.1180). To avoid any possible inconsistency between current § 107.585 and proposed § 107.1180, the proposed rule would require any reduction of Regulatory Capital under § 107.585 by an Early Stage SBIC to be approved by SBA in writing.

Section 107.692—Examination fees. SBA intends to closely monitor the performance of Early Stage SBICs to help manage the higher risk associated with early stage investing. All SBICs undergo periodic regulatory compliance examinations, and SBA expects that examinations of Early Stage SBICs will include particular attention to the value of unrealized investments. Under the proposed amendments to § 107.692, SBA would charge Early Stage SBICs an examination fee that is 10 percent higher than the base fee until all debenture leverage has been repaid and no further leverage will be issued. This is the same fee structure applied to participants in SBA's Participating Securities SBIC program.

Section 107.1120—General eligibility requirements for Leverage. Proposed paragraph (k) of this section would provide for a new certification by Early Stage SBICs seeking an SBA leverage commitment or draw. The Early Stage SBIC would be required to certify that it will provide at least 50 percent of the aggregate dollar amount of its financings to "early stage" companies, in accordance with the Early Stage SBIC definition in § 107.50. SBA seeks input from the public on whether 50% minimum is an appropriate level of early stage investments. SBA has proposed a prospective certification, rather than a certification stating that the Early Stage SBIC currently complies with the early stage investment requirement, to provide flexibility for a fund to take advantage of good investment opportunities when they occur. SBA intends to monitor Early Stage SBICs' performance in making early stage investments, and would treat a failure to meet the 50 percent requirement as an event of default under an Early Stage SBIC's leverage (see proposed § 107.1810(f)(11)).

Section 107.1150—Maximum amount of Leverage for a Section 301(c) Licensee. In this section, SBA is proposing special limits on the maximum amount of leverage that will be available to an Early Stage SBIC.

First, the maximum amount that SBA would commit to an Early Stage SBIC on a lifetime basis would be 100 percent of the SBIC's highest Regulatory Capital or \$50 million, whichever is less. In addition, the maximum leverage that an Early Stage SBIC could have outstanding at any time would be limited to 100 percent of its paid-in private capital ("Leverageable Capital") or \$50 million, whichever is less. Finally, the cumulative amount of leverage drawn by an Early Stage SBIC could not exceed the cumulative amount of private capital paid into the fund by its investors. The reason for these limits is two-fold. First, early stage investing is an inherently high risk activity. Second, SBA plans to allocate a relatively small amount of leverage to the Early Stage initiative (up to \$200 million per year over five years). Under the existing rules for leverage eligibility, which permit a single SBIC to have outstanding leverage of up to \$150 million, the entire allocation could be used up by a very small number of SBICs, resulting in insufficient portfolio diversification and increased risk to SBA. Although a leverage ceiling of less than \$50 million per fund would improve diversification still further, SBA believes a lower limit could make the Early Stage initiative unattractive to many prospective fund managers and investors.

Section 107.1180—Required distributions to SBA by Early Stage SBICs. In this section, SBA is proposing to add distribution requirements that would apply only to Early Stage SBICs. The current regulations generally allow a debenture SBIC to distribute profits to its investors, with no obligation to prepay debentures prior to their maturity date (although SBICs may prepay debentures in whole at any time without penalty). SBA believes that applying these rules to Early Stage SBICs would result in an unacceptably high risk of default. Compared to most debenture SBICs, the returns realized by Early Stage SBICs are expected to be irregular and unpredictable, with a few investments producing large profits while many other investments may result in complete or partial losses. Depending on when profits are realized, the existing distribution rules could result in losses to SBA even if an Early Stage SBIC generates positive returns overall. For example, an Early Stage SBIC that earned large profits early in its life could distribute all of those profits to its private investors, assuring them of a net positive return on their investment, and thereafter perform poorly and default on its SBA leverage.

To reduce this type of risk, the proposed rule would require an Early Stage SBIC to make a distribution to SBA whenever it makes a distribution to its investors. Distributions could be made on any quarterly Payment Date (March 1, June 1, September 1, or December 1). SBA would apply any such distribution to the repayment of the SBIC's outstanding debentures. Proposed § 107.1180(b) states that all distributions to SBA would be applied to repayment of outstanding debentures in the same order as they were issued. Like other debenture leverage, debentures issued by Early Stage SBICs could be prepaid in whole but not in part. Under proposed § 107.1180(c), payment of all interest and Charges due and payable on outstanding debentures would be required as a condition of making a distribution; such interest and Charges could be paid either prior to or simultaneously with a distribution.

Proposed § 107.1180 would apply equally to all distributions, including distributions of profits and returns of invested capital. However, Early Stage SBICs would still be subject to § 107.585 (as revised by this proposed rule), which limits an SBIC's ability to reduce its Regulatory Capital. The practical effect of this limitation is that an Early Stage SBIC would have to obtain SBA's prior written approval for any distribution that is not from profits. For a distribution that is from profits, an Early Stage SBIC must notify SBA in writing at least 10 business days before the planned distribution date.

SBA's share of a distribution would depend on the Early Stage SBIC's "highest ratio" of outstanding leverage to Leverageable Capital, and its Capital Impairment Percentage (CIP), as determined under existing § 107.1840. Under proposed § 107.1180(d)(2)(i), if the CIP is less than 50 percent, distributions would be allocated pro rata (based on the "highest ratio") between SBA (up to the amount of the outstanding debenture leverage) and the Early Stage SBIC's investors. For example, if an Early Stage SBIC with a CIP of less than 50 percent has \$25 million of contributed capital from its investors and has drawn \$25 million of leverage from SBA, the distribution would be allocated 50% to the investors and 50% to SBA. If the Early Stage SBIC has \$30 million of contributed capital from its investors and has drawn only \$20 million of leverage from SBA, the distribution would be allocated 60% to the investors and 40% to SBA. An Early Stage SBIC's "highest ratio" of outstanding leverage to Leverageable Capital, rather than the ratio at the time of the distribution, will be used to

determine SBA's share of a distribution. Thus, even if the Early Stage SBIC repays SBA leverage or other events occur that cause a reduction in the Early Stage SBIC's ratio of outstanding leverage to Leverageable Capital, it would continue to base the allocation of future distributions on the "highest ratio" rather than the current ratio.

Under proposed § 107.1180(d)(2)(ii), if the CIP reached 50 percent or more, SBA would receive 100 percent of any distribution until all outstanding debentures have been repaid. However, if the Early Stage SBIC reduces its CIP below 50 percent, it could resume distributions to its investors, as described above. SBA expects that all or nearly all Early Stage SBICs will have a maximum allowable CIP of 70 percent, as determined under existing § 107.1830, so a 50 percent CIP would not indicate a condition of Capital Impairment. However, SBA believes that its ability to take priority in distributions when the CIP reaches 50 percent is an appropriate risk reduction measure for the Early Stage initiative, based on historical data showing that a high proportion of SBICs that reach a 50 percent CIP go on to exceed their maximum allowable CIP.

Proposed § 107.1180(d)(3) and (d)(4) would provide for a "true-up" of cumulative distributions each time an Early Stage SBIC makes a distribution. SBA believes that with the true-up, the proposed distribution rules would operate more consistently, with fewer distortions created by differences among SBICs in the timing of gains and losses.

Proposed § 107.1180(d)(3) would multiply an Early Stage SBIC's total cumulative distributions (including the SBIC's current proposed distribution) by SBA's percentage share of cumulative distributions calculated under § 107.1180(d)(2). The sum of all prior distributions to SBA would then be subtracted from this cumulative result to calculate the amount distributable to SBA under proposed § 107.1180(d)(4). Under proposed § 107.1180(d)(5), the actual dollar amount to be distributed to SBA would be the smallest of three figures: The amount calculated under § 107.1180(d)(4); the total amount of the SBIC's planned distribution; and the total debenture leverage outstanding.

Following is an example of the distribution mechanics for an Early Stage SBIC with a "highest leverage ratio" of 1:

First distribution: SBIC's outstanding leverage and Leverageable Capital are both equal to \$5 million and its CIP is zero. The SBIC wants to distribute profits of \$20 million. The SBIC is current on all debenture interest and

fees. On a pro rata basis, SBA and the SBIC's investors would each receive 50 percent of the distribution, or \$10 million. However, the most that SBA can receive is \$5 million, the total amount of leverage outstanding. Therefore, the SBIC's investors would receive \$15 million.

Second distribution: SBIC's outstanding leverage is \$15 million, Leverageable Capital is \$20 million, and

CIP is zero. The SBIC wants to distribute profits of \$10 million. The SBIC's highest leverage ratio remains at 1. Total cumulative distributions (prior and current) equal \$30 million, of which SBA's share under § 107.1180(d)(3) would equal \$15 million. Under § 107.1180(d)(4), the \$5 million that SBA received from the first distribution must then be subtracted from the \$15 million. The result, \$10 million, is the

smallest of the three amounts under proposed § 107.1180(d)(5), so SBA would receive \$10 million and the SBIC's investors would receive no distribution. On a cumulative basis, SBA and the investors would have received \$15 million each that shows each step of the calculation listed in Table 1, Early Stage SBIC Distribution Example:

TABLE 1—EARLY STAGE SBIC DISTRIBUTION EXAMPLE
(Dollars in millions)

	Distribution 1	Distribution 2
(1) Leverageable capital	\$5.0	\$20.0
(2) Outstanding leverage	5.0	15.0
(3) Cumulative leverage issued	5.0	20.0
(4) Leverage ratio	1.00	0.75
(5) Current proposed distribution	20.0	10.0
(6) Cumulative distributions	20.0	30.0
(7) Highest leverage ratio	1.00	1.00
(8) Capital impairment percentage	0%	0%
(9) [Highest Leverage Ratio/(Highest Leverage Ratio + 1)] × 100	50.0%	50.0%
(10) Line (6) × Line (9)	10.0	15.0
(11) Prior distributions to SBA	0.0	5.0
(12) Line (10) minus Line (11)	10.0	10.0
(13) Amount of distribution to SBA equals least of:		
(i) Line (12)	10.0	10.0
(ii) Line (5)	20.0	10.0
(iii) Line (2)	5.0	15.0
SBA's Share of Distribution	5.0	10.0
Investors' Share of distribution	15.0	
Post Distribution: Cumulative Distributions to SBA	5.0	15.0
Cumulative Distributions to investors	15.0	15.0

Proposed § 107.1180(e) would allow an Early Stage SBIC to prepay debenture leverage in order of issue without making any distribution to its investors. This type of voluntary prepayment could be made on any quarterly Payment Date.

Section 107.1181—Interest reserve requirements for Early Stage SBICs. This section would require an Early Stage SBIC to maintain funds in reserve to cover interest and Charges on its outstanding debentures. This provision is an important element of risk management for the Early Stage initiative because Early Stage SBICs are not expected to generate current interest or dividend income, which for most debenture SBICs is the primary source of cash used to service their SBA debt.

SBA expects that some Early Stage SBICs will seek SBA leverage in the form of a discounted debenture, which will not require cash interest payments during the first five years of its term. Instead, the proceeds received by the Early Stage SBIC when the debenture is issued will be discounted; over the first five years following issuance, the carrying value of the debenture will

accrete until it reaches face value, and semi-annual interest payments will be required beginning in year six. No interest reserve will be required for these discounted debentures.

For standard debentures, an Early Stage SBIC would be required to maintain a reserve equal to the total interest and annual Charge that will be payable on each such debenture over the first five years of its term. The reserve may consist of binding unfunded commitments from the Early Stage SBIC's Institutional Investors and/or "restricted" cash held by the Early Stage SBIC. Neither such unfunded commitments nor such restricted cash could be used for any purpose other than payment of interest, Charges, and any other amounts due to SBA. Restricted cash would be held in a separate bank account and reported separately from other cash in the Early Stage SBIC's financial statements. The required reserve associated with an individual debenture would be reduced on each Payment Date as the Early Stage SBIC made the required payment of interest and Charges. Furthermore, if the Early Stage SBIC prepaid a debenture,

the reserve requirement associated with that debenture would be correspondingly eliminated. The interest reserve requirement and the associated restrictions on the general partner's ability to call capital would have to be included in the Early Stage SBIC's limited partnership agreement.

Section 107.1182—Valuation requirements for Early Stage SBICs based on Capital Impairment Percentage. This section would require an Early Stage SBIC to notify SBA in writing if it has a Capital Impairment Percentage of at least 50 percent, even if its maximum allowable CIP is higher. When SBA receives this notification, or makes its own determination that the CIP is at least 50 percent, SBA would have the right to require the Early Stage SBIC to engage a third party valuation expert, acceptable to SBA, to perform valuations of some or all of the licensee's investments, as determined by SBA. This provision would give SBA an important monitoring tool to guide decision-making with respect to Early Stage SBICs that have begun to experience some financial difficulty.

Section 107.1810—Events of default and SBA’s remedies for Licensee’s noncompliance with terms of Debentures. SBA is proposing four changes in this section that would apply only to Early Stage SBICs. First, existing § 107.1810(f)(2) provides that an improper distribution made by an SBIC is an event of default. Proposed § 107.1810(f)(2)(iv) would add distributions by Early Stage SBICs, as permitted under proposed § 107.1180, to the list of specific distributions that would *not* be considered improper distributions.

Second, under proposed new § 107.1810(f)(11), it would be an event of default if an Early Stage SBIC fails to meet the requirement to invest at least 50 percent of its financing dollars in early stage companies, as defined under the proposed Early Stage SBIC definition in § 107.50. This provision would require an Early Stage SBIC to meet the 50 percent requirement as soon as the total dollars invested to date are equal to or greater than Regulatory Capital. At that point, a typical Early Stage SBIC would have deployed at least half of its total funds available for investment and thus would have had ample opportunity to seek a variety of investment opportunities. Third, under proposed new § 107.1810(f)(12), it would be an event of default if an Early Stage SBIC fails to maintain the interest reserve required under proposed § 107.1181, as discussed earlier in this preamble.

The conditions in proposed § 107.1810(f)(11) and (f)(12) would both be in the category of events of default with opportunity to cure. If the Early Stage SBIC fails to cure to SBA’s satisfaction, SBA could invoke the remedies in existing § 107.1810(g), which include the right to declare outstanding debenture leverage immediately due and payable.

Finally, proposed new § 107.1810(j) would provide SBA with additional remedies to help maximize recoveries from Early Stage SBICs that have been transferred to a liquidation status. Under this section, if SBA must honor its guarantee and pay the principal of an Early Stage SBIC’s debentures, upon such payment SBA would have the right to prohibit the SBIC from making additional investments without SBA approval (except for any investments the SBIC had already legally committed itself to make); to prohibit Distributions by the SBIC to any party other than SBA until all leverage and other amounts due to SBA have been repaid; to require all the SBIC’s investor commitments to be funded at the earliest time(s) permitted under the SBIC’s limited partnership

agreement and other applicable documents; to review and re-determine the SBIC’s approved Management Expenses (as defined in existing § 107.520); and to the appointment of SBA or its designee as receiver for the SBIC. The receivership would be for the purpose of continuing the SBIC’s operations; the appointment of a liquidating receiver is governed by existing provisions of the Small Business Investment Act and is not affected by this proposed rule.

B. Technical Changes to Regulations

Section 107.130—Requirement for qualified management. SBA is proposing one clarification in this section. The current regulation provides that an applicant must show “[w]hen applying for a license” that it has a qualified management team with the knowledge and experience to make the type of investments contemplated by the applicant’s business plan and SBA regulations. SBA has interpreted this section as requiring an SBIC to also maintain a qualified management team post-licensing, and has taken measures including suspending leverage draws when it determines that a qualified management team is not present. The proposed rule would make clear that a licensed SBIC (including an Early Stage SBIC) must have qualified management as long as it has a license.

Section 107.1130—Leverage fees and additional charges payable by Licensee. This section includes two changes to bring the regulation into conformity with statutory requirements. Current § 107.1130(d) provides for a 1 percent annual fee (“Charge”) that SBICs must pay on their outstanding SBA leverage, whether in the form of debentures or participating securities. However, section 303(b) of the Act (as amended by section 2(a)(1)(B) of P.L. 107–100, December 21, 2001) provides for the Charge on debentures to be adjusted annually as necessary to keep the debenture program at zero cost to taxpayers, and sets a maximum annual Charge of 1.38 percent. Section 303(g)(2) of the Act (as amended by section 117 of Pub. L. 108–84, September 30, 2003) provides for the Charge on participating securities to be similarly adjusted and sets a maximum annual Charge of 1.46 percent. Proposed § 107.1130(d)(1) and (d)(2) would conform to these two statutory provisions and to SBA’s actual practice in determining the annual Charge to be paid by SBICs.

Compliance With Executive Orders 12866, 12988 and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget has determined that this rule is a “significant” regulatory action under Executive Order 12866. The Regulatory Impact Analysis is set forth below.

1. Necessity of Regulation

The Small Business Investment Act of 1958 identifies the SBIC program’s mission as follows: “to stimulate and supplement the flow of private equity capital and long-term loan funds which small business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization, and which are not available in adequate supply * * *” Based on venture capital industry data (ThomsonOne VentureXpert), SBA believes that early stage businesses lack access to needed financing capital. Although the venture industry provided over \$22 billion in financings to U.S. businesses in calendar year 2010, this represented over a 23% decline from 2007. Less than a third of these financing dollars went to early stage or start-up businesses. Given the decline in venture capital financings over the past 3 years, SBA seeks to expand access to early stage businesses by implementing an initiative to provide up to \$1 billion in debenture leverage over five years (beginning in FY 2012) to a limited number of SBICs focused on early stage investments.

If SBA debenture leverage is to be used to finance early stage small businesses, the high risk associated with such investments indicates the need for more protections than those provided by the standard SBIC debenture and current regulations to mitigate risk and cost to the taxpayer. SBA is proposing regulatory changes to manage the risks associated with an early stage portfolio, including: (1) Limiting leverage for an individual Early Stage SBIC to 100 percent of Regulatory Capital or \$50 million, whichever is less; (2) establishing special distribution rules to require repayment of leverage whenever an Early Stage SBIC makes distributions to its investors; and (3) implementing risk monitoring actions appropriate to SBA’s leverage guarantor/creditor status. Even with these actions, in order to maintain an initial subsidy rate of zero for the debenture program while limiting the increase in leverage fees, SBA can only issue leverage to Early

Stage SBICs as a very small percentage of its portfolio.

2. Alternative Approaches to Regulation

SBA considered several alternatives to these proposed regulations. The first alternative was for SBA not to pursue the Early Stage initiative and continue with its current credit policy of not providing debenture leverage to SBICs that focus on early stage equity investing. SBA rejected this alternative because of the critical need for early-stage funding, particularly in the \$1 to \$5 million range that fits well with SBA's small business size standards.

SBA also considered seeking legislation for a new program specifically focused on investing in early stage small businesses. Although such an alternative could have provided an opportunity to introduce useful risk-management provisions, such as SBA profit sharing, SBA chose not to pursue this alternative because of the compelling need to begin assisting early stage small businesses as quickly as possible. A third alternative was for SBA to modify its credit policies to license and approve leverage to qualified early stage focused SBICs without changes in program regulations or in the terms of debenture leverage. SBA believes that doing so would not be financially responsible and would present an excessively high risk of losses to the taxpayer. Ultimately, SBA decided that it could responsibly license a limited number of early stage SBICs after implementing appropriate regulatory changes to manage the associated risk.

In proposing the definition for an Early Stage SBIC, SBA considered both the type of investment that should qualify as "early stage" and whether an Early Stage SBIC's portfolio should be limited to early stage investments exclusively. Many small businesses in the earliest stages of product development ("seed stage" companies) could benefit from access to additional capital. However, SBA chose not to limit the Early Stage initiative to seed stage investments because of their high risk and the long holding periods they typically require. Although Early Stage SBICs would not be prohibited from investing in seed stage companies, to use SBA debenture leverage successfully they will likely need to start generating cash returns on investments within 4 to 6 years after licensing. This timing concern is also why the proposed definition requires only 50 percent of an Early Stage SBIC's portfolio to be in early stage investments. This standard would allow Early Stage SBICs to make some later

stage investments that may produce current income or have shorter holding periods, thereby reducing the risk of default on SBA leverage.

In determining the maximum amount of leverage for which an Early Stage SBIC would be eligible, SBA decided that a one-to-one match between leverage and private capital (one "tier" of leverage) would provide the best balance between program cost and attractiveness to fund managers and investors. A second tier of leverage would result in a much higher projected loss rate, and a correspondingly greater increase in annual leverage fees for all debenture SBICs receiving new leverage commitments. SBA also considered a model in which SBA would have provided only half a tier of leverage. This lower ratio of leverage to private capital would have a much lower impact on leverage fees but would be unlikely to attract high quality fund managers and investors.

SBA also considered various dollar limits on the maximum leverage available to an Early Stage SBIC, in order to avoid an excessive concentration of risk in a small number of funds. A low dollar limit could allow more funds to be licensed, but could be unattractive to stronger applicants with the ability to raise and deploy larger amounts of capital. SBA believes the proposed limit of \$50 million is sufficient to attract high quality applicants. SBA also believes that \$50 million of leverage, in combination with at least \$50 million of private capital, is more than adequate to support a primarily early stage portfolio, with most financings expected to be in the \$1 to \$5 million range.

3. Potential Benefits and Costs

SBA anticipates that this proposed rule would provide significant benefit to early stage small businesses seeking investments by Early Stage SBICs. In estimating the impact, SBA considered that \$1 billion in anticipated leverage will be matched by a minimum of \$1 billion in private capital over the next 5 years, beginning in FY 2012. SBA expects that Early Stage SBICs will invest over a 5 to 7 year period after licensing. Allowing for payment of management expenses and interest, SBA estimates that the Early Stage initiative will result in approximately \$125 million annually in financings to small businesses over an 8 to 10 year period.

The proposed rule would impose additional cost in the form of increased annual fees on all debenture SBICs seeking new leverage commitments. The estimated cost has been incorporated into the program formulation model

which determines the annual fee needed to keep the debenture program's original subsidy cost at zero, as required by law. For FY 2012, SBA has budgeted \$150 million in leverage commitments to Early Stage SBICs, within the anticipated appropriated SBIC Debenture loan levels, representing approximately 7 percent of total expected debenture commitments. This 7 percent allocation would increase the annual fee on all new debenture commitments by approximately 13.7 basis points. This increase reflects the additional risk associated the early stage equity investments contemplated by the Early Stage initiative. Early stage investing is higher-risk than the typical SBIC portfolio, and would have required fees in excess of statutory caps, if operated on a stand-alone bases. To align fees and costs to the taxpayers with the overall policy goals, the Early Stage initiative incorporates terms designed to mitigate risk, and is limited to no more than \$200 million per fiscal year to keep the annual fees at reasonable levels. The cost is expected to vary each year based on the factors and assumptions used to develop the annual fee, including the total amount of debenture leverage commitments estimated, the amount committed to Early Stage SBICs, and interest rates.

Executive Order 12988

This action meets applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or presumptive effect.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action is included above in the Regulatory Impact Analysis under Executive Order 12866.

In connection with the launch of the President's "Start-Up America Initiative", SBA announced its commitment to making financing available to early stage small businesses through the SBIC program. In an effort to engage interested parties in this regulatory action, SBA has since made presentations at SBIC association meetings, Start-up America-related public events, and venture capital industry forums to discuss both the market need for new sources of early stage financing and key issues associated with the design of the Early Stage initiative. Participants were broadly supportive of using the SBIC program to expand the financing options available to early stage small

businesses, while adding key protective provisions to manage program risk.

Executive Order 13132

SBA has determined that this proposed 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, for the purposes of Executive Order 13132, Federalism, SBA has determined that this proposed rule has no federalism implications warranting the preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

SBA has determined that this Early Stage SBIC proposed rule will not impose additional reporting or recordkeeping requirements. Early Stage SBIC applicants will submit the same license application form as other SBIC program applicants (OMB Control Number 3245-0062). Post-licensing, Early Stage SBICs will have the same recordkeeping and reporting requirements as any other licensed SBIC.

Regulatory Flexibility Act, 5 U.S.C. 601-612

When an agency promulgates a rule, the Regulatory Flexibility Act (5 U.S.C. 601-612) requires the agency to prepare an initial regulatory flexibility analysis (IRFA) describing the potential economic impact of the rule on small entities and alternatives that may minimize that impact. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This proposed rule affects all SBICs issuing debentures, of which there are approximately 160, most of which are small entities. Therefore, SBA has determined that this proposed rule will have an impact on a substantial number of small entities. However, SBA has determined that the impact on entities affected by the rule will not be significant. SBA intends to maintain the SBIC program's initial subsidy cost to taxpayers at zero by charging up front and annual fees on its leverage. SBA calculates the annual fee each year using historical data to assess the appropriate fee to offset expected losses. The actual costs for SBIC guarantees may be higher or lower, and SBA will monitor program performance closely. Because SBA expects Early Stage SBICs to be riskier than standard SBICs, the

annual fees needed to keep the debenture program's original subsidy cost at zero are higher. For FY 2012, SBA estimates \$150 million leverage commitments to Early Stage SBICs, which increases the annual fee charged to all SBICs seeking new debenture commitments by approximately 13.7 basis points. Since annual leverage fees were introduced in FY 1998, the annual fee has ranged from a high of 100 basis points (1 percent) to a low of 29 basis points, with a 13-year median of 88 basis points. Although the cost will vary in the future based on economic factors and assumptions used to develop the annual fee, SBA expects the fee to remain under 1 percent, comparable to historical annual fees and below the statutory maximum of 1.38 percent. For debenture leverage committed and drawn by SBICs in FY 2012, SBA estimates that the sum of the debenture interest rate plus the annual fee will be in the vicinity of 5 percent. Debenture SBICs typically use the proceeds of debenture leverage to make loans to small businesses at interest rates in the 12 to 16 percent range, providing them with a significant spread over their cost of funds. Accordingly, the Administrator of the SBA hereby certifies that this rule will not have a significant impact on a substantial number of small entities. SBA welcomes comment from members of the public who believe there will be a significant impact either on SBICs, or on companies that receive funding from SBICs.

List of Subjects in 13 CFR Part 107

Investment companies, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend part 107 of title 13 of the Code of Federal Regulations as follows:

PART 107—SMALL BUSINESS INVESTMENT COMPANIES

1. The authority citation for part 107 continues to read as follows:

Authority: 15 U.S.C. 681 et seq., 683, 687(c), 687b, 687d, 687g, 687m and Pub. L. 106-554, 114 Stat. 2763; and Pub. L. 111-5, 123 Stat. 115.

2. Amend § 107.50 by adding a definition of "Early Stage SBIC" and revising the definition of "Payment Date," to read as follows:

§ 107.50 Definitions of terms.

* * * * *

Early Stage SBIC means a Section 301(c) Partnership Licensee, licensed

pursuant to § 107.310 of this part, in which at least 50 percent of all Loans and Investments (in dollars) must be made to Small Businesses that are "early stage" companies at the time of the Licensee's initial Financing. For the purposes of this definition, an "early stage" company is one that has never achieved positive cash flow from operations in any fiscal year.

* * * * *

Payment Date means:

(1) For a Participating Securities issuer, each February 1, May 1, August 1, and November 1 during the term of a Participating Security, or

(2) For an Early Stage SBIC, each March 1, June 1, September 1, and December 1 during the term of a Debenture.

* * * * *

3. Amend § 107.130 by revising the first sentence to read as follows:

§ 107.130 Requirement for qualified management.

When applying for a license, and while you have a license, you must show, to the satisfaction of SBA, that your current or proposed management team is qualified and has the knowledge, experience and capability necessary for investing in the types of businesses contemplated by the Act, the regulations in this part 107, and your business plan. * * *

4. Amend § 107.210 by revising the paragraph subject heading and the first sentence of paragraph (a)(1) introductory text and adding paragraph (a)(3) to read as follows:

§ 107.210 Minimum capital requirements for Licensees.

(a) * * *

(1) Licensees other than Participating Securities issuers and Early Stage SBICs. Except for Participating Securities issuers and Early Stage SBICs, a Licensee must have Regulatory Capital of at least \$5,000,000. * * *

* * * * *

(3) Early Stage SBICs. An Early Stage SBIC must have Regulatory Capital of at least \$20 million.

* * * * *

5. Amend § 107.300 by revising the introductory text and adding paragraph (d) to read as follows:

§ 107.300 License application form and fee.

The license application must be submitted on SBA Form 2181 together with all applicable exhibits on SBA Form 2182 and a non-refundable processing fee computed as follows:

* * * * *

(d) All applicants seeking to be licensed as Early Stage SBICs will pay the fee for a Partnership Licensee plus an additional \$10,000 fee, for a total of \$25,000.

6. Add § 107.305 to read as follows:

§ 107.305 Evaluation of license applicants.

SBA will evaluate a license applicant based on the submitted application materials, any interviews with the applicant's management team, and the results of background investigations, public record searches, and other due diligence conducted by SBA and other Federal agencies. SBA's evaluation will consider factors including the following:

(a) Management qualifications, including demonstrated investment skills and experience as a principal investor; business reputation; adherence to legal and ethical standards; record of active involvement in making and monitoring investments and assisting portfolio companies; successful history of working as a team; and experience in developing appropriate processes for evaluating investments and implementing best practices for investment firms.

(b) Performance of managers' prior investments, including investment returns measured both in percentage terms and in comparison to appropriate industry benchmarks; the extent to which investments have been realized as a result of sales, repayments, or other exit mechanisms; and the contribution of prior investments to the growth of portfolio company revenues and number of employees.

(c) Applicant's proposed investment strategy, including clarity of objectives; strength of management's rationale for pursuing the selected strategy; compliance with this part 107 and applicable provisions of part 121 of this chapter; fit with management's skills and experience; and the availability of

sufficient resources to carry out the proposed strategy.

(d) Applicant's proposed organizational structure and fund economics, including compliance with this part 107; soundness of financial projections and underlying assumptions; a compensation plan that provides managers with appropriate economic incentives; a reasonable basis for allocations of profits and fees to Persons not involved in management; and governance procedures that provide appropriate checks and balances.

7. Add § 107.310 to read as follows:

§ 107.310 When and how to apply for licensing as an Early Stage SBIC.

From time to time, SBA will publish a Notice in the **Federal Register**, inviting the submission of applications for licensing as an Early Stage SBIC. SBA will not consider an application from an Early Stage SBIC applicant that is under Common Control with another Early Stage SBIC applicant or an existing Early Stage SBIC (unless it has no outstanding Leverage or Leverage commitments and will not seek additional Leverage in the future). Applicants must comply with both the regulations in this part 107 and any requirements specified in the Notice, including submission deadlines. The Notice will specify procedures for a particular application period.

8. Add § 107.320 to read as follows:

§ 107.320 Evaluation of Early Stage SBICs.

SBA will evaluate an Early Stage SBIC license applicant based on the same factors applicable to other license applicants, as set forth in § 107.305, with particular emphasis on managers' skills and experience in evaluating and investing in early stage companies. In addition, SBA reserves the right to maintain diversification among Early Stage SBICs with respect to:

(a) The year in which they commence operations, and

(b) Their geographic location.

9. Add § 107.565 to read as follows:

§ 107.565 Restrictions on third-party debt of Early Stage SBICs.

If you are an Early Stage SBIC and you have outstanding Leverage or a Leverage commitment, you must get SBA's prior written approval to have, incur, or refinance any third-party debt other than accounts payable from routine business operations.

10. Amend § 107.585 by revising the first sentence to read as follows:

§ 107.585 Voluntary decrease in Licensee's Regulatory Capital.

You must obtain SBA's prior written approval to reduce your Regulatory Capital by more than two percent in any fiscal year, unless otherwise permitted under §§ 107.1560 and 107.1570, *provided however*, that if you are an Early Stage SBIC, you must obtain SBA's prior written approval for any reduction of your Regulatory Capital, including any reduction pursuant to a Distribution under § 107.1180 of this part. * * *

11. Amend § 107.692 by redesignating paragraphs (c)(4) and (5) as paragraphs (c)(5) and (6), adding a new paragraph (c)(4), and revising the table in paragraph (d) to read as follows:

§ 107.692 Examination fees.

* * * * *

(c) * * *

(4) If you are an Early Stage SBIC with outstanding Leverage or Leverage commitments, you will pay an additional charge equal to 10% of your base fee;

* * * * *

(d) * * *

Examination fee discounts	Amount of discount—% of base examination fee	Examination fee additions	Amount of addition—% of base examination fee
No prior violations	15	Partnership or limited liability company	5
Responsiveness	10	Participating Security Licensee	10
		Records/Files at multiple locations	10
		Early Stage SBIC	10

* * * * *

12. Amend § 107.1120 by adding paragraph (k) to read as follows:

§ 107.1120 General eligibility requirements for Leverage.

* * * * *

(k) If you are an Early Stage SBIC, certify in writing that at least 50 percent of the aggregate dollar amount of your

Financings will be provided to "early stage" companies as defined under the definition of Early Stage SBIC in § 107.50 of this part.

13. Amend § 107.1130 by revising the first sentence of paragraph (d)(1) and the first sentence of paragraph (d)(2) to read as follows:

§ 107.1130 Leverage fees and additional charges payable by Licensee.

* * * * *

(d) * * *

(1) *Debentures*. You must pay to SBA a Charge, not to exceed 1.38 percent per annum, on the outstanding amount of your Debentures issued on or after October 1, 1996, payable under the same

terms and conditions as the interest on the Debentures. * * *

(2) *Participating Securities*. You must pay to SBA a Charge, not to exceed 1.46 percent per annum, on the outstanding amount of your Participating Securities issued on or after October 1, 1996, payable under the same terms and conditions as the Prioritized Payments on the Participating Securities. * * *

14. Amend § 107.1150 by revising the first sentence of the introductory text and adding paragraph (d) to read as follows:

§ 107.1150 Maximum amount of Leverage for a Section 301(c) Licensee.

A Section 301(c) Licensee, other than an Early Stage SBIC, may have maximum outstanding Leverage as set forth in paragraphs (a) through (c) of this section. An Early Stage SBIC may have maximum outstanding Leverage as set forth in paragraph (d) of this section. * * *

(d) *Early Stage SBICs*. Subject to SBA's credit policies, if you are an Early Stage SBIC:

(1) The total amount of any and all Leverage commitments you receive from SBA shall not exceed 100 percent of your highest Regulatory Capital or \$50 million, whichever is less;

(2) On a cumulative basis, the total amount of Leverage you have issued shall not exceed the total amount of capital paid in by your investors; and

(3) The maximum amount of Leverage you may have outstanding at any time is the lesser of:

(i) 100 percent of your Leverageable Capital, or

(ii) \$50 million.

15. Amend Subpart I of Part 107 by adding an undesignated center heading and by adding new §§ 107.1180, 107.1181, and 107.1182 to read as follows:

Subpart I—SBA Financial Assistance for Licenses (Leverage)

* * * * *

Special Rules for Leverage Issued by an Early Stage SBIC

§ 107.1180 Required distributions to SBA by Early Stage SBICs.

(a) *Distribution requirement*. If you are an Early Stage SBIC with outstanding Leverage, you may make Distributions to your investors and to SBA only as permitted under this § 107.1180. You may make a Distribution on any Payment Date. Unless SBA permits otherwise, you must notify SBA in writing of any

planned distribution under this section, including computations of the amounts distributable to SBA and your investors, at least 10 business days before the distribution date.

(b) *How SBA will apply Distributions*. Any amounts you distribute to SBA, or its designated agent or Trustee, under this § 107.1180 will be applied to repayment of principal of outstanding Debentures in order of issue. You may prepay any Debenture in whole, but not in part, on any Payment Date without penalty.

(c) *Condition for making a Distribution*. You may make a Distribution under this § 107.1180 only if you have paid all interest and Charges on your outstanding Debentures that are due and payable, or will pay such interest and Charges simultaneously with your Distribution.

(d) *SBA's share of Distribution*. For each proposed Distribution, determine SBA's share of the Distribution as follows:

(1) Determine the highest ratio of outstanding Leverage to Leverageable Capital that you have ever attained (your "Highest Leverage Ratio"). For the purpose of determining your Highest Leverage Ratio, any deferred interest Debentures issued at a discount must be included in the computation at their face value.

(2) Determine SBA's percentage share of cumulative Distributions:

(i) If your Capital Impairment Percentage under § 107.1840 is less than 50 percent as of the Distribution date, SBA's percentage share of cumulative Distributions equals:

$[\text{Highest Leverage Ratio}/(\text{Highest Leverage Ratio} + 1)] \times 100$

For example, if your Highest Leverage Ratio equals 1, then SBA's share of any distribution you make will be 50 percent.

(ii) If your Capital Impairment Percentage under § 107.1840 is 50 percent or greater as of the Distribution date, SBA's percentage share of cumulative Distributions equals 100 percent.

(3) Multiply the sum of all your prior Distributions and your current proposed Distribution (including Distributions to SBA, your limited partners and your General Partner) by SBA's percentage share of cumulative Distributions as determined in paragraph (d)(2) of this section.

(4) From the result in paragraph (d)(3) of this section, subtract the sum of all your prior Distributions to SBA under this § 107.1180.

(5) The amount of your Distribution to SBA will be the least of:

(i) The result in paragraph (d)(4) of this section;

(ii) Your current proposed Distribution; or

(iii) Your outstanding Leverage.

(e) *Additional Leverage prepayment*. On any Payment Date, subject to the terms of your Leverage, you may make a payment to SBA to be applied to repayment of the principal of one or more outstanding Debentures in order of issue, without making any Distribution to your investors.

§ 107.1181 Interest reserve requirements for Early Stage SBICs.

(a) *Reserve requirement*. If you are an Early Stage SBIC with outstanding Leverage, for each Debenture which requires periodic interest payments to SBA during the first five years of its term, you must maintain a reserve sufficient to pay the interest and Charges on such Debenture for the first 21 Payment Dates following the date of issuance. This reserve may consist of any combination of the following:

(1) Binding unfunded commitments from your Institutional Investors that cannot be called for any purpose other than the payment of interest and Charges to SBA, or the payment of any amounts due to SBA; and

(2) Cash maintained in a separate bank account or separate investment account permitted under § 107.530 of this part and separately identified in your financial statements as "restricted cash" available only for the purpose of paying interest and Charges to SBA, or for the payment of any amounts due to SBA.

(b) Your limited partnership agreement must incorporate the reserve requirement in paragraph (a) of this section.

§ 107.1182 Valuation requirements for Early Stage SBICs based on Capital Impairment Percentage.

(a) If you are an Early Stage SBIC, you must compute your Capital Impairment Percentage and determine whether you have a condition of Capital Impairment in accordance with §§ 107.1830 and 107.1840 of this part.

(b) You must promptly notify SBA in writing if your Capital Impairment Percentage is at least 50 percent, even if your maximum permitted Capital Impairment Percentage is higher.

(c) Upon receipt of your notification under paragraph (b) of this section, or upon making its own determination that your Capital Impairment Percentage is at least 50 percent, SBA has the right to require you to engage, at your expense, an independent third party, acceptable to SBA, to prepare valuations of some or

all of your Loans and Investments, as designated by SBA.

16. Amend § 107.1810 by revising paragraphs (f)(2)(ii) and (iii) and adding paragraphs (f)(2)(iv), (f)(11), (f)(12), and (j) to read as follows:

§ 107.1810 Events of default and SBA's remedies for Licensee's noncompliance with terms of Debentures.

* * * * *

(f) * * *

(2) * * *

(ii) Payments from Retained Earnings Available for Distribution based on either the shareholders' prorata interests or the provisions for profit distributions in your partnership agreement, as appropriate;

(iii) Distributions by Participating Securities issuers as permitted under §§ 107.1540 through 107.1580; and

(iv) Distributions by Early Stage SBICs as permitted under § 107.1180.

* * * * *

(11) *Failure by an Early Stage SBIC to meet investment requirements.* You are an Early Stage SBIC and, beginning on the first fiscal quarter end when your cumulative total Financings (in dollars) are at least equal to your Regulatory Capital, you have not made at least 50 percent of such Financings to Small Businesses that at the time of your initial Financing were "early stage" companies, as defined under the definition of Early Stage SBIC in § 107.50 of this part.

(12) *Failure by an Early Stage SBIC to maintain required interest reserve.* You are an Early Stage SBIC and you fail to maintain a sufficient reserve to pay interest and Charges on your Debentures as required under § 107.1181 of this part.

* * * * *

(j) *Additional SBA remedies applicable to Debentures issued by Early Stage SBICs.*

If you are an Early Stage SBIC, upon SBA's payment pursuant to its guarantee of any of your Debentures, SBA shall have the following additional rights and you consent to SBA's exercise of any or all of such rights:

(1) To prohibit you from making any additional investments except for investments under legally binding commitments you entered into before such payment by SBA and, subject to SBA's prior written approval, investments that are necessary to protect your investments;

(2) Until all Leverage is repaid and amounts related thereto are paid in full, to prohibit Distributions by you to any party other than SBA, its agent or Trustee;

(3) To require all your commitments from investors to be funded at the earliest time(s) permitted in accordance with your Articles;

(4) To review and re-determine your approved Management Expenses; and

(5) To the appointment of SBA or its designee as your receiver under section 311(c) of the Act for the purpose of continuing your operations.

Dated: December 6, 2011.

Karen G. Mills,

Administrator.

[FR Doc. 2011-31658 Filed 12-8-11; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91, 576, 580, and 583

[Docket No. FR-5475-P-01]

Homeless Management Information Systems Requirements

AGENCY: Office of the Assistant Secretary for Community Planning and Development.

ACTION: Proposed rule.

SUMMARY: This proposed rule provides for the establishment of regulations for Homeless Management Information Systems (HMIS), which are the local information technology systems that HUD recipients and subrecipients use for homeless assistance programs authorized by the McKinney-Vento Homeless Assistance Act (the McKinney-Vento Act). The Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (HEARTH Act), enacted into law on May 20, 2009, in addition to consolidating and amending programs authorized by the McKinney-Vento Act, codifies in law the Continuum of Care planning process, as well as certain data collection requirements integral to HMIS. The HEARTH Act requires that HUD ensure operation of and consistent participation by recipients and subrecipients in HMIS. While Continuums of Care have been using HMIS for several years, this proposed rule would add a new part to the Code of Federal Regulations to regulate the administration of HMIS and collection of data using HMIS, as provided for by the HEARTH Act. In addition, this proposed rule would make corresponding changes to HUD's regulations for Consolidated Submissions for Community Planning and Development Programs, at 24 CFR part 91; the Emergency Solutions Grants program, at 24 CFR part 576; the Shelter

Plus Care Program, at 24 CFR part 582; and the Supportive Housing Program, at 24 CFR part 583.

DATES: *Comment Due Date.* February 7, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, 451 7th Street, SW., Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500.

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

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

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

8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ann Marie Oliva, Director, Office of Special Needs Assistance Programs, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410-7000; telephone number (202) 708-4300 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Information Relay Service at (800) 877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background—HEARTH Act

The Act to Prevent Mortgage Foreclosures and Enhance Mortgage Credit Availability was signed into law on May 20, 2009 (Pub. L. 111-22). This new law implements a variety of measures directed toward keeping individuals and families from losing their homes. Division B of this new law is the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009. The HEARTH Act consolidates and amends three of the homeless assistance programs authorized by title IV of the McKinney-Vento Act (42 U.S.C. 11371 *et seq.*) into a single grant program. Also, the HEARTH Act revised the Emergency Shelter Grants program to broaden its existing emergency shelter and homelessness prevention activities, to add new activities to rapidly rehouse homeless families and individuals, and to change the program's name to the Emergency Solutions Grant program. The HEARTH Act also codifies in law the Continuum of Care planning process and certain data collection requirements and requires HUD to ensure operation of and consistent participation by recipients and subrecipients of programs authorized by Title IV of the McKinney-Vento Act in HMIS.

II. This Proposed Rule

A. Background

Commencing in 2004, HUD has required recipients of McKinney-Vento Act funds to collect electronic data on their homeless clients through HMIS.¹

¹ HUD's "Third Progress Report on HUD's Strategy for Improving Homeless Data Collection, Reporting and Analysis," dated March 2004, described HUD's efforts, commencing in 2001 and in collaboration with recipients and subrecipients to develop an effective data collection system on the homeless, at both the national and local levels. See <http://www.hud.gov/offices/cpd/homeless/>

HMIS is a software application used to collect demographic information on people served. The purpose of HMIS is to record and store client-level information about the numbers, characteristics and needs of persons who use homeless housing and supportive services and about persons who receive assistance for persons at risk of homelessness over time, to produce an unduplicated count of homeless persons for each Continuum of Care; to understand the extent and nature of homelessness locally, regionally and nationally; and to understand patterns of service use and measure the effectiveness of programs.

This proposed rule establishes regulations for HMIS at 24 CFR part 580 and makes corresponding amendments to the Consolidated Plan regulations, codified in 24 CFR part 91; the Emergency Solutions Grants program regulations, codified in 24 CFR part 576, and established by interim rule published on December 5, 2011 (76 FR 75954); the Shelter Plus Care program regulations, codified in 24 CFR part 582; and the Supportive Housing Program regulations, codified in 24 CFR part 583. Informed by HUD's experience with HMIS, the proposed rule would implement the HEARTH Act requirements and make mandatory the practices that HUD previously provided as guidance. The regulatory framework proposed by this rule is designed to provide for uniform technical requirements of HMIS, for proper collection of data and maintenance of the database, and to ensure the confidentiality of the information in the database. HUD is publishing the HMIS rule separate from the program rules in part to avoid repetition in those rules, but also because recipients of grants and assistance from other Federal agencies that are now requiring them to use HMIS to collect data and produce reports will benefit from a separate rule.

The following sections of this preamble provide a section-by-section overview of the proposed rule.

B. Section-by-Section Overview of Proposed Part 580

General Provisions (Subpart A)

Purpose and Scope (§ 580.1)

This section provides that the purpose of HMIS is to record and store client-level information about the numbers, characteristics, and needs of homeless persons and those at risk of

[hmis/strategy/reporttocongress2004.pdf](http://www.hud.gov/offices/cpd/homeless/hmis/strategy/reporttocongress2004.pdf). These efforts concluded with a notice that HUD published in the **Federal Register** on July 30, 2004 (69 FR 45888) that provided final data and technical standards for HMIS.

homelessness. This section also clarifies the scope of homeless assistance and prevention programs that must utilize HMIS.

With respect to scope, this rule clarifies that all recipients of financial assistance under the Continuum of Care program, the Emergency Solutions Grant program, the Rural Housing Stability Assistance (RHS) program, as well as HUD programs previously funded under the McKinney-Vento Act (the Supportive Housing Program, the Shelter Plus Care program, and the Section 8 Single Room Occupancy Moderate Rehabilitation program) are required to use HMIS to collect client-level data on persons served. Homeless and nonhomeless projects not funded under the McKinney-Vento Act may participate in the local HMIS, and must follow HMIS regulations and any additional requirements as may be issued by notice, in accordance with the Paperwork Reduction Act.

Definitions (§ 580.3)

Under this rule, a comparable database means a database used by a victim service provider or a legal service provider that collects client-level data over time and generates unduplicated aggregate reports based on the data, in accordance with the requirements of this part. Information entered into a comparable database must not be entered directly into or provided to an HMIS.

Consistent with section 401(32) of the McKinney-Vento Act, this rule defines the term *victim service provider* as a private nonprofit organization whose primary mission is to provide services to victims of domestic violence, dating violence, sexual assault, or stalking. This term includes rape crisis centers, battered women's shelters, domestic violence transitional housing programs, and other programs.

HMIS Administration (Subpart B)

This section of the proposed rule identifies the responsibilities of the Continuum of Care, and the HMIS Lead.

Responsibilities for HMIS Administration (§ 580.5)

This section establishes that the Continuum of Care is responsible for making decisions about HMIS management and administration. As provided in the Definition section of this rule, Continuum of Care means the group composed of representatives of organizations, including nonprofit homeless providers, faith-based organizations, governments, businesses, advocates, public housing agencies, school districts, social service providers,

mental health agencies, hospitals, universities, affordable housing developers, and law enforcement, that serve homeless and formerly homeless veterans, and homeless and formerly homeless persons that carry out the responsibilities delegated to a Continuum of Care under HUD's regulations in 24 CFR part 578. The Continuum of Care is responsible for ensuring that the HMIS for the Continuum of Care is operated in accordance with the provisions of the new regulations and other applicable laws.

Duties of the Continuum of Care (§ 580.7)

This section provides that the Continuum of Care must designate a single information system as the official HMIS software for the geographic area. A single information system reduces administrative burden, is more economical for Continuums and, most importantly, allows for Continuum-wide collaboration between organizations serving homeless persons and persons at risk of homelessness. The Continuum must also designate the HMIS Lead. The HMIS Lead must be an instrumentality of state or local government, or a private nonprofit organization. The Continuum must review, revise, and approve all policies and plans the HMIS Lead is required to develop. Finally, the Continuum must develop a governance charter and document all assignments and designations consistent with the governance charter.

This section also provides that a Continuum of Care may choose to participate in HMIS with one or more other Continuums of Care. To create a multi-Continuum HMIS, each Continuum must designate the same HMIS software and the same HMIS Lead and must adopt a joint governance charter. The HMIS must be capable of reporting unduplicated data for each Continuum of Care separately.

Duties of the HMIS Lead (§ 580.9)

This section lists the duties of the HMIS Lead. These duties include developing written policies and procedures for all Covered Homeless Organizations (CHOs), executing an HMIS participation agreement with each CHO, serving as the applicant to HUD for any HMIS grants that will cover the Continuum of Care geographic area, and monitoring compliance by all CHOs of the Continuum of Care.

Eligible Activities (Subpart C)

Funding for HMIS (§ 580.21)

Funding for HMIS is provided through Federal assistance or other

public or private resources. HMIS Leads and CHOs must refer to program regulations to determine how funds are made available. One source of Federal funding for HMIS is the programs authorized by Title IV of the McKinney-Vento Act. The applicable program regulations for the HUD McKinney-Vento Act programs are found in the regulations of Chapter V of title 24 of the Code of Federal Regulations. These regulations provide how funds are made available and the requirements attached to those funds. Concurrently with the publication of this rule, HUD is also publishing the Emergency Solutions Grants interim rule. HUD expects to publish proposed rules for the new programs created by the HEARTH Act amendments to the McKinney-Vento Act shortly. Those rules will control the extent to which grant funds can be used for the costs of carrying out HMIS activities.

Eligible Activities (§ 580.23)

This section identifies the activities that are needed to administer and run an HMIS. The activities listed in § 580.23(a) may be carried out only by the HMIS Lead. This is because the HMIS Lead is the only organization given the authority by the Continuum of Care to make system-wide decisions regarding the HMIS that impact all CHOs within the Continuum and because all of these activities relate to administering the system on behalf of the Continuum and the CHOs. The activities listed in § 580.23(b) are activities that every organization that contributes data to an HMIS will need to do. If an HMIS Lead also operates a project and contributes data to the HMIS, it will carry out these activities in addition to those listed under § 580.23(a). This section also clarifies that operation of a comparable database by victim service providers and legal service providers is an eligible HMIS activity.

Carrying Out HMIS Activities (§ 580.25)

This section requires recipients and subrecipients of McKinney-Vento Act program funds to participate in the HMIS established by the Continuum of Care for their geographic area and specifies the parameters in which recipients and subrecipients of funds carry out eligible HMIS activities. Participation in HMIS by recipients and subrecipients of Emergency Solutions Grants program funds is statutorily required.

This section also provides that victim service providers must not directly enter or provide data into an HMIS if they are legally prohibited from participating in

HMIS and that legal service providers may choose not to use HMIS if it is necessary to protect attorney-client privileges. Victim service providers and legal service providers that are recipients of funds requiring participation in HMIS, but which do not directly enter data into an HMIS, must use a comparable database. This section specifies the standards for a comparable database. Victim service providers have been prohibited from entering data into HMIS since the passage of the Violence Against Women Act and Department of Justice Reauthorization Act of 2005 (42 U.S.C. 13925). The *Notice of Allocation, Application Procedures, and Requirements for Homelessness Prevention and Rapid Re-Housing Program Recipients and subrecipients under the American Recovery and Reinvestment Act of 2009* (HPRP Notice) established, for the first time, standards for a comparable database and required victim service providers to enter data into a comparable database. Entering data into a comparable database was necessary to produce the reports required by the Homelessness Prevention and Rapid Re-Housing Program (HPRP). The HPRP Notice also established the ability for legal service providers to use a comparable database instead of directly entering data into the HMIS where it is necessary to protect attorney-client privileges. HUD is proposing to adopt above requirements in this rule because without information from victim service providers and legal service providers, the collaborative applicant cannot effectively carry out its required duties and the Continuum of Care cannot evaluate the system-wide performance of the Continuum. A comparable database allows the collaborative applicant and Continuum to obtain the aggregate data needed while respecting the sensitive nature of the client-level information if it complies with all HMIS data, technical, and security standards as established in this part or by notice.

HMIS Governance, Technical, Security, and Data Quality Standards (Subpart D)
HMIS Governance Standards (§ 580.31)

The importance of the integrity and security of HMIS cannot be overstated. Given such importance, it is equally important that HMIS is administered and operated under high standards of data quality and security. To strive to meet this objective, this section requires the HMIS Lead to adopt policies and procedures for the operation of its HMIS. These policies and procedures must not only meet HUD standards, but as this regulatory section specifies, the

policies and procedures must meet applicable state or local governmental requirements. This section also emphasizes that the HMIS Lead and the CHOs are jointly responsible for ensuring that HMIS data processing capabilities, including the collection, maintenance, use, disclosure, transmission, and destruction of data and the maintenance privacy, security, and confidentiality protections. In particular, governing policies and procedures must allow any CHO that is also a covered entity under the Health Insurance Portability and Accountability Act (HIPAA) to make disclosures of protected health information in a manner that fully complies with the HIPAA privacy and security rules.

HMIS Technical Standards (§ 580.33), HMIS Security Standards (§ 580.35), and Data Quality Standards and Management (§ 580.37)

These three sections address required technical aspects of the HMIS system and provide direction to ensure that each HMIS is and remains a system of accuracy, integrity, and confidentiality. The standards in these three regulatory sections broadly present the parameters of each of these areas. By including these standards in regulations, HUD seeks to have uniform and consistent standards with respect to technology, security, and data quality. It is not HUD's intent that these standards be so restrictive that there is no flexibility to adapt to changing technology, which may enhance security, data quality, and the technical features of the system application that is currently HMIS. Therefore, specific details applicable to each of these areas will be reserved for inclusion in a notice that will be subject to the Paperwork Reduction Act.

The placement of the detailed operating and technical functions of HMIS in a supplemental document will allow HUD to be more responsive to changes in technology. HUD will propose any changes to these standards through notice and the public comment process. This procedure will allow for a more expedient adoption of technology requirements. The security standards section specifies that HMIS Leads must establish a security plan, which must be approved by the Continuum of Care, designate a security officer, conduct workforce security screening, report

security incidents, establish a disaster recovery plan, and conduct an annual security review. Additionally, HMIS Leads must ensure that each CHO designates a security officer and conducts workforce security measures, and that each user completes security training at least annually and each CHO conducts an annual security review.

The data quality standards and management section specifies that HMIS Leads must set data quality benchmarks for CHOs, including bed coverage rates and service-volume coverage rates. In the 2006 Continuum of Care Exhibit 1 Application, HUD established the use of bed coverage rates as a data quality measure. As HMIS is used to collect increasing amounts of information on projects without overnight accommodations, HUD needs a method for calculating the coverage rate a Continuum of Care has in recording the people served in these projects. HUD proposes that service-volume coverage be calculated for a HUD-defined category of projects without overnight accommodations, such as homelessness prevention projects or street outreach projects, by dividing the number of persons served annually by the projects that participate in the HMIS by the number of persons served annually by all of the Continuum of Care projects within the HUD-defined category. HUD is specifically seeking public comment on this data quality measurement.

Maintaining and Archiving Data (§ 580.51)

This section specifies that CHOs and HMIS Leads refer to applicable program regulations to determine the length of time that records must be maintained for inspection and monitoring purposes. The HMIS Lead may archive data in the HMIS, but must follow archiving data standards established by HUD in **Federal Register** notices.

C. Explanation of Changes to Proposed Changes to Parts 91, 576, 582, and 583

This proposed rule would revise the definition of HMIS in 24 CFR part 91 and each of the HMIS-related sections of 24 CFR part 576, as amended by the Interim Rule for the Emergency Solutions Grants program, published on December 5, 2011 (76 FR 75954). Specifically, references to the new part 580 replace the references to HUD's standards on participation, data

collection, and reporting under a local HMIS.

This proposed rule would also revise the recordkeeping requirements for the definition of "homeless" to allow a certificate or other appropriate service transaction recorded in an HMIS that meets the requirements of the new part 580 to be acceptable evidence of third-party documentation and intake worker observations in parts 576, 582, and 583.

III. Solicitation of Public Comment

HUD invites comment on the HMIS requirements as presented in this proposed rule. Public comment on this rule will assist HUD in developing an effective regulatory framework for administration of HMIS.

IV. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, "Regulatory Planning and Review." This rule was determined to be a "significant regulatory action," as defined in section 3(f) of the order (although not an economically significant regulatory action under the order). The docket file is available for public inspection in the Regulations Division, Office of the General Counsel, 451 7th Street SW., Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at (202) 402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at (800) 877-8339.

Information Collection Requirements

The information collection requirements contained in this proposed rule have been submitted to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

Information collection	Number of respondents	Response frequency (average)	Total annual responses	Burden hours per response	Total annual hours
580.5 Responsibility for HMIS administration	450	1	450	4	1,800
580.7 Duties of the Continuum of Care	450	1	450	42	18,900
580.9(a) Duties of the HMIS Lead—Ensure operation and participation	350	125	43,750	8	350,000
580.9(b) Duties of the HMIS Lead—Develop written policies	350	1	350	80	28,000
580.9(c) Duties of the HMIS Lead—Execute participation agreements	350	125	43,750	1	43,750
580.9(e) Duties of the HMIS Lead—Monitor and Enforce Compliance	350	125	43,750	8	350,000
580.9(f) Duties of the HMIS Lead—Develop plans	350	3	1,050	40	42,000
580.25(d) Carrying out HMIS Activities—Standards for Comparable Database	2,000	1	2,000	40	80,000
580.31(c) Unduplicated Count	350	1	350	16	5,600
580.31(f) Implementing specifications	300	1	300	4	1,200
580.35(d)(1) Administrative Safeguards—Security Officer	7,600	1	7,600	2	15,200
580.35(d)(2) Workforce Security	7,600	12	91,200	2	182,400
580.35(d)(3) Security Awareness Training and Follow-up	350	125	43,750	1	43,750
580.35(d)(4) Reporting Security Incidents	350	1	350	8	2,800
580.35(d)(5) Disaster Recovery Plan	350	1	350	8	2,800
580.35(6) Annual Security Review	350	125	43,750	1	43,750
580.35(7) Contracts and Other Arrangements	350	125	43,750	.25	10,938
580.37(c) Data Quality Benchmarks	350	1	350	4	1,400
Total					1,224,288

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposal by name and docket number (FR-5475-P-01) and must be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: (202) 395-6947; and Reports Liaison Officer, Office of Community Planning and Development, Department of Housing

and Urban Development, 451 Seventh Street, SW., Room 7220, Washington, DC 20410-7000.

Environmental Impact

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

Unfunded Mandates Reform Act

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

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory

flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule addresses the requirements of the HMIS as provided by the HEARTH Act (Pub. L. 111-22). The purpose of this rule is to determine the framework and conditions of the information technology system used by all recipients of grant funds under the McKinney-Vento Act, as amended by the HEARTH Act. Given the narrow scope of this rule, HUD has determined that it would not have a significant economic impact on a substantial number of small entities.

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

Executive Order 13132, Federalism

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

final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

List of Subjects

24 CFR Part 91

Aged, Grant programs—housing and community development, Homeless, Individuals with disabilities, Low- and moderate-income housing, Reporting and recordkeeping requirements.

24 CFR Part 576

Community facilities, Emergency solutions grants, Grant programs—housing and community development, Grant program—social programs, Homeless, Reporting and recordkeeping requirements.

24 CFR Part 580

Community facilities, Emergency shelter grants, Grant programs—housing and community development, Homeless, Information technology system, Management system, Nonprofit organizations, Reporting requirements, Supportive housing programs—housing and community development, Supportive services.

24 CFR Part 582

Homeless, Rent subsidies, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

24 CFR Part 583

Homeless, Rent subsidies, Reporting and recordkeeping requirements, Supportive housing programs—housing and community development, Supportive services.

Accordingly, for the reasons stated above, HUD proposes to amend 24 CFR parts 91, 576, 580, and 583 as follows:

PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND DEVELOPMENT PROGRAMS

1. The authority citation for 24 CFR part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601–3619, 5301–5315, 11331–11388, 12701–12711, 12741–12756, and 12901–12912.

2. In § 91.5, the definition of “Homeless Management Information System (HMIS)” is revised to read as follows:

§ 91.5 Definitions.

* * * * *

Homeless Management Information System (HMIS). The information system designated by the Continuum of Care to comply with the requirements of 24 CFR part 580 and used to record, analyze, and transmit client and activity data in regard to the provision of shelter, housing, and services to individuals and families who are homeless or at risk of homelessness.

* * * * *

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

3. The authority citation for 24 CFR part 576 continues to read as follows:

Authority: 42 U.S.C. 11371 et seq., 42 U.S.C. 3535(d).

4. In § 576.2, the definition of “homeless management information system (HMIS)” is revised, and the definition of “HMIS Lead” is added, to read as follows:

§ 576.2 Definitions.

* * * * *

Homeless Management Information System (HMIS) means the information system designated by the Continuum of Care to comply with 24 CFR part 580 and used to record, analyze, and transmit client and activity data in regard to the provision of shelter, housing, and services to individuals and families who are homeless or at risk of homelessness.

HMIS Lead means the entity designated by the Continuum of Care in accordance with 24 CFR part 580 to operate the Continuum’s HMIS on the Continuum’s behalf.

* * * * *

5. Section 576.107 is revised to read as follows:

§ 576.107 HMIS component.

(a) Eligible costs.

(1) The recipient or subrecipient may use ESG funds to pay the costs of contributing data to the HMIS designated by the Continuum of Care for the area, including the costs of:

- (i) Purchasing or leasing computer hardware;
(ii) Purchasing software or software licenses;
(iii) Purchasing or leasing equipment, including telephones, faxes, and furniture;
(iv) Obtaining technical support;
(v) Leasing office space;
(vi) Paying charges for electricity, gas, water, phone service, and high-speed data transmission necessary to operate or contribute data to the HMIS;
(vii) Paying salaries for operating HMIS, including:
(A) Completing data entry;

(B) Monitoring and reviewing data quality;

- (C) Completing data analysis;
(D) Reporting to the HMIS Lead;
(E) Training staff on using the HMIS or a comparable database; and
(F) Implementing and complying with HMIS requirements;

(viii) Paying costs of staff to travel to and attend HUD-sponsored and HUD-approved training on HMIS and programs authorized by Title IV of the McKinney-Vento Homeless Assistance Act;

(ix) Paying staff travel costs to conduct intake; and

(x) Paying participation fees charged by the HMIS Lead, as defined in 24 CFR 580.3, if the recipient or subrecipient is not the HMIS Lead.

(2) If the recipient or subrecipient is the HMIS Lead, as defined in 24 CFR 580.3, it may also use ESG funds to pay the costs of:

- (i) Hosting and maintaining HMIS software or data;
(ii) Backing up, recovering, or repairing HMIS software or data;
(iii) Upgrading, customizing, and enhancing the HMIS;
(iv) Integrating and warehousing data, including development of a data warehouse for use in aggregating data from subrecipients using multiple software systems;
(v) Administering the system;
(vi) Reporting to providers, the Continuum of Care, and HUD; and
(vii) Conducting training on using the system or comparable database, including traveling to the training.

(3) If the subrecipient is a victim services provider or a legal services provider, it may use ESG funds to establish and operate a comparable database that complies with 24 CFR part 580.

(b) General restrictions. Activities funded under this section must comply with the HMIS requirements at 24 CFR part 580.

6. In § 576.400, paragraph (f) is revised to read as follows:

§ 576.400 Area-wide systems coordination requirements.

* * * * *

(f) Participation in HMIS. The recipient must ensure that data on all persons served and all activities assisted under ESG are entered into the applicable HMIS for the geographic area in which those persons and activities are located, or a comparable database, as provided under 24 CFR part 580. The entry, storage, and use of this data are subject to the HMIS requirements at 24 CFR part 580.

7. In § 576.500, paragraphs (b) and (x)(1)(i) are revised to read as follows:

§ 576.500 Recordkeeping and reporting requirements.

* * * * *

(a) * * *

(b) *Homeless status*. The recipient must maintain and follow written intake procedures to ensure compliance with the homeless definition in § 576.2. The procedures must require documentation at intake of the evidence relied upon to establish and verify homeless status. The procedures must establish the order of priority for obtaining evidence as third-party documentation first, intake worker observations second, and certification from the person seeking assistance third. However, lack of third-party documentation must not prevent an individual or family from being immediately admitted to emergency shelter, receiving street outreach services, or being immediately admitted to shelter or receiving services provided by a victim service provider. A certificate or other appropriate service transaction recorded in an HMIS or other database that meets the standards prescribed by HUD in 24 CFR part 580 is acceptable evidence of third-party documentation and intake worker observations.

* * * * *

(x) * * *

(1) * * *

(i) All records containing protected identifying information, as defined in 24 CFR 580.3, regarding any individual or family who applies for and/or receives ESG assistance will be kept secure and confidential;

* * * * *

PART 582—SHELTER PLUS CARE

8. The authority for 24 CFR part 582 continues to read as follows:

Authority: 42 U.S.C. 3535(d), and 11403–11407b.

9. In § 582.301, paragraph (b) is revised to read as follows:

§ 582.301 Recordkeeping.

(a) [Reserved.]

(b) *Homeless status*. The recipient must maintain and follow written intake procedures to ensure compliance with the homeless definition in § 582.5. The procedures must require documentation at intake of the evidence relied upon to establish and verify homeless status. The procedures must establish the order of priority for obtaining evidence as third-party documentation first, intake worker observations second, and certification from the person seeking assistance third. However, lack of third-party documentation must not prevent an individual or family from being

immediately admitted to emergency shelter, receiving street outreach services, or being immediately admitted to shelter or receiving services provided by a victim service provider, as defined in section 401(32) of the McKinney-Vento Homeless Assistance Act, as amended by the HEARTH Act. A certificate or other appropriate service transaction recorded in an HMIS or other database that meets the standards prescribed by HUD in 24 CFR part 580 is acceptable evidence of third-party documentation and intake worker observations.

* * * * *

PART 583—SUPPORTIVE HOUSING PROGRAM

10. The authority citation for 24 CFR part 583 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 11389.

11. In § 583.301, paragraph (b) is revised to read as follows:

§ 583.301 Recordkeeping.

(a) [Reserved.]

(b) *Homeless status*. The recipient must maintain and follow written intake procedures to ensure compliance with the homeless definition in § 583.5. The procedures must require documentation at intake of the evidence relied upon to establish and verify homeless status. The procedures must establish the order of priority for obtaining evidence as third-party documentation first, intake worker observations second, and certification from the person seeking assistance third. However, lack of third-party documentation must not prevent an individual or family from being immediately admitted to emergency shelter, receiving street outreach services, or being immediately admitted to shelter or receiving services provided by a victim service provider, as defined in section 401(32) of the McKinney-Vento Homeless Assistance Act, as amended by the HEARTH Act. A certificate or other appropriate service transaction recorded in an HMIS or other database that meets the standards prescribed by HUD in 24 CFR part 580 is acceptable evidence of third-party documentation and intake worker observations.

* * * * *

12. A new part 580 is added to read as follows:

PART 580—HOMELESS MANAGEMENT INFORMATION SYSTEM**Subpart A—General Provisions**

Sec.

580.1 Purpose and scope.

580.3 Definitions.

Subpart B—HMIS Administration

580.5 Responsibility for HMIS administration.

580.7 Duties of the Continuum of Care.

580.9 Duties of the HMIS Lead.

Subpart C—Eligible Activities

580.21 Funding for HMIS.

580.23 Eligible Activities.

580.25 Carrying out eligible activities.

Subpart D—HMIS Governance, Technical, Security, and Data Quality Standards

580.31 HMIS governance standards.

580.33 HMIS technical standards.

580.35 HMIS security standards.

580.37 Data quality standards and management.

Subpart E—Maintaining and Archiving Data

580.41 Maintaining and archiving data.

Subpart F—Sanctions

580.51 Sanctions.

Authority: 42 U.S.C. 11301, 42 U.S.C. 3535(d).

Subpart A—General Provisions**§ 580.1 Purpose and scope.**

(a) *Purpose*. The purpose of a homeless management information system (HMIS), whether funded by public or private resources, is to record and store client-level information about the numbers, characteristics, and needs of persons who use homeless housing and supportive services and for persons who receive assistance for persons at risk of homelessness, including:

(1) *Aggregation of HMIS data*.

Information in HMIS may be aggregated to:

(i) Obtain information about the extent and nature of homelessness over time;

(ii) Produce an unduplicated count of homeless persons;

(iii) Understand patterns of service use; and

(iv) Measure the effectiveness of homeless assistance projects and programs.

(2) *Uses of aggregate HMIS*

information. Information generated from the HMIS:

(i) Will be used by recipients and subrecipients to report to HUD and for such other reasons as may be specified in law or regulation or by HUD through notices;

(ii) Will be used by HUD and other Federal agencies to report to Congress, to evaluate recipient performance, and for such other reasons as may be specified in law or regulation or by HUD through notice; and

(iii) May be made available to the public to raise awareness and enhance local planning processes.

(b) *Scope.* (1) Every Continuum of Care must have an HMIS that is operated in compliance with the requirements of this part.

(2) All recipients of grants from the programs authorized by Title IV of the McKinney-Vento Act are required to use HMIS, except as provided in § 580.25(d).

(3) Homeless and nonhomeless projects that are not funded by grants from programs authorized by Title IV of the McKinney-Vento Act may also participate in the local HMIS, and must follow all of the requirements set forth in this part.

§ 580.3 Definitions.

The following terms have the following meanings:

Act means the McKinney-Vento Homeless Assistance Act, and, unless otherwise specified, as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009 (Division B of Pub. L. 111–22 (HEARTH Act)) (42 U.S.C. 11371 *et seq.*).

Continuum of Care means the group composed of representatives from organizations including nonprofit homeless providers, victim service providers, faith-based organizations, governments, businesses, advocates, public housing agencies, school districts, social service providers, mental health agencies, hospitals, universities, affordable housing developers, law enforcement, organizations that serve veterans, and homeless and formerly homeless persons organized to carry out the responsibilities of a Continuum of Care established under 24 CFR part 578.

Comparable database means a database that is not the Continuum's official HMIS, but an alternative system that victim service providers and legal services providers may use to collect client-level data over time and to generate unduplicated aggregate reports based on the data, and that complies with the requirements of this part. Information entered into a comparable database must not be entered directly into or provided to an HMIS.

Contributing HMIS Organization (or CHO) means an organization that operates a project that contributes data to an HMIS.

Data recipient means a person who obtains personally identifying information from an HMIS Lead or from a CHO for research or other purposes not directly related to the operation of the HMIS, Continuum of Care, HMIS Lead, or CHO.

Homeless Management Information System (HMIS) means the information system designated by Continuums of

Care to comply with the requirements of this part and used to record, analyze, and transmit client and activity data in regard to the provision of shelter, housing, and services to individuals and families who are homeless or at risk of homelessness.

HMIS Lead means an entity designated by the Continuum of Care in accordance with this part to operate the Continuum's HMIS on its behalf.

HMIS vendor means a contractor who provides materials or services for the operation of an HMIS. An HMIS vendor includes an HMIS software provider, web server host, data warehouse provider, as well as a provider of other information technology or support.

HUD means the Department of Housing and Urban Development.

Participation fee means a fee the HMIS Lead charges CHOs for participating in the HMIS to cover the HMIS Lead's actual expenditures, without profit to the HMIS Lead, for software licenses, software annual support, training, data entry, data analysis, reporting, hardware, connectivity, and administering the HMIS.

Protected identifying information means information about a program participant that can be used to distinguish or trace a program participant's identity, either alone or when combined with other personal or identifying information, using methods reasonably likely to be used, which is linkable to the program participant.

Unduplicated count of homeless persons means an enumeration of homeless persons where each person is counted only once during a defined period.

User means an individual who uses or enters data in an HMIS or another administrative database from which data is periodically provided to an HMIS.

Victim service provider means a private nonprofit organization whose primary mission is to provide services to victims of domestic violence, dating violence, sexual assault, or stalking. This term includes rape crisis centers, battered women's shelters, domestic violence transitional housing programs, and other programs.

Subpart B—HMIS Administration

§ 580.5 Responsibility for HMIS administration.

Every Continuum of Care must have an HMIS that complies with this part. The Continuum of Care is responsible for ensuring that its HMIS is administered in accordance with the requirements of this part and other

applicable Federal, state, and local laws and ordinances.

§ 580.7 Duties of the Continuum of Care.

(a) *Required duties.* The Continuum of Care must:

(1) Designate a single information system as the official HMIS software for the geographic area. The software must comply with the requirements of this part.

(2) Designate an HMIS Lead, which may be itself, to operate the HMIS. The HMIS Lead must be a state or local government, an instrumentality of state or local government, or a private nonprofit organization.

(3) Develop a governance charter, which at a minimum includes:

(i) A requirement that the HMIS Lead enter into written HMIS Participation Agreements with each CHO requiring the CHO to comply with this part and imposing sanctions for failure to comply;

(ii) The participation fee charged by the HMIS; and

(iii) Such additional requirements as may be issued by notice from time to time.

(4) Maintain documentation evidencing compliance with this part and with the governance charter; and

(5) Review, revise and approve the policies and plans (required by this part and by any notices issued from time to time).

(b) *Discretionary actions.* A Continuum of Care may choose to participate in an HMIS with one or more other Continuums, subject to the following conditions:

(1) All Continuums of Care within a multi-Continuum HMIS must designate the same HMIS Lead and must work jointly with the HMIS Lead to develop and adopt a joint governance charter;

(2) All Continuums of Care within a multi-continuum HMIS must designate the same governance, technical, security, privacy, and data quality standards;

(3) Each Continuum of Care must designate the same information system as the official HMIS software; and

(4) The HMIS must be capable of reporting unduplicated data for each Continuum of Care separately.

§ 580.9 Duties of the HMIS Lead.

The HMIS Lead shall:

(a) Ensure the operation of and consistent participation by recipients of funds from the Emergency Solutions Grants Program and from the other programs authorized by Title IV of the McKinney-Vento Act. Duties include establishing the HMIS; conducting oversight of the HMIS; and taking

corrective action, if needed, to ensure that the HMIS is compliant with the requirements of this part;

(b) Develop written HMIS policies and procedures in accordance with § 580.31 for all CHOs;

(c) Execute a written HMIS Participation Agreement with each CHO, which includes the obligations and authority of the HMIS Lead and CHO, the requirements of the security plan with which the CHO must abide, the requirements of the privacy policy with which the CHO must abide, the sanctions for violating the HMIS Participation Agreement (e.g., imposing a financial penalty, requiring completion of standardized or specialized training, suspending or revoking user licenses, suspending or revoking system privileges, or pursuing criminal prosecution), and an agreement that the HMIS Lead and the CHO will process Protected Identifying Information consistent with the agreement. The HMIS Participation Agreement may address other activities to meet local needs;

(d) Serve as the applicant to HUD for grant funds to be used for HMIS activities for the Continuum of Care's geographic area, as directed by the Continuum, and, if selected for an award by HUD, enter into a grant agreement with HUD to carry out the HUD-approved activities;

(e) Monitor and enforce compliance by all CHOs with the requirements of this part and report on compliance to the Continuum of Care and HUD;

(f) The HMIS Lead must submit a security plan (see § 580.35), a data quality plan (see § 580.37), and a privacy policy (see § 580.31(g)) to the Continuum of Care for approval within [the date that is 6 months after the effective date of the final rule to be inserted at final rule stage] and within 6 months after the date that any change is made to the local HMIS. The HMIS Lead must review and update the plans and policy at least annually. During this process, the HMIS Lead must seek and incorporate feedback from the Continuum of Care and CHO. The HMIS Lead must implement the plans and policy within 6 months of the date of approval by the Continuum of Care.

Subpart C—Eligible Activities

§ 580.21 Funding for HMIS.

Eligibility of costs of carrying out HMIS activities depends on the source of the funds. HMIS Leads and CHOs must look to the regulations for the funding source to determine what costs are eligible.

§ 580.23 Eligible activities.

(a) *HMIS Lead.* Only the HMIS Lead may carry out the following activities:

(1) Host and maintain HMIS software or data;

(2) Backup, recovery, and repair of the HMIS software or data;

(3) Upgrade, customize, and enhance the HMIS;

(4) Integrate and warehouse data, including development of a data warehouse for use in aggregating data from subrecipients using multiple software systems;

(5) System administration;

(6) Report to providers, the Continuum, and HUD;

(7) Conduct training for recipients on the use of the system, including the reasonable cost of travel to the training; and

(8) Such additional activities as may be authorized by HUD in notice.

(b) *HMIS Lead and CHOs.* HMIS Leads that are also CHOs and other CHOs may carry out the following activities:

(1) Purchase, lease, or license computer hardware and software;

(2) Purchase or lease equipment, including telephones, faxes, and furniture;

(3) Pay for technical support;

(4) Lease office space;

(5) Pay for electricity, gas, water, phone service, and high-speed data transmission costs necessary to operate and participate in the HMIS;

(6) Pay salaries for operating HMIS, which includes:

(i) Data entry;

(ii) Monitor and review data quality;

(iii) Data analysis;

(iv) Report to the HMIS Lead;

(v) Attend HUD-sponsored and HUD-approved training on HMIS and programs authorized by Title IV of the McKinney-Vento Act;

(vi) Conduct training for CHOs on the HMIS or comparable database;

(vii) Travel to conduct intake and to attend training;

(viii) Implement and comply with HMIS requirements; and

(7) Pay the participation fee to the HMIS Lead that is established by the Continuum of Care in the governance charter;

(8) If the CHO is a victim services provider, as defined under 24 CFR 580.3, or a legal services provider, establish and operate a comparable database that complies with 24 CFR 580.25; and

(9) Such other activities as authorized by HUD in notice.

§ 580.25 Carrying out HMIS activities.

(a) *ESG.* Each recipient and subrecipient of ESG grant funds under

24 CFR part 576 is required to enter data in the Continuum's HMIS or a comparable database, as provided under this part.

(b) *Reserved.*

(c) *Reserved.*

(d) *Victim service and legal service providers.* Victim service providers shall not directly enter or contribute data into an HMIS if they are legally prohibited from participating in HMIS. Legal service providers may choose not to use HMIS if it is necessary to protect attorney-client privilege. Victim service and legal service providers that are recipients of funds that require participation in HMIS that do not directly enter or contribute data to an HMIS must use a comparable database instead.

(1) *Standards for a comparable database.* (i) The comparable database must meet the standards of this part and comply with all HMIS data information, security, and processing standards, as established by HUD in notice.

(ii) The comparable database must meet the standards for security, data quality, and privacy of the HMIS within the Continuum of Care. The comparable database may use more stringent standards than the Continuum of Care's HMIS.

(2) Victim service providers and legal service providers may suppress aggregate data on specific client characteristics if the characteristics meet the requirements of this part and any conditions as may be established by HUD in notice.

Subpart D—HMIS Governance, Technical, Security, and Data Quality Standards

§ 580.31 HMIS governance standards.

(a) *Development of local HMIS policies and procedures.* An HMIS Lead must adopt written policies and procedures for the operation of the HMIS that apply to the HMIS Lead, its CHOs, and the Continuum of Care. These policies and procedures must comply with all applicable Federal law and regulations, and applicable state or local governmental requirements. An HMIS Lead may not establish local standards for any CHO that contradicts, undermines, or interferes with the implementation of the HMIS standards as prescribed in this part.

(b) The HMIS Lead and the CHO using the HMIS are jointly responsible for ensuring that HMIS processing capabilities remain consistent with the privacy obligations of the CHO.

(c) *Unduplicated count.* An HMIS Lead must, at least once annually, or upon request from HUD, submit to the

Continuum of Care an unduplicated count of clients served and an analysis of unduplicated counts, when requested by HUD.

(d) *Reporting.* The HMIS Lead shall submit reports to HUD as required.

(e) *CHO requirements.* A CHO must comply with the applicable standards set forth in this part.

(f) *Implementing specifications.* A CHO must comply with Federal, state, and local laws that require additional privacy or confidentiality protections. When a privacy or security standard conflicts with other Federal, state, and local laws to which the CHO must adhere, the CHO must contact the HMIS Lead and collaboratively update the applicable policies for the CHO to accurately reflect the additional protections.

(g) *Other requirements.* (1) An HMIS Lead must develop a privacy policy. At a minimum, the privacy policy must include data collection limitations; purpose and use limitations; allowable uses and disclosures; openness description; access and correction standards; accountability standards; protections for victims of domestic violence, dating violence, sexual assault, and stalking; and such additional information and standards as may be established by HUD in notice.

(2) Every organization with access to protected identifying information must implement procedures to ensure and monitor its compliance with applicable agreements and the requirements of this part, including enforcement of sanctions for noncompliance.

(3) An HMIS Lead or CHO that contracts with an HMIS vendor must, as part of its contract with an HMIS vendor, require the HMIS vendor and the software to comply with HMIS standards issued by HUD.

§ 580.33 HMIS technical standards.

(a) *In general.* HMIS Leads and HMIS vendors are jointly responsible for ensuring compliance with the technical standards applicable to HMIS, as provided in this document and any supplemental notices, and for addressing any identified system or operating deficiencies promptly. Grant funds must be used only for software that meets the requirements of this part.

(b) *Required functionality.* The HMIS must meet all required functionality established by HUD in notice.

(c) *Unduplication requirements.* An HMIS must be capable of unduplicating client records as established by HUD in notice.

(d) *Data collection requirements.* (1) *Collection of all data elements.* An HMIS must contain fields for collection

of all data elements established by HUD in notice. For fields that contain response categories, the response categories in the HMIS must either directly match or map to the response categories defined by HUD.

(2) *Maintaining historical data.* An HMIS must be able to record data from a theoretically limitless number of service transactions and historical observations for data analysis over time and assessment of client outcomes, while following Federal, state, territorial, or local data retention laws and ordinances.

(e) *Reporting requirements.* (1) *Standard HUD reports.* An HMIS must be able to generate the report outputs specified by HUD. The reporting feature must be able to represent dates in the past for all historical and transactional data elements.

(2) *Data quality reports.* An HMIS must be capable of producing reports that enable the CHOs and the HMIS Lead to assess compliance with local data quality benchmarks and any HUD-established data quality benchmarks.

(3) *Audit reports.* An HMIS must be capable of generating audit reports to allow the HMIS Lead to review the audit logs on demand, including minimum data requirements established by HUD in notice.

§ 580.35 HMIS security standards.

(a) *In general.* Security standards, as provided in this section, are directed to ensure the confidentiality, integrity, and availability of all HMIS information; protect against any reasonably anticipated threats or hazards to security; and ensure compliance by end users. Written policies and procedures must comply with all applicable Federal law and regulations, and applicable state or local governmental requirements.

(b) *System applicability.* All HMIS Leads, CHOs, and HMIS vendors must follow the security standards established by HUD in notice.

(c) *Security management.* (1) *Security plan.* All HMIS Leads must develop a HMIS security plan, which meets the minimum requirements for a security plan as established by HUD in notice, and which must be approved by the Continuum of Care.

(2) *Timeline for implementation.* The HMIS Lead must submit the security plan to the Continuum of Care for approval within 6 months of [effective date of final rule to be inserted at final rule stage]. The HMIS Lead and CHOs must implement all administrative, physical, and technical safeguards within 6 months of the initial approval of the security plan. If one or more of

these standards cannot be implemented, the HMIS Lead must justify the implementation delay and produce a plan of action for mitigating the shortfall, and develop milestones to eliminate the shortfall over time.

(d) *Administrative safeguards.* The administrative actions, policies, and procedures required to manage the selection, development, implementation, and maintenance of security measures to protect HMIS information must, at a minimum, meet the following:

(1) *Security officer.* Each HMIS Lead and each CHO must designate an HMIS security officer to be responsible for ensuring compliance with applicable security standards. The HMIS Lead must designate one staff member as the HMIS security officer.

(2) *Workforce security.* The HMIS Lead must ensure that each CHO conduct criminal background checks on the HMIS security officer and on all administrative users. Unless otherwise required by HUD, background checks may be conducted only once for administrative users.

(3) *Security awareness training and follow-up.* The HMIS Lead must ensure that all users receive security training prior to being given access to the HMIS, and that the training curriculum reflects the policies of the Continuum of Care and the requirements of this part. HMIS security training is required at least annually.

(4) *Reporting security incidents.* Each HMIS Lead must implement a policy and chain of communication for reporting and responding to security incidents, including a HUD-determined predefined threshold when reporting is mandatory, as established by HUD in notice.

(5) *Disaster recovery plan.* The HMIS Lead must develop a disaster recovery plan, which must include at a minimum, protocols for communication with staff, the Continuum of Care, and CHOs and other requirements established by HUD in notice.

(6) *Annual security review.* Each HMIS Lead must complete an annual security review to ensure the implementation of the security requirements for itself and CHOs. This security review must include completion of a security checklist ensuring that each of the security standards is implemented in accordance with the HMIS security plan.

(7) *Contracts and other arrangements.* The HMIS Lead must retain copies of all contracts and agreements executed as part of the administration and management of the HMIS or required to

comply with the requirements of this part.

(e) *Physical safeguards.* The HMIS Lead must implement physical measures, policies, and procedures to protect the HMIS.

(f) *Technical safeguards.* The HMIS Lead must implement security standards establishing the technology that protects and controls access to protected electronic HMIS information, and outline the policy and procedures for its use.

§ 580.37 Data quality standards and management.

(a) *In general.* The data quality standards ensure the completeness, accuracy, and consistency of the data in the HMIS. The Continuum of Care is responsible for the quality of the data produced.

(b) *Definitions.* For the purpose of this section, the term:

(1) *HMIS participating bed* means a bed on which required information is collected in an HMIS and is disclosed at least once annually to the HMIS Lead in accordance with the requirements of this part.

(2) *Lodging project* means a project that provides overnight accommodations.

(3) *Nonlodging project* means a project that does not provide overnight accommodations.

(c) *Data quality benchmarks.* HMIS Leads must set data quality benchmarks for CHOs. Benchmarks must include separate benchmarks for lodging and nonlodging projects. HMIS Leads must establish data quality benchmarks, including minimum bed coverage rates and service-volume coverage rates, for the Continuum(s) of Care. HMIS Leads may establish different benchmarks for different types of projects (*e.g.*, emergency shelter projects, permanent housing projects) based on population.

(1) For the purpose of data quality, the bed coverage rate measures the level of lodging project providers' participation in a Continuum of Care's HMIS.

(i) The bed coverage rate is calculated by dividing the number of HMIS participating by the total number of year-round beds in the geographic area covered by the Continuum of Care.

(ii) Bed coverage rates must be calculated separately for emergency shelter, safe haven, transitional housing, and permanent housing.

(iii) Bed coverage rates must be calculated for each comparable database.

(2) For the purpose of data quality, the service-volume coverage rate measures the level of nonlodging project participation in a Continuum of Care's HMIS.

(i) Service-volume coverage is calculated for each HUD-defined category of dedicated homeless nonlodging projects, such as street outreach projects, based on population.

(ii) The service-volume coverage rate is equal to the number of persons served annually by the projects that participate in the HMIS divided by the number of persons served annually by all Continuum of Care projects within the HUD-defined category.

(iii) Service-volume rates must be calculated for each comparable database.

(d) *Data quality management.* (1) *Data quality plan.* All HMIS Leads must develop and implement a data quality plan, as established by HUD in notice.

(2) The HMIS must be capable of producing reports required by HUD to assist HMIS Leads in monitoring data quality.

Subpart E—Maintaining and Archiving Data

§ 580.41 Maintaining and archiving data.

(a) *Maintaining data.* Applicable program regulations establish the length of time that records must be maintained for inspection and monitoring to determine that the recipient has met the requirements of the program regulations.

(b) *Archiving data.* Archiving data means the removal of data from an active transactional database for storage in another database for historical, analytical, and reporting purposes. The HMIS Lead must follow archiving data standards established by HUD in notice, as well as any applicable Federal, state, territorial, local, or data retention laws or ordinances.

Subpart F—Sanctions

§ 580.51 Sanctions

The program regulations for the programs that fund the HMIS activities contain the sanctions for noncompliance with this part.

Dated: November 4, 2011.

Mercedes Márquez,

Assistant Secretary for Community, Planning and Development.

[FR Doc. 2011-31634 Filed 12-8-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 167

[USCG-2011-0351]

Port Access Route Study: The Atlantic Coast From Maine to Florida

AGENCY: Coast Guard, DHS.

ACTION: Notice of study; reopening of the comment period.

SUMMARY: The U.S. Coast Guard is reopening the comment period to further its outreach efforts and solicit additional comments concerning its Port Access Route Study being conducted along the Atlantic Coast from Maine to Florida.

DATES: Comments and related material must reach the Docket Management Facility on or before January 31, 2012.

ADDRESSES: You may submit comments identified by docket number USCG-2011-0351 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* (202) 493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329. To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice of study contact George Detweiler, Office of Navigation Systems, Coast Guard, telephone (202) 372-1566, email George.H.Detweiler@uscg.mil or submit questions to ACPARS@uscg.mil. If you have questions on viewing or submitting material to the docket, call Ms. Renee K. Wright, Program Manager, Docket Operations, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

We encourage you to participate in this study by submitting comments and related materials. All comments received will be posted, without change,

to <http://www.regulations.gov> and will include any personal information you have provided.

A. Submitting Comments

If you submit comments, please include the docket number for this rulemaking (USCG–2011–0351), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, click on the “submit a comment” box, which will then become highlighted in blue. In the “Document Type” drop down menu select “Notice” and insert “USCG–2011–0351” in the “Keyword” box. Click “Search” then click on the balloon shape in the “Actions” column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

B. Viewing the Comments and Documents

To view the comments and documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, click on the “read comments” box, which will then become highlighted in blue. In the “Keyword” box insert “USCG–2011–0351” and click “Search.” Click the “Open Docket Folder” in the “Actions” column. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

Anyone can search the electronic form of comments received into any of

our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

II. Background and Purpose

The Coast Guard announced in the **Federal Register** (76 FR 27288, May 11, 2011) that it was conducting a Port Access Route Study (PARS) to evaluate the continued applicability of, and the need for modifications to, current vessel routing measures off the Atlantic Coast from Maine to Florida. The original comment period closed on August 9, 2011. The initial announcement contains definitions and useful background information concerning the PARS. The public is encouraged to review the initial announcement.

The data gathered during the Atlantic Coast PARS may result in establishment of one or more new vessel routing measures, modification of existing routing measures, or disestablishment of existing routing measures off the Atlantic Coast from Maine to Florida. The goal of the Atlantic Coast PARS is to enhance navigational safety by examining existing shipping routes and waterway uses, and, to the extent practicable, reconciling the paramount right of navigation within designated port access routes with other reasonable waterway uses such as the leasing of outer continental shelf blocks for the construction and operation of offshore renewable energy facilities. The recommendations of the study may lead to future rulemaking action or appropriate international agreements.

The Coast Guard received 26 comments to the docket. After review of the comments, the Coast Guard has determined that it needs to reopen the comment period to seek more information to ensure that the PARS is comprehensive in its data collection and analysis. Most of the comments received to date were applicable to the Mid-Atlantic region, including the approaches into Chesapeake Bay and Delaware Bay. Moreover, these comments were limited to issues relevant to oceangoing shipping and coastwise tug and barge traffic and did not include information from other stakeholders. In addition to the Mid-Atlantic region, the Coast Guard has become aware of private sector interest in developing wind energy and hydrokinetic installations off the coasts of Maine, North Carolina, South Carolina, Georgia, and Florida.

Therefore, it is important that the Coast Guard receive comments on the potential impacts to the maritime community in these locations as well.

The Coast Guard is using Automatic Identification System (AIS) data as its primary means of determining routes or operating areas based on the density and track lines of AIS equipped vessels. However, it is important for the Coast Guard to also collect data on routes or operating areas that may not be reflected in the AIS data. This request for comments is the primary means for the Coast Guard to collect information from stakeholders who may not be represented in the AIS data or for which the number of transits in a given area are not substantial. These users may include commercial fishing vessels, small passenger vessels, sightseeing and eco-tour vessels, recreational and charter fishing vessels, yachts, and sailing vessels.

III. Questions

The Coast Guard requests specific responses to the following questions, which are in addition to the questions posed in the initial notice.

(1) How are your ocean going vessel coastwise routes affected by seasonal or episodic weather variations?

(2) How are your near coastal tug and barge routes affected by seasonal or episodic weather variations?

(3) Is there a regularly scheduled recreational event that uses the near coastal waters in your area? Recreational events would include offshore fishing tournaments, offshore power boat races, offshore sailing regattas, etc.

(4) Do you regularly transit the near coastal area on recreational/private yachts? If yes, how far offshore is your typical route? Does your route change seasonally or according to weather conditions?

(5) Should coastwise routes be established along the Atlantic Seaboard similar to the “M–95” marine highway corridor designated by the Maritime Administration as part of “America’s Marine Highway Program”? For more information on this program, see *America’s Marine Highway Program—Report to Congress—April 2011* (http://www.marad.dot.gov/documents/MARAD_AMH_Report_to_Congress.pdf). If yes, where should they be located?

(6) What are the pros and cons to the Coast Guard designating coastwise fairways or traffic separation schemes (TSSs)?

(7) Could the creation of designated coastwise routes adversely impact watchstanding or other operational requirements? If so, please explain.

(8) If coastwise fairways were created, should separate fairways be created for different vessel types such as tug and barge vs. deep draft vessels?

(9) Should there be separate lanes for vessels travelling in opposing directions?

(10) Should participation in any coastwise traffic scheme be voluntary or mandatory for all or certain classes of vessels?

(11) Given the potentially long transit times, varying sea state and weather conditions; what is an appropriate width for fairways to prevent degradation to navigational safety? Are there particular areas where the width could be smaller or should be larger?

This notice is issued under authority of 33 U.S.C. 1223(c) and 5 U.S.C. 552.

Dated: October 31, 2011.

Robert C. Parker,

Vice Admiral, U.S. Coast Guard, Commander, Atlantic Area.

[FR Doc. 2011-31594 Filed 12-8-11; 8:45 am]

BILLING CODE 9110-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2011-0713; FRL-9504-9]

Approval and Promulgation of Air Quality Implementation Plans; Delaware, Maryland, New Jersey, and Pennsylvania; Determinations of Attainment of the 1997 8-Hour Ozone Standard for the Philadelphia-Wilmington-Atlantic City Moderate Nonattainment Area and Withdrawal of Attainment Demonstration Proposed Disapprovals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and withdrawal of proposed rule.

SUMMARY: EPA is proposing to make two determinations regarding the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE 8-hour ozone moderate nonattainment area (the Philadelphia Area). First, EPA is proposing to make a determination that the Philadelphia Area has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). This proposed determination is based upon complete, quality assured, and certified ambient air monitoring data that show the area has monitored attainment of the 1997 8-hour ozone NAAQS for the 2008-2010 monitoring period. If this proposal is made final, the requirement for the Philadelphia Area to submit certain planning

requirements related to the attainment of the 1997 8-hours ozone NAAQS shall be suspended for so long as the area continues to attain the 1997 8-hour ozone NAAQS. Although these requirements are suspended, EPA is not precluded from acting upon these elements at any time if submitted to EPA for review and approval. Second, EPA is also proposing to determine that the Philadelphia Area has attained the 1997 8-hour ozone NAAQS by its attainment date of June 15, 2011. Finally, EPA is withdrawing the May 8, 2009 proposed disapprovals of the attainment demonstrations for the Philadelphia Area, based on the ambient air quality monitoring data demonstrating attainment. These actions are being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before January 9, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2011-0713 by one of the following methods:

A. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

B. *Email:* fernandez.cristina@epa.gov

C. *Mail:* EPA-R03-OAR-2011-0713, Cristina Fernandez, Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2011-0713. 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 email. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov>, your email address will be automatically captured

and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning EPA's proposed action related to Delaware, Maryland or Pennsylvania, please contact Maria A. Pino (215) 814-2181, or by email at pino.maria@epa.gov. If you have questions concerning EPA's proposed action related to New Jersey, please contact Paul Truchan (212) 637-4249, or by email at truchan.paul@epa.gov.

SUPPLEMENTARY INFORMATION: For detailed information regarding this proposal, EPA prepared a Technical Support Document (TSD). The TSD can be viewed at <http://www.regulations.gov>. The following outline is provided to aid in locating information in this action.

- I. What is EPA proposing?
- II. What Proposed Rule is EPA withdrawing?
- III. What is the background for these actions?
- IV. What are the effects of these proposed actions?
- V. What is EPA's analysis of the relevant air quality data?
- VI. Proposed Actions
- VII. Withdrawal Action
- VIII. Statutory and Executive Order Reviews

I. What is EPA proposing?

Pursuant to sections 181(b)(2)(A) and 179(c) of the CAA, EPA is proposing to determine that the Philadelphia Area

attained the 1997 8-hour ozone NAAQS by its attainment date, June 15, 2011. This proposed determination is based upon complete, quality assured, and certified ambient air monitoring data from 2008–2010 that show the area has monitored attainment of the 1997 8-hour ozone NAAQS during this monitoring period.

EPA is also proposing to make a determination that the Philadelphia Area has attained the 1997 8-hour NAAQS. This proposed determination is based upon complete, quality assured, and certified ambient air monitoring data that show the area has monitored attainment of the 1997 8-hour ozone NAAQS for the 2008–2010 monitoring period. Once this proposal becomes final, the requirement for this area to submit an attainment demonstration, reasonably available control measures (RACM), a reasonable further progress (RFP) plan, and contingency measures related to attainment of the 1997 8-hour ozone NAAQS shall be suspended for so long as the area continues to attain the 1997 8-hour ozone NAAQS. Although these requirements are suspended, EPA is not precluded from acting upon these elements at any time if submitted to EPA for review and approval. The States of Delaware and Maryland, and the Commonwealth of Pennsylvania submitted these SIP elements for their portions of the Philadelphia Area to EPA for review and approval in June 2007. The State of New Jersey submitted these SIP elements for its portion of the Philadelphia Area to EPA for review and approval in October 2007.

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 parts per million (ppm). This action addresses only the 1997 8-hour ozone standard of 0.08 ppm, and does not address any subsequently revised 8-hour ozone standard.

II. What Proposed Rule is EPA withdrawing?

On May 8, 2009, EPA proposed disapproval of Delaware's, Maryland's, New Jersey's and Pennsylvania's 8-hour ozone attainment demonstrations for the Philadelphia Area. See 74 FR 21599, 74 FR 21588, 74 FR 21578, and 74 FR 21604, respectively. Based on the monitored air quality data demonstrating attainment of the 1997 8-hour ozone NAAQS, EPA is withdrawing the May 8, 2009 proposed disapprovals of the attainment demonstrations. The Docket ID Numbers for the proposed disapprovals are EPA–R03–OAR–2008–0930, EPA–R03–OAR–2008–0929, EPA–R02–OAR–2008–0497,

and EPA–R03–OAR–2008–0928, respectively.

III. What is the background for these actions?

A. The Philadelphia Area

In 1997, EPA revised the health-based NAAQS for ozone, setting it at 0.08 ppm averaged over an 8-hour time frame. EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time, than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma.

On April 30, 2004 (69 FR 23951), EPA finalized its attainment/nonattainment designations for areas across the country with respect to the 8-hour ozone standard. These actions became effective on June 15, 2004. Among those nonattainment areas is the Philadelphia Area. The Philadelphia Area includes the entire State of Delaware; Cecil County in Maryland; Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Ocean, and Salem Counties in New Jersey; and Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties in Pennsylvania. The Philadelphia Area was classified as a moderate nonattainment area. See 40 CFR 81.808, 81.321, 81.331, and 81.339.

Moderate areas are required to attain the 1997 8-hour ozone NAAQS by no later than six years after designation, or June 15, 2010. See 40 CFR 51.903. However, the Philadelphia Area qualified for a 1-year extension of its attainment date, based on the complete, certified ambient air quality data for the 2009 ozone season. On January 21, 2011, EPA approved a 1-year extension of the Philadelphia Area's attainment date, from June 15, 2010 to June 15, 2011. See 76 FR 3838 and 76 FR 3840.

B. Requirement To Determine Attainment by the Attainment Date

Under CAA sections 179(c) and 181(b)(2), EPA is required to make a determination that a nonattainment area has attained by its attainment date, and publish that determination in the **Federal Register**. Under CAA section 181(b)(2), which is specific to ozone nonattainment areas, if EPA determines that an area failed to attain the ozone NAAQS by its attainment date, EPA is

required to reclassify that area to a higher classification.

C. Clean Data Determination

Under the provisions of EPA's ozone implementation rule (see 40 CFR 51.918), if EPA issues a determination that an area is attaining the relevant standard (through a rulemaking that includes public notice and comment), it will suspend the area's obligations to submit an attainment demonstration, RACM, RFP, contingency measures, and other planning requirements related to attainment for as long as the area continues to attain. The determination of attainment is not equivalent to a redesignation. The state must still meet the statutory requirements for redesignation in order to be redesignated to attainment.

D. Ambient Air Quality Monitoring Data

Complete, quality assured, certified 8-hour ozone air quality monitoring data for 2008 through 2010 show that the Philadelphia Area has attained the 1997 8-hour ozone NAAQS.

IV. What are the effects of these proposed actions?

If finalized, the proposed actions will not constitute a redesignation to attainment under section 107(d)(3) of the CAA. The designation status of the Philadelphia Area will remain nonattainment for the 1997 8-hour ozone NAAQS until such time as EPA determines that the area meets the CAA requirements for redesignation to attainment, including an approved maintenance plan.

A. Proposed Determination of Attainment by the Attainment Date

EPA is proposing to determine that the Philadelphia Area has attained the 1997 8-hour ozone NAAQS by its applicable attainment date of June 15, 2011. Once this determination of attainment is made final, EPA will have met its requirement pursuant to CAA sections 181(b)(2)(A) and 179(c) to determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date. The effect of a final determination of attainment by the area's attainment date will be to discharge EPA's obligation under CAA sections 181(b)(2)(A) and 179, and to establish that, in accordance with CAA section 181(b)(2)(A), the area will not be reclassified for failure to attain by its applicable attainment date.

B. Clean Data Determination

EPA is proposing to determine that the Philadelphia Area is attaining the

1997 8-hour ozone NAAQS. Once EPA finalizes this determination of attainment, the CAA requirement for the Philadelphia Area to submit an attainment demonstration and the associated RFP plan, RFP contingency measure, RACM analysis, contingency measures, and any other planning SIPs related to attainment of the 1997 8-hour ozone NAAQS would be suspended for so long as the area continues to attain the 1997 8-hour ozone NAAQS.

Although these requirements can be suspended with an approved clean data determination, EPA is not precluded from acting upon these elements, which were submitted to EPA in June and October of 2007 by the States of Delaware, Maryland, and New Jersey and the Commonwealth of Pennsylvania. In fact, EPA approved each state's RFP plans, RFP contingency measures, and RACM analyses for the Philadelphia Area in separate rulemaking actions. Therefore, these requirements have been fulfilled. EPA approved the RFP plans, RFP contingency measures, and RACM analyses from Delaware, Maryland, New Jersey, and Pennsylvania on April 8, 2010, June 11, 2010, May 15, 2009, and February 7, 2011, respectively. See 75 FR 17863, 75 FR 33172, 74 FR 22837, and 76 FR 6559.

The clean data determination will:
 (1) Suspend the requirements to submit an attainment demonstration, contingency measures for attainment, and any other planning SIPs related to attainment of the 1997 8-hour ozone NAAQS;

(2) Continue until such time, if any, that EPA (i) redesignates the area to attainment at which time those requirements no longer apply, or (ii) subsequently determines that the area has violated the 1997 8-hour ozone NAAQS;

(3) Be separate from, and not influence or otherwise affect, any future designation determination or requirements for the area based on any new or revised ozone NAAQS; and

(4) Remain in effect regardless of whether EPA designates this area as a nonattainment area for purposes of any new or revised ozone NAAQS.

V. What is EPA's analysis of the relevant air quality data?

Consistent with the requirements contained in 40 CFR part 50, EPA has reviewed the ozone ambient air monitoring data for the monitoring period from 2008 through 2010 for the Philadelphia Area, as recorded in the EPA Air Quality System (AQS) database. On the basis of that review,

EPA has concluded that this area attained the 1997 8-hour ozone NAAQS based on data for the 2008–2010 ozone seasons.

Under EPA regulations at 40 CFR part 50, the 1997 8-hour ozone standard is attained at a site when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations at an ozone monitor is less than or equal to 0.08 ppm (*i.e.*, 0.084 ppm, based on the rounding convention in 40 CFR part 50, appendix I). This 3-year average is referred to as the design value. When the design value is less than or equal to 0.084 ppm at each monitoring site within the area, then the area is meeting the NAAQS.

Also, the data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness as determined in appendix I of 40 CFR part 50.

Table 1 shows the ozone design values for each monitor in the Philadelphia Area for the years 2008–2010. All 2008–2010 design values are below 0.084 ppm, and all monitors meet the data completeness requirements. Therefore, the Philadelphia Area has attained the 1997 8-hour ozone NAAQS, considering 2008–2010 data.

TABLE 1—2008–2010 PHILADELPHIA AREA 1997 8-HOUR OZONE DESIGN VALUES

State	County	Site ID	2008–2010 Design value (ppm)	2008–2010 Average percent data completeness
DE	Kent	10–001–0002	0.074	100
		10–003–1007	0.075	92
		10–003–1010	0.076	91
		10–003–1013	0.075	98
	Sussex	10–005–1002	0.077	99
		10–005–1003	0.077	97
MD	Cecil	24–015–0003	0.080	94
NJ	Atlantic	34–001–0006	0.074	96
		34–007–1001	0.080	97
	Cumberland	34–011–0007	0.076	98
		34–015–0002	0.081	98
	Mercer	34–021–0005	0.078	98
		34–029–0006	0.081	98
PA	Bucks	42–017–0012	0.083	99
		42–029–0100	0.076	97
	Delaware	42–045–0002	0.074	98
		42–091–0013	0.078	98
	Montgomery	42–101–0004	0.066	97
		42–101–0024	0.082	95

EPA's review of the data indicates that the Philadelphia Area has met the 1997 8-hour ozone NAAQS. Additional information on air quality data for the Philadelphia Area can be found in the TSD.

VI. Proposed Action

EPA is proposing to make two determinations regarding the Philadelphia Area. First, EPA is proposing to make a determination that the Philadelphia Area has attained the 1997 8-hour NAAQS. If EPA finalizes

this determination, the requirements to submit an attainment demonstration, contingency measures for attainment, and any other planning requirements related to attainment of the 1997 8-hour ozone NAAQS will be suspended, as provided in 40 CFR section 51.918, so

long as the area continues to attain the 1997 8-hour ozone NAAQS. Second, pursuant to sections 179 and 181(b)(2)(A) of the CAA, EPA is proposing to determine that the Philadelphia Area has attained the 1997 8-hour ozone NAAQS by its attainment date, June 15, 2011. These proposed determinations are based upon complete, quality assured, and certified ambient air monitoring data that show the area has monitored attainment of the 1997 8-hour ozone NAAQS for the 2008–2010 monitoring period. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

VII. Withdrawal Action

Based on ambient air quality monitoring data that demonstrates attainment of the 1997 8-hour ozone NAAQS, EPA is withdrawing the May 8, 2009 proposed disapprovals of Delaware's, Maryland's, New Jersey's, and Pennsylvania's 8-hour ozone attainment demonstrations for the Philadelphia Area. (74 FR 21599, 74 FR 21588, 74 FR 21578, and 74 FR 21604)

VIII. Statutory and Executive Order Reviews

This action proposes to make a determination of attainment based on air quality, and would, if finalized, result in the suspension of certain Federal requirements, and would not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 proposed determination that the Philadelphia Area has attained the 1997 8-hour ozone NAAQS does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

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

Dated: October 25, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

Dated: November 22, 2011.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2011–31665 Filed 12–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 85, 86, and 600

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 523, 531, 533, 536, and 537

[EPA–HQ–OAR–2010–0799; FRL–9505–1; NHTSA–2010–0131]

RIN 2060–AQ54; RIN 2127–AK79

Public Hearings for 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards

AGENCY: Environmental Protection Agency (EPA) and National Highway

Traffic Safety Administration (NHTSA), DOT.

ACTION: Announcement of public hearings

SUMMARY: EPA and NHTSA are announcing public hearings to be held for the joint proposed rules “2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards,” published in the **Federal Register** on December 1, 2011. The agencies will also accept comment on NHTSA’s Draft Environmental Impact Statement (Draft EIS), available on NHTSA’s Web site at <http://www.nhtsa.gov/fuel-economy>. Three hearings will be held, on January 17, January 19, and January 24, 2012. The agencies will assume that all oral comments presented at the hearing are addressed to the joint proposed rules only, unless speakers specifically reference NHTSA’s Draft EIS in oral or written testimony.

DATES: NHTSA and EPA will jointly hold three public hearings on the following dates: January 17, 2012 in Detroit, Michigan; January 19, 2012 in Philadelphia, Pennsylvania; and January 24, 2012 in San Francisco, California. The hearings will start at 10 a.m. local time and continue until 5 p.m. or until everyone has had a chance to speak. If you would like to present oral testimony at one of these public hearings, please contact the person identified under **FOR FURTHER INFORMATION CONTACT**, at least ten days before the hearing.

ADDRESSES: The January 17, 2012 hearing will be held at the Courtyard Detroit Downtown, 333 East Jefferson Avenue, Detroit, Michigan 48226. The January 19, 2012 hearing will be held at the Crowne Plaza Philadelphia Downtown, 1800 Market Street, Philadelphia, Pennsylvania 19103. The January 24, 2012 hearing will be held at the Hyatt at Fisherman’s Wharf, 555 North Point Street, San Francisco, California 94133. The hearings will be held at sites accessible to individuals with disabilities. In addition, the agencies will provide the opportunity for the public to listen to each hearing through the following conference call-in line: 1–(866) 299–3188; conference code 734 214 4423#. Please note that this conference line will allow the public to listen only; persons listening will not be able to give an oral presentation via the conference line.

FOR FURTHER INFORMATION CONTACT: If you would like to present oral testimony at a public hearing, please contact JoNell Iffland at EPA by the date specified under **DATES**, at: Office of

Transportation and Air Quality, Assessment and Standards Division (ASD), Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214-4454; fax number: (734) 214-4816; email address:

iffland.jonell@epa.gov. Please provide the following information: Name, affiliation, address, email address, telephone and fax numbers, time you wish to speak (morning, afternoon) if there is a preference, and whether you require accommodations such as a sign language interpreter or translator.

Questions concerning the proposed rules should be addressed to NHTSA: Rebecca Yoon, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: (202) 366-2992. EPA: Chris Lieske, Office of Transportation and Air Quality, Assessment and Standards Division (ASD), Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214-4584; fax number: (734) 214-4816; email address: lieske.christopher@epa.gov. You may learn more about the proposal by visiting NHTSA's or EPA's web pages at <http://www.nhtsa.gov/fuel-economy> or <http://www.epa.gov/otaq/climate/regulations.htm> or by searching the public dockets (NHTSA-2010-0131 (for the proposed rule) or NHTSA-2011-0056 (for the Draft EIS); EPA-HQ-OAR-2010-0799) at <http://www.regulations.gov>.

SUPPLEMENTARY INFORMATION: The purpose of the public hearings is to provide the public an opportunity to present oral comments regarding NHTSA and EPA's proposals for "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards." (December, 1, 2011; 76 FR 74854) These hearings also offer an opportunity for the public to provide oral comments regarding NHTSA's Draft EIS, accompanying the proposed NHTSA fuel economy standards. The agencies will assume that all oral comments presented at the hearing are addressed to the joint proposed rules only, unless speakers specifically reference NHTSA's Draft EIS in oral or written testimony.

The joint proposed rules issued by EPA and by NHTSA on behalf of the

Department of Transportation, would further reduce greenhouse gas emissions from and improve fuel economy for light-duty vehicles for model years 2017-2025. The proposal extends the National Program beyond the greenhouse gas and corporate average fuel economy standards for these vehicles set for model years 2012-2016. On May 21, 2010, President Obama issued a Presidential Memorandum requesting that NHTSA and EPA develop through notice and comment rulemaking a coordinated National Program to reduce greenhouse gas emissions of light-duty vehicles for model years 2017-2025. The proposal, consistent with the President's request, responds to the country's critical needs to address global climate change and to reduce oil consumption. NHTSA is proposing Corporate Average Fuel Economy standards under the Energy Policy and Conservation Act, as amended by the Energy Independence and Security Act, and EPA is proposing greenhouse gas emissions standards under the Clean Air Act. These standards would apply to passenger cars, light-duty trucks, and medium-duty passenger vehicles, and, if ultimately adopted, would represent a continued harmonized and consistent National Program. Under the National Program for model years 2017-2025, automobile manufacturers would be able to continue building a single light-duty national fleet that satisfies all requirements under both programs while ensuring that consumers still have a full range of vehicle choices. EPA is also proposing minor changes to the light-duty vehicle regulations applicable to model years 2012-2016, with respect to air conditioner performance, regulatory treatment of emergency vehicles, and measurement of nitrous oxides.

The proposal for which EPA and NHTSA are holding the public hearings was published in the **Federal Register** on December 1, 2011 (76 FR 74854) and is also available at the Web pages listed above under **FOR FURTHER INFORMATION CONTACT** and also in the rulemaking dockets. NHTSA's Draft Environmental Impact Statement is available on NHTSA's web page and in NHTSA's docket for the EIS, both referenced above. Once NHTSA and EPA learn how many people have registered to speak at each public hearing, we will allocate an

appropriate amount of time to each participant, allowing time for necessary breaks. In addition, we will reserve a block of time for anyone else in the audience who wishes to give an oral presentation. For planning purposes, each speaker should anticipate speaking for approximately ten minutes, although we may need to shorten that time if there is a large turnout. We request that you bring three copies of your statement or other material for the EPA and NHTSA panels. To accommodate as many speakers as possible, we prefer that speakers not use technological aids (e.g., audio-visuals, computer slideshows). However, if you wish to do so, you must notify the contact persons in the **FOR FURTHER INFORMATION CONTACT** section above. You also must make arrangements to provide your presentation or any other aids to NHTSA and EPA in advance of the hearing in order to facilitate set-up.

NHTSA and EPA will conduct the hearings informally, and technical rules of evidence will not apply. We will arrange for a written transcript of each hearing and keep the official record of each hearing open for 30 days to allow speakers to submit supplementary information. Panel members may ask clarifying questions during the oral presentations, but will not respond to the presentations at that time. You may make arrangements for copies of the transcripts directly with the court reporter. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearings. To be assured of consideration, written comments on the proposal must be received by January 30, 2012 (76 FR 74854). Written comments on NHTSA's Draft EIS must be received or uploaded to NHTSA's docket for the EIS by January 31, 2012.

Dated: December 5, 2011.

Ronald Medford,

Deputy Administrator, National Highway Traffic Safety Administration.

Dated: December 5, 2011.

Margo T. Oge,

Director, Office of Transportation and Air Quality, Environmental Protection Agency.

[FR Doc. 2011-31653 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

Notices

Federal Register

Vol. 76, No. 237

Friday, December 9, 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 COMMERCE

Foreign-Trade Zones Board

[Docket 77–2011]

Foreign-Trade Zone 89—Las Vegas, NV; Application for Reorganization and Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Nevada Development Authority, grantee of FTZ 89, requesting authority to reorganize and expand the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09 (correction 74 FR 3987, 1/22/09); 75 FR 71069–71070, 11/22/10). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new “usage-driven” FTZ sites for operators/users located within a grantee’s “service area” in the context of the Board’s standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on November 29, 2011.

FTZ 89 was approved by the Board on November 7, 1983 (Board Order 227, 48 FR 51665, 11/10/1983) and expanded on December 4, 1989 (Board Order 452, 54 FR 50787, 12/11/1989), March 11, 1994 (Board Order 688, 59 FR 12893, 3/18/1994) and June 22, 2010 (Board Order 1688, 75 FR 38778, 07/06/2010).

The current zone project includes the following sites: Site 1: (23 acres)—Las Vegas Convention Center, Las Vegas; Site 3: (Two parcels, 317 acres and 120,000 sq. ft.)—within the Hughes Airport Center Industrial Park, adjacent to McCarran International Airport, Las Vegas; Site 4: (37 acres)—North Las Vegas Business Center, North Las Vegas;

Site 5: (516 acres)—AMPAC Development Company—Gibson Business Park, Las Vegas; Site 6: (160 acres)—Las Vegas International Air Cargo Center at McCarran International Airport, Las Vegas; Site 7: (10 acres)—Union Park, 875 Grand Central Parkway, Las Vegas; Site 8: (0.34 acres)—Nevada International Trade Company, 6650 Spencer Street, Suite 110 (expires 01/31/2012), Las Vegas; and, Site 9: (365 acres)—City View Business Park, Interstate 15 and State Road 604, North Las Vegas.

The grantee’s proposed service area under the ASF would be all of Clark County, Nevada. If approved, the grantee would be able to-serve sites throughout the service area based on companies’ needs for FTZ designation. The proposed service area is within and adjacent to the Las Vegas U.S. Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include existing sites 1, 3, 5, 6, 7 and 9 as “magnet” sites and existing Site 8 as a “usage-driven” site. The applicant is also requesting approval of the following initial “usage-driven” sites: Proposed Site 10 (9.93 acres)—Levi Straus & Company, 7600 Eastgate Road, Henderson; and, Proposed Site 11 (60.55 acres)—Levi Straus & Company, 501 Executive Airport Drive, Henderson. In addition, the applicant is requesting to remove Site 4 due to changed circumstances, as well as reduce the amount of acreage at Site 5.

In accordance with the Board’s regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board’s Executive Secretary at the address below. The closing period for their receipt is February 7, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 22, 2012.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401

Constitution Avenue NW., Washington, DC 20230–0002, and in the “Reading Room” section of the Board’s Web site, which is accessible via <http://www.trade.gov/ftz>. For further information, contact Christopher Kemp at Christopher.Kemp@trade.gov or (202) 482–0862.

Dated: November 29, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–31306 Filed 12–8–11; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 60, 61 and 62–2011]

Foreign-Trade Zones 140 and 78; Applications for Subzone Authority; Dow Corning Corporation, Hemlock Semiconductor Corporation and Hemlock Semiconductor, L.L.C.; Extension of Comment Periods

The comment periods for the applications for subzone authority at the Dow Corning Corporation facility in Midland, Michigan (76 FR 63282–63283, October 12, 2011), at the Hemlock Semiconductor Corporation facility in Hemlock, Michigan (76 FR 63282, October 12, 2011) and at the Hemlock Semiconductor, L.L.C. facility in Clarksville, Tennessee (76 FR 63281–63282, October 12, 2011) are being extended. A public hearing will be held on the applications, and the comment periods are being extended through the date of the public hearing. When the public hearing has been scheduled, a notice will be published with the date and time of the hearing as well as the specific date on which the comment periods will close following the hearing.

For further information, contact Elizabeth Whiteman at Elizabeth.Whiteman@trade.gov or (202) 482–0473.

Dated: December 5, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–31684 Filed 12–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE**Bureau of Industry and Security**

[Docket No. 111130706-1686-01]

Impact of Implementing the Chemical Weapons Convention (CWC) on Commercial Activities Involving "Schedule 1" Chemicals Through Calendar Year 2011; Impact of Adding Salts of CWC "Schedule 1" Chemicals to "Schedule 1;" Impact of Declaring Production of "Schedule 1" Chemicals as Intermediates**AGENCY:** Bureau of Industry and Security, Commerce.**ACTION:** Notice of inquiry.

SUMMARY: The Bureau of Industry and Security (BIS) is seeking public comments on the impact that implementation of the Chemical Weapons Convention (CWC), through the Chemical Weapons Convention Implementation Act (CWCIA), and the Chemical Weapons Convention Regulations (CWCRCR), has had on commercial activities involving "Schedule 1" chemicals during calendar year 2011. Additionally, BIS seeks public comments on whether the addition of salts of certain CWC "Schedule 1" chemicals (e.g., saxitoxin or nitrogen mustards) to the list of "Schedule 1" chemicals in the CWC Annex on Chemicals would impact any commercial activities. Finally, BIS is seeking public comments on whether any commercial chemical production activities in the U.S. could possibly involve the production of a "Schedule 1" chemical as an intermediate in the synthesis of other chemicals. In this regard, note that the CWC, CWCIA, and CWCRCR have the potential to impact commercial activities, not only when the "Schedule 1" chemicals are end products, but whenever "Schedule 1" chemicals (e.g., nitrogen mustards) are produced as intermediates in the synthesis of other chemicals.

DATES: Comments must be received by January 9, 2012.**ADDRESSES:** You may submit comments by any of the following methods:

- *Email:* wfisher@bis.doc.gov. Include the phrase "Schedule 1 Notice of Inquiry" in the subject line;
- *Fax:* (202) 482-3355 (Attn: Willard Fisher);
- *Mail or Hand Delivery/Courier:* Willard Fisher, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th Street & Pennsylvania Avenue NW., Room 2705, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: For questions on the Chemical Weapons Convention requirements for "Schedule 1" chemicals, contact Douglas Brown, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482-1001. For questions on the submission of comments, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482-2440.

SUPPLEMENTARY INFORMATION:**Background**

The purpose of this notice of inquiry is threefold: (1) To collect information to assist BIS in its preparation of the annual certification to the Congress that is required under Condition 9 of Senate Resolution 75, April 24, 1997, in which the Senate gave its advice and consent to the ratification of the Chemical Weapons Convention; (2) to collect information that would assist BIS to evaluate whether salts of certain "Schedule 1" chemicals should be added to the list of "Schedule 1" chemicals; and (3) to collect information that would indicate to BIS whether any "Schedule 1" chemicals, or salts thereof, are produced as intermediates in the commercial production of some other chemical.

Request for Comments Concerning the Impact of Implementing the Chemical Weapons Convention (CWC) on Commercial Activities Involving "Schedule 1" Chemicals Through Calendar Year 2011

In providing its advice and consent to the ratification of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC) (the Convention), the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its ratification. Condition 9, titled "Protection of Advanced Biotechnology," calls for the President to certify to Congress on an annual basis that "the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1." On July 8, 2004, President Bush, by Executive Order 13346, delegated his authority to

make the annual certification to the Secretary of Commerce.

The CWC is an international arms control treaty that contains certain verification provisions. In order to implement these verification provisions, the CWC established the Organization for the Prohibition of Chemical Weapons (OPCW). The CWC imposes certain obligations on countries that have ratified the Convention (i.e., States Parties), among which are the enactment of legislation to prohibit the production, storage, and use of chemical weapons, and the establishment of a National Authority to serve as the national focal point for effective liaison with the OPCW and other States Parties for the purpose of achieving the object and purpose of the Convention and the implementation of its provisions. The CWC also requires each State Party to implement a comprehensive data declaration and inspection regime to provide transparency and to verify that both the public and private sectors of the State Party are not engaged in activities prohibited under the CWC.

"Schedule 1" chemicals consist of those toxic chemicals and precursors set forth in the CWC "Annex on Chemicals" and in Supplement No. 1 to part 712 of the Chemical Weapons Convention Regulations (CWCRCR) (15 CFR parts 710-722). The CWC identified these toxic chemicals and precursors as posing a high risk to the object and purpose of the Convention.

The CWC restricts the production of "Schedule 1" chemicals for protective purposes to two facilities per State Party. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103-21 defined the term "protective purposes" to mean "used for determining the adequacy of defense equipment and measures." Consistent with this definition, U.S. implementation, as authorized via Presidential Decision Directive (PDD) 70, December 17, 1999, assigned the responsibility to operate these two facilities to the Department of Defense (DOD), thereby precluding commercial production of "Schedule 1" chemicals for protective purposes in the United States. The Department of Defense maintains strict controls on "Schedule 1" chemicals produced at its facilities in order to ensure the accountability and proper use of such chemicals, consistent with the object and purpose of the Convention. These actions did not establish any limitations on "Schedule 1" chemical activities that are not prohibited by the CWC. However, the CWC stipulates a one metric ton limit for "Schedule 1" chemicals in a State Party.

The provisions of the CWC that affect commercial activities involving "Schedule 1" chemicals are implemented in the CWCR (see 15 CFR 712) and in the Export Administration Regulations (EAR) (see 15 CFR 742.18 and 15 CFR 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCR restrict commercial production of "Schedule 1" chemicals to research, medical, or pharmaceutical purposes. Other industrial uses are prohibited. The CWCR also contain other requirements and prohibitions that apply to "Schedule 1" chemicals and/or "Schedule 1" facilities. Specifically, the CWCR:

- (1) Prohibit the import of "Schedule 1" chemicals from States not Party to the Convention (15 CFR 712.2(b));
- (2) Require annual declarations by certain facilities engaged in the production of "Schedule 1" chemicals in excess of 100 grams aggregate per calendar year (i.e., declared "Schedule 1" facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));
- (3) Require government approval of "declared Schedule 1" facilities (15 CFR 712.5(f));
- (4) Provide that "declared Schedule 1" facilities are subject to initial and routine inspection by the Organization for the Prohibition of Chemical Weapons (15 CFR 712.5(e) and 716.1(b)(1));
- (5) Require 200 days advance notification of establishment of new "Schedule 1" production facilities producing greater than 100 grams aggregate of "Schedule 1" chemicals per calendar year (15 CFR 712.4);
- (6) Require advance notification and annual reporting of all imports and exports of "Schedule 1" chemicals to, or from, other States Parties to the Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and
- (7) Prohibit the export of "Schedule 1" chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, "Schedule 1" chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act and the Chemical

Weapons Convention Regulations, has had on commercial activities involving "Schedule 1" chemicals during calendar year 2011. To allow BIS to properly evaluate the significance of any harm to commercial activities involving "Schedule 1" chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

Request for Comments Concerning the Impact of Adding Salts of Certain CWC "Schedule 1" Chemicals to the List of "Schedule 1" Chemicals in the CWC Annex on Chemicals

The OPCW has recently been considering whether to add salts of certain "Schedule 1" chemicals, specifically of saxitoxin and nitrogen mustards, to the list of "Schedule 1" chemicals in the CWC Annex on Chemicals. This would mean that the salts of these "Schedule 1" chemicals would likely be identified as "Schedule 1" chemicals, themselves. As a result, they too would become subject to any impact that implementation of the CWC, through the CWCIA and the CWCR, has on commercial activities involving "Schedule 1" chemicals.

BIS seeks comments as to whether salts of any "Schedule 1" chemical, which are not currently listed as "Schedule 1" chemicals in the CWC Annex on Chemicals, are produced (as an end product or in a captive use situation), consumed, transferred, or stored in the United States. Note that, if the CWC were to add any of these salts to the list of "Schedule 1" chemicals in the CWC Annex on Chemicals, this could impact commercial activities in the event that these new "Schedule 1" chemicals were produced as intermediates in the synthesis of other chemicals. For example, such production or captive use by a facility, following a decision by the OPCW to add any of these salts to the list of "Schedule 1" chemicals in the CWC Annex on Chemicals, could subject that facility to the CWC requirements for destruction of "chemical weapons production facilities."

Request for Comments on Whether Any "Schedule 1" Chemicals, or Salts Thereof, Are Produced as Intermediates in the Commercial Production of Some Other Chemical

As defined in 15 CFR 710.1, production of a "Schedule 1" chemical means formation through chemical synthesis as well as processing to extract and isolate "Schedule 1" chemicals. On November 10, 2005, the

Organization for the Prohibition of Chemical Weapons (OPCW) decided, "that the production of a "Schedule 1" chemical is understood, for declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur" (C-10/DEC.12). At the time of this decision, there were no known examples of so-called captive use of "Schedule 1" chemicals. This is no longer the case. Based on new information provided by Denmark to the Executive Council of the OPCW, the United States is aware that a commercial pharmaceutical facility in Denmark produced a "Schedule 1" chemical (a nitrogen mustard), as an intermediate in the production of another chemical, which, arguably, would cause the facility to meet the definition of a Chemical Weapons Production Facility.

While it appears unlikely that the pharmaceutical facility will be determined to be a Chemical Weapons Production Facility, Denmark has ordered the facility to halt future production of the pharmaceutical product and sought resolution through the OPCW Executive Council.

In view of this development, BIS is seeking public comments as to whether any similar situations of so-called captive use of a "Schedule 1" chemical may exist in the United States.

Submission of Comments

All comments must be submitted to one of the addresses indicated in this notice. The Department requires that all comments be submitted in written form.

The Department encourages interested persons who wish to comment to do so at the earliest possible time. The period for submission of comments will close on January 9, 2012. The Department will consider all comments received before the close of the comment period. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them. All

comments submitted in response to this notice will be a matter of public record and will be available for public inspection and copying.

The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays public comments on the BIS Freedom of Information Act (FOIA) Web site at <http://www.bis.doc.gov/foia>. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration, at (202) 482-1093, for assistance.

Dated: December 5, 2011.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2011-31690 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Emerging Technology and Research Advisory Committee; Notice of Partially Closed Meeting—Room Change

The Emerging Technology and Research Advisory Committee (ETRAC) will meet on December 14, 8:30 a.m., Room 3884 and December 15, 2011, 8:30 a.m., Room 6087B, at the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on emerging technology and research activities, including those related to deemed exports.

Agenda

Wednesday, December 14

Closed Session: 8:30 a.m.–5 p.m.

1. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)(1) and 10(a)(3).

Thursday, December 15

Open Session: 8:30 a.m.–3:30 p.m.

1. ETRAC Member Discussion Emerging Technology Analysis; and Impact of Export Controls on the conduct of U.S. science and technology activities in the United States.

2. Public Comments.

The open sessions will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at

Yvette.Springer@bis.doc.gov no later than December 7, 2011.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on November 21, 2011, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended, that the portion of the meeting dealing with matters which would be likely to frustrate significantly implementation of a proposed agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482-2813.

Dated: December 5, 2011.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2011-31585 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-JT-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-475-818]

Certain Pasta From Italy: Notice of Final Results of the Fourteenth Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 8, 2011, the Department of Commerce (the Department) published the preliminary results of the fourteenth administrative review for the antidumping duty order on certain pasta from Italy.¹ The review covers two manufacturers/exporters and 11 non-selected companies. Pastificio Lucio Garofalo S.p.A. (“Garofalo”) and Molino e Pastificio Tomasello S.p.A.

¹ See *Certain Pasta from Italy: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 48125 (August 8, 2011) (“*Preliminary Results*”).

(“Tomasello”) were selected as mandatory respondents.² The period of review (“POR”) is July 1, 2009, through June 30, 2010.

As a result of our analysis of the comments received, the final results remain unchanged from the preliminary results for Garofalo and Tomasello. The final weighted-average dumping margins for these companies are listed below in the “Final Results of Review” section of this notice.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Joy Zhang (Tomasello) or George McMahon (Garofalo) AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; *telephone:* (202) 482-1168 or (202) 482-1167, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 8, 2011, the Department published the preliminary results of the fourteenth administrative review of the antidumping duty order on certain pasta from Italy. On September 7, 2011, Petitioners³ and Garofalo submitted a case brief. On September 12, 2011, Petitioners submitted a rebuttal brief. On September 14, 2011, Tomasello submitted a rebuttal brief.⁴

Scope of the Order

Imports covered by this order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

² As a result of withdrawals of request for review, we rescinded this review, in part, with respect to Pastificio Di Martino Gaetano & F.lli SpA (“Di Martino”), Pastificio Felicetti Srl (“Felicetti”), and Pasta Zara SpA (“Zara”). See *Certain Pasta from Italy: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 23973 (April 29, 2011).

³ Petitioners are New World Pasta Company, Dakota Growers Pasta Company, and American Italian Pasta Company.

⁴ Tomasello submitted an untimely rebuttal brief. Based on Tomasello's explanation of the circumstances regarding its late filing and its request for acceptance of this brief, the Department extended the deadline and accepted Tomasello's rebuttal brief for these final results. See Letter from Melissa G. Skinner, Director, Office 3, to David L. Simon, counsel for Tomasello, dated September 16, 2011.

Excluded from the scope of this order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Istituto Mediterraneo Di Certificazione, by QC&I International Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, by Associazione Italiana per l'Agricoltura Biologica, by Codex S.r.L., by Bioagricert S.r.L., or by Istituto per la Certificazione Etica e Ambientale. Effective July 1, 2008, gluten free pasta is also excluded from this order. See *Certain Pasta from Italy: Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation, in Part*, 74 FR 41120 (August 14, 2009). The merchandise subject to this order is currently classifiable under items 1901.90.9095 and 1902.19.20 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the "Issues and Decision Memorandum for the Final Results of the Fourteenth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy (2009–2010)" from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ("Issues and Decision Memorandum"), dated concurrently with this notice and which is hereby adopted by this notice. A list of the issues which parties have raised, and to which we have responded in the Issues and Decision Memorandum, is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System ("IA ACCESS"). IA ACCESS is available in the Central Records Unit, main Commerce Building, Room 7046. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Web at <http://ia.ita.doc.gov/frn/>. The signed Issues and Decision Memorandum and electronic version of the Issues and

Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Garofalo

Regarding Garofalo, based on our analysis of the comments received, we have made no changes in calculating the dumping margin. Garofalo submitted a comment in its case brief regarding the Department's draft liquidation instructions. Based on our analysis of this comment, we find that, because the particular importer-specific rate referenced by Garofalo in its case brief is a *de minimis* rate, the Department has revised its liquidation instructions for this certain importer-specific rate to instruct U.S. Customs and Border Protection ("CBP") to liquidate at a rate of zero percent. See Issues and Decision Memorandum at Comment 2.

Regarding Tomasello, based on our analysis of the comments received, we have made no changes in calculating the dumping margin. See Issues and Decision Memorandum at Comment 3.

Final Results of Review

We determine that the following weighted-average margins exist for the period July 1, 2009, through June 30, 2010:

Manufacturer/exporter	Margin (percent)
Garofalo	3.20
Tomasello	4.18
Review-Specific Average Rate ⁵ Applicable to the Following Companies:	3.57
Agritalia, Erasmo, Indalco, Labor, PAM, P.A.P., Afeltra, Fabianelli, Riscossa, Rummo, and Rustichella ⁶ .	

Duty Assessment

The Department shall determine and CBP shall assess antidumping duties on

⁵ This rate is a weighted-average percentage margin (calculated based on the publicly ranged U.S. values of the two reviewed companies with an affirmative dumping margin) for the period July 1, 2009, through June 30, 2010. See Memorandum to the File, titled, "Pasta from Italy: Margin for Respondents Not Selected for Individual Examination," from Joy Zhang and George McMahon, Case Analysts, through James Terpstra, Program Manager, dated August 1, 2011.

⁶ The non-selected companies are: Agritalia S.r.L. ("Agritalia"), Domenico Paone fu Erasmo S.p.A. ("Erasmo"), Industria Alimentare Colavita, S.p.A. ("Indalco"), Labor S.r.L. ("Labor"), PAM S.p.A. and its affiliate, Liguori Pastificio dal 1820 SpA ("PAM"), P.A.P. SNC Di Paziienza G.B. & C. ("P.A.P."), Premiato Pastificio Afeltra S.r.L. ("Afeltra"), Pastificio Fabianelli S.p.A. ("Fabianelli"), Pastificio Riscossa F.lli Mastromauro S.p.A. ("Riscossa"), Rummo S.p.A. Molino e Pastificio ("Rummo"), and Rustichella d'Abruzzo S.p.A. ("Rustichella").

all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), the Department calculates an assessment rate for each importer of the subject merchandise for each respondent. Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (i.e., at or above 0.5 percent), the Department will issue appraisal instructions directly to CBP to assess antidumping duties on appropriate entries.

To determine whether the duty assessment rates covering the period were *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), for each respondent we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to that importer or customer and dividing this amount by the total entered value of the sales to that importer (or customer). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis*, and the respondent has reported reliable entered values, we apply the assessment rate to the entered value of the importer's/customer's entries during the review period. Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis* and we do not have reliable entered values, we calculate a per-unit assessment rate by aggregating the dumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer).

The Department clarified its "automatic assessment" regulation on May 6, 2003. See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the respondent for which it did not know its merchandise 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 intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following antidumping duty deposit rates will be effective upon publication of the final results of this administrative review for all shipments of pasta from Italy entered, or withdrawn from warehouse, for

consumption on or after the publication date of these final results, as provided for by section 751(a)(1) of the Tariff Act of 1930, as amended (the Act): (1) The cash deposit rate for companies subject to this review will be the rate established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis*, no cash deposit will be required; (2) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less-than-fair-value (“LTFV”) investigation, the cash deposit rate will continue to be the company-specific rate established for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the 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 subject merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered by this review, a prior review, or the LTFV investigation, the cash deposit rate will be 15.45 percent, the all-others rate established in the Section 129 determination. *See Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 25261 (May 4, 2007). These cash deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary’s presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (“APO”) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(5). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is

hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 2, 2011.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

List of Comments in the Issues and Decision Memorandum

Comment 1: *Whether to use Zeroing Methodology in this Administrative Review for Garofalo*

Comment 2: *Whether the Department Should Modify its Liquidation Instructions to U.S. Customs and Border Protection regarding Garofalo*

Comment 3: *Whether the Department Should Include Certain Capitalized Labor Costs in its Calculation of Tomasello’s Cost of Production*

[FR Doc. 2011–31676 Filed 12–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501]

Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: On June 8, 2011, the Department of Commerce (“the Department”) published the preliminary results of the antidumping duty administrative review of certain welded carbon steel pipe and tube from Turkey. The administrative review covers the Borusan Group¹ and Toscelik,² producers and exporters of the subject merchandise. The period of review (“POR”) is May 1, 2009, through April 30, 2010.

Based on our analysis of the comments received, we have made certain changes in the margin calculations. The final results, consequently, differ from the preliminary results. The final weighted-

¹ The Borusan Group includes Borusan Mannesmann Boru Sanayi ve Ticaret A.S., Borusan Birlesik Boru Fabrikalari San ve Tic., Borusan Istikbal Ticaret T.A.S., Borusan Holding A.S., Borusan Gemlik Boru Tesisleri A.S., Borusan Ihracat Ithalat ve Dagitim A.S., and Borusan Ithacat ve Dagitim A.S. (collectively, “Borusan”).

² Toscelik Profil ve Sac Endustrisi A.S., Toscelik Metal Ticaret A.S., and Tosyali Dis Ticaret A.S. (collectively, “Toscelik”).

average dumping margins for the reviewed firms are listed below in the section entitled “Final Results of Review.”

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT:

Dennis McClure or Victoria Cho, at (202) 482–5973 or (202) 482–5075, respectively; AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On June 8, 2011, the Department published in the **Federal Register** the preliminary results of the antidumping duty administrative review of certain welded carbon steel pipe and tube from Turkey. *See Certain Welded Carbon Steel Pipe and Tube from Turkey; Notice of Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 33204 (June 8, 2011) (“*Preliminary Results*”).

We invited interested parties to comment on our preliminary results. We received case briefs from Toscelik, Borusan, and U.S. Steel Corporation (“U.S. Steel”), on July 7, 2011, July 22, 2011, and July 22, 2011, respectively. On August 2, 2011, we received rebuttal briefs from Borusan, U.S. Steel, and Allied Tube and Conduit Corporation and TMK IPSCO (collectively, “Allied Tube and TMK”).³ The Department has conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (“the Act”).

Period of Review

The POR covered by this review is May 1, 2009, through April 30, 2010.

Scope of the Order

The products covered by this order include circular welded non-alloy steel pipes and tubes, of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded and coupled). Those pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air, and other liquids and gases in

³ U.S. Steel and Allied Tube and TMK are petitioners in this administrative review.

plumbing and heating systems, air conditioner units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing and mechanical applications, such as for fence tubing, and for protection of electrical wiring, such as conduit shells.

The scope is not limited to standard pipe and fence tubing, or those types of mechanical and structural pipe that are used in standard pipe applications. All carbon steel pipes and tubes within the physical description outlined above are included in the scope of this order, except for line pipe, oil country tubular goods, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit.

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule of the United States ("HTSUS") subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this proceeding and to which we have responded are listed in Appendix 1 to this notice and addressed in the Memorandum To: Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, From: Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, Subject: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey for the period of review May 1, 2009, through April 30, 2010, dated December 2, 2011 ("Issues and Decision Memorandum"), which is hereby adopted by this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendation in this public memorandum which is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System ("IA ACCESS"). Access to IA ACCESS is available in the Central Records Unit, room 7046, of the main Commerce 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 electronic versions of the Decision Memorandum

in IA ACCESS and on the Web are identical in content.

Changes From the Preliminary Results

Based on our analysis of the comments received from interested parties, we have made the following changes in calculating Borusan's and Toscelik's dumping margins for the final results: (1) We corrected the margin program for a clerical error with respect to Borusan's quarterly costs; (2) we revised Borusan's quarterly costs for exempted duty; (3) we reclassified certain of Borusan's home market advertising expenses as indirect expenses; (4) we adjusted Toscelik's reported quarterly costs for new mill depreciation; (5) we adjusted Toscelik's financial expense ratio denominator to exclude the effect of the inventory impairment reversal; and (6) we applied the alternative quarterly cost calculation methodology for Toscelik for the final results. See Issues and Decision Memorandum at Comments 1 through 7 for Borusan and Comments 8 through 11 for Toscelik. For further details on how the changes were applied in the margin calculation, see Memorandum to the File, from Victoria Cho and Dennis McClure, International Trade Analysts, through James Terpstra, Program Manager, entitled "Final Results in the 2009/2010 Administrative Review on Welded Pipe and Tube from Turkey," dated December 5, 2011; see also Memorandum to Neal M. Halper from Laurens Van Houten, "Regarding the Antidumping Duty Administrative Review of Certain Welded Carbon Steel Standard Pipe and Tube from Turkey ("Pipe and Tube"), Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Borusan Mannesmann Boru Sanayi ve Ticaret, A.S. and Toscelik Profil ve Sac Endustrisi A.S. and its affiliated exporter Tosyali Dis Ticaret, A.S.," dated December 5, 2011.

Final Results of Review

As a result of this review, we determine that the following margins exist for the period May 1, 2009, through April 30, 2010:

Manufacturer/exporter	Weighted-average margin (percent)
Borusan	4.46
Toscelik	0.95

Disclosure

We will disclose calculation memorandums used in our analysis to parties to these proceedings within five

days of the date of publication of this notice.⁴

Assessment

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries.

Pursuant to 19 CFR 351.212(b)(1), because Borusan and Toscelik reported the entered value for all of its U.S. sales, we have calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales for which entered value was reported. To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we have calculated importer-specific *ad valorem* ratios based on the entered value.

Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

The Department clarified its "automatic assessment" regulation on May 6, 2003.⁵ This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the country-specific all-others rate established in the less-than-fair-value ("LTFV") investigation if there is no rate for the intermediate company(ies) involved in the transaction.

Cash Deposit Requirements

The following antidumping duty deposit rates will be effective upon publication of this notice of final results of the administrative review for all shipments of welded pipe and tube from Turkey entered, or withdrawn from warehouse, for consumption on or after the date of the publication of these final results, as provided by section 751(a)(1) of the Act: (1) For the companies subject to this review, the cash deposit rate will be the rates listed above; (2) for previously reviewed or investigated companies not listed above, the cash

⁴ See 19 CFR 351.224(b).

⁵ See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

deposit rate will continue to be the company-specific rate published for the most recent final results in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and, (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 14.74 percent, the all-others rate established in the LTFV investigation.⁶ These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective orders ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/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 of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

⁶ See *Antidumping Duty Order; Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 51 FR 17784 (May 15, 1986).

Dated: December 2, 2011.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I—Issues in Decision Memorandum

Borusan

Comment 1: Whether To Use Quarterly Cost for Borusan

Comment 2: The Cost Recovery Test

Comment 3: Duty Exemption Calculation

Comment 4: Inadvertent Assignment of Surrogate Costs

Comment 5: The Department's Treatment of Borusan's Reported "N" in Its VATH Field

Comment 6: Borusan's Home Market Advertising Expenses

Comment 7: Zeroing of Dumping Margins in Administrative Reviews

Toscelik

Comment 8: Application of Quarterly Costs

Comment 9: Financial Expense Ratio Calculation

Comment 10: Short-term Borrowing Rate Used To Calculate Imputed Credit Expense

Comment 11: Treatment of Warranty and Bank Charges in the Program

[FR Doc. 2011-31678 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-583-837]

Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet and strip (PET Film) from Taiwan. The period of review (POR) for this administrative review is July 1, 2009, through June 30, 2010. This review covers the following producers/exporters of the subject merchandise: Nan Ya Plastics Corporation, Ltd. (Nan Ya), and Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co., Ltd. (collectively, Shinkong). We invited interested parties to comment on our *Preliminary Results*.¹ Based on our analysis of the

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 47540 (August 5, 2011) (*Preliminary Results*).

comments received, we have made changes to the margin applied to Nan Ya, which are discussed in the "Changes Since the Preliminary Results" section, below. Therefore, the final results for Nan Ya differ from the *Preliminary Results*. The final dumping margins for this review are listed in the "Final Results of Review" section, below.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT:

Gene Calvert or Emily Halle, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 428-3586 or (202) 482-0176, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 2011, the Department published in the *Federal Register* the *Preliminary Results*.² Since the publication of the *Preliminary Results*, the following events have occurred. On August 15, 2011, the Department issued a post-preliminary supplemental questionnaire to Shinkong, and Shinkong timely filed its questionnaire response on August 25, 2011.³ The Department notified interested parties that they were to file their case briefs with the Department by September 1, 2011, and rebuttal briefs filed by September 19, 2011, in accordance with 19 CFR 351.309(d)(1).⁴ In response to timely requests from Nan Ya, case brief deadlines were extended twice by the Department to October 3, 2011.⁵ Nan Ya timely filed a case brief on October 3, 2011.⁶ On October 11, 2011, DuPont

² Prior to publication of the *Preliminary Results*, Nan Ya informed the Department that it would not be responding to the Department's questionnaire and that it would not be participating in the 09-10 administrative review. See Memorandum from Gene H. Calvert to the File, "Preliminary Results in the Administrative Review on Polyethylene Terephthalate Film, Sheet and Strip from Taiwan (PET film): Nan Ya Plastic Corporation, Ltd. Non-Participation in the Administrative Review for the Period July 1, 2009, through June 30, 2010" (August 1, 2011) (Nan Ya's Non-Participation Memorandum).

³ See Letter from Shinkong, "Polyethylene Terephthalate Film, Sheet and Strip (PET Film) from Taiwan: Supplemental Questionnaire Response," dated August 25, 2011 (Post Preliminary Supplemental Response).

⁴ See Letter from Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, to All Interested Parties, dated September 1, 2011.

⁵ See Letter from Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, to All Interested Parties, dated September 9, 2011, and September 23, 2011.

⁶ See Letter from Nan Ya, "Polyethylene Terephthalate (PET) Film from Taiwan," dated October 4, 2011.

Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, Petitioners), timely filed a rebuttal case brief.⁷

As discussed in the *Preliminary Results*, Nan Ya withheld requested information, which significantly impeded the proceeding, and failed to cooperate to the best of its ability. Therefore, pursuant to sections 776(a)(2)(A) and (C) and 776(b) of the Tariff Act of 1930, as amended (the Act), the Department preliminarily determined that the use of adverse facts available (AFA) for Nan Ya was appropriate, and assigned a rate of 99.31 percent, which was based on transaction-specific margins calculated for Nan Ya during the previous 2008–09 administrative review. Based on our analysis of the comments received, for the final results we have used data from the current POR, instead of secondary information and, thus, have revised the AFA rate for Nan Ya.

Period of Review

The POR is July 1, 2009, through June 30, 2010.

Scope of the Order

The products covered by the order are all gauges of raw, pretreated, or primed polyethylene terephthalate film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Imports of PET Film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

The issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, “Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Issues and Decision Memorandum for the Final Results” (Decision

⁷ See Letter from Petitioners, “Polyethylene Terephthalate (PET) Film, Sheet, and Strip from Taiwan: Petitioners’ Rebuttal Brief,” dated October 11, 2011.

Memorandum), dated concurrently with this notice, which is hereby adopted by this notice. A list of the issues addressed in the Decision Memorandum is appended to this notice. The Decision Memorandum is on file electronically via Import Administration’s Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available in the Department’s Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at <http://ia.ita.doc.gov/frn>. The signed Decision Memorandum and electronic versions of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Shinkong’s Post Preliminary Supplemental Response stated that it incurred inland freight for subject merchandise that was returned during the POR, but that it did not provide any replacements for the returned merchandise.⁸ Shinkong provided the inland freight expenses incurred for returns, and the Department treated this expense as a warranty expense, part of direct selling expenses, and deducted it from the home market’s net price build up.⁹ The inclusion of this additional data for the final results had no impact on Shinkong’s weighted-average margin with respect to the *Preliminary Results*.¹⁰

In the *Preliminary Results*, the Department applied an AFA rate of 99.31 percent to Nan Ya because it did not respond to the Department’s initial questionnaire.¹¹ Based on comments received, for the final results, we have revised the AFA rate for Nan Ya from 99.31 percent to 74.34 percent. A discussion of the Department’s decision to revise Nan Ya’s AFA rate can be found in the Decision Memorandum.

Final Results of Review

As a result of our review, we determine that the following weighted-average margins exist for the period of July 1, 2009, through June 30, 2010:

⁸ See Post Preliminary Supplemental Response at 3.

⁹ See Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, regarding “Analysis for the Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co. Ltd” dated concurrently with this notice for a detailed discussion of these changes.

¹⁰ See *id.*

¹¹ See Nan Ya’s Non-Participation Memorandum.

Manufacturer/exporter	Weighted-average margin (percent)
Nan Ya Plastics Corporation, Ltd	74.34
Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co., Ltd	6.98

Assessment Rates

Pursuant to 19 CFR 351.212(b), the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. We will instruct CBP to liquidate entries of merchandise produced and/or exported by Nan Ya and Shinkong. For assessment purposes, because Shinkong did not report either the identities of its importers or the entered values of its sales, we calculated customer-specific per unit duty assessment rates. Because Nan Ya reported no information to the Department for this POR, we will instruct CBP to apply an assessment rate to all entries it produced and/or exported equal to the weighted-average margin indicated above. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of these final results of review.

The Department clarified its “automatic assessment” regulation on May 6, 2003.¹² This clarification applies to entries of subject merchandise during the POR produced by the companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate non-reviewed entries at the all-others rate of 2.40 percent from the investigation if there is no rate for the intermediate company(ies) involved in the transaction.¹³

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided by section 751(a)(2)(C) of the Act: (1) For the

¹² See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

¹³ See *Notice of Amended Final Antidumping Duty Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Taiwan*, 67 FR 44174 (July 1, 2002) (*Investigation Final Determination*).

companies covered by this review, the cash deposit rate will be the rates listed above; (2) for merchandise exported by producers or exporters not covered in this review but covered in a previous segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published in the most recent final results in which that producer or exporter participated; (3) if the exporter is not a firm covered in this review or in any previous segment of this proceeding, but the producer is, the cash deposit rate will be that established for the producer of the merchandise in these final results of review or in the most recent final results in which that producer participated; and, (4) if neither the exporter nor the producer is a firm covered in this review or in any previous segment of this proceeding, the cash deposit rate will be 2.40 percent, the all-others rate established in the less than fair value investigation.¹⁴ These deposit requirements, when imposed, shall remain in effect until further notice.

Notification Regarding Administrative Protective Orders

This notice is the only reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred, and in the subsequent assessment of double antidumping duties.

We are issuing and publishing these final results and this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 5, 2011.

Christian Marsh,

Acting Assistant Secretary for Import Administration.

Appendix—Decision Memorandum

Comment 1: Whether Nan Ya's Preliminary

AFA Rate Is Unlawfully Punitive

Comment 2: Whether Nan Ya's Preliminary

AFA Rate Is Corroborated

Comment 3: Whether the Department Failed

To Follow Past Court and Department

Precedent With Respect to Nan Ya's

Preliminary AFA Rate

Comment 4: Whether Na Ya's Preliminary

AFA Rate Is Aberrational

[FR Doc. 2011-31695 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-533-824]

Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 5, 2011, the Department of Commerce (Department) published the preliminary results of administrative review of the antidumping duty order on polyethylene terephthalate film (PET Film) from India.¹ This review covers one producer/exporter of subject merchandise: Ester Industries Ltd. (Ester). Based on the results of our analysis of the comments received, we did not make any changes to the preliminary results. However, the Department did make changes to the preliminary results of the concurrent countervailing duty administrative review. Accordingly, we adjusted Ester's U.S. price in our margin calculations for Ester's export subsidy rate calculated for the final results of review, causing a change in the antidumping duty margin calculated for these final results. For the final dumping margins, see the "Final Results of Review" section below.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Elfi Blum or Toni Page, AD/CVD Operations, Office 6, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230;

¹ See *Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 47546 (August 5, 2011) (*Preliminary Results*).

telephone: (202) 428-0197 or (202) 482-1398, respectively.

SUPPLEMENTARY INFORMATION:

Background

Since the *Preliminary Results*, the following events have taken place. Ester submitted a timely case brief on September 6, 2011. DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, Petitioners) filed a timely rebuttal brief on September 12, 2011.

Period of Review

The period of review is July 1, 2009 through June 30, 2010.

Scope of the Order

The products covered by the antidumping duty order are all gauges of raw, pretreated, or primed PET film, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of PET film are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the antidumping duty order is dispositive.

Analysis of Comments Received

The issue of zeroing was raised in the case and rebuttal briefs by parties in this administrative review are addressed in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, "Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from India: Issues and Decision Memorandum for the Final Results" (Decision Memorandum), dated concurrently with, and hereby adopted by this notice. A list of the comments raised in the briefs and addressed in the Decision Memorandum is appended to this notice. The Decision Memorandum is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the internet at <http://www.trade.gov/ia/>. The signed Decision Memorandum

¹⁴ See *Investigation Final Determination*.

and the electronic versions of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we did not make any adjustments to our margin calculations for Ester. We revised the adjustment to U.S. price in our margin calculations for Ester's export subsidy rate calculated for the final results of review in the concurrent countervailing duty administrative review, causing a change in the antidumping duty margin calculated for these final results.

Final Results of Review

As a result of our review, we determine that the following weighted-average margins exist for the period of July 1, 2009, through June 30, 2010:

Manufacturer/exporter	Weighted-average margin (percent)
Ester Industries, Ltd	6.81

Assessment Rates

The Department shall determine, and U.S. Customs and Border Protection ("CBP") shall assess, antidumping duties on all appropriate entries. We will instruct CBP to liquidate entries of merchandise produced and/or exported by Ester. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. For assessment purposes, where the respondent reported the entered value for its sales, we calculated importer-specific (or customer-specific) *ad valorem* assessment rates based on the ratio of the total amount of the dumping duties calculated for the examined sales to the total entered value of those same sales. See 19 CFR 351.212(b). However, where the respondent did not report the entered value for its sales, we will calculate importer-specific (or customer-specific) per unit duty assessment rates. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any per unit duty assessment rate calculated in the final results of this review is above *de minimis* (i.e., at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we intend to instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is zero or *de minimis* (i.e., less than 0.50 percent). See 19 CFR 351.106(c)(1).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of PET Film from India entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (the Act): (1) The cash deposit rate for the company under review will be the rate established in the final results of this review (except, if the rate is zero or *de minimis*, i.e., less than 0.50 percent, no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and, (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review, the cash deposit rate will be the all others rate for this proceeding, 5.71 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification Regarding Administrative Protective Orders

This notice is the only reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

We are issuing and publishing these final results and this notice in

accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 5, 2011.

Christian Marsh,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2011-31693 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-910]

Circular Welded Carbon Quality Steel Pipe From the People's Republic of China: Rescission of the 2010-2011 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") is rescinding the administrative review of the antidumping duty order on circular welded carbon quality steel pipe ("CWP") from the People's Republic of China ("PRC") for the period of review ("POR") of July 1, 2010, through June 30, 2011, with respect to twenty-nine companies. This rescission is based on the timely withdrawal of the requests for review by the only interested party that requested review of these companies.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Thomas Martin or Robert Bolling, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-3936 or (202) 482-3434, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2011, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on CWP from the PRC. See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 76 FR 38609, 38610 (July 1, 2011). In response, on August 1, 2011, the Ad Hoc Coalition For Fair Pipe Imports and its individual members, Allied Tube & Conduit, IPSCO Tubulars, Inc., Sharon Tube Company, Western Tube & Conduit Corporation, and Wheatland Tube Company (hereafter referred to as

“Petitioners”) timely requested an administrative review of entries of the subject merchandise during the POR from the following companies: Adler Steel Ltd. (“Adler Steel”), Al Jazeera Steel Products Co SAOG (“Al Jazeera Steel”), Baoshan Iron & Steel Co., Ltd. (“Baoshan”), Benxi Northern Steel Pipes, Co. Ltd. (“Benxi Northern”), CNOOC Kingland Pipeline Co., Ltd. (“CNOOC Kingland”), ETCO (China) International Trading Co., Ltd. (“ETCO”), Great River Trading International Co. (“Great River Trading”), Guangzhou Juyi Steel Pipes Co., Ltd. (“Guangzhou Juyi”), Hebei Zhongyuan Steel Pipe Manufacturer (“Hebei Zhongyuan”), Hefei Zijin Steel Tube Manufacturing Co., Ltd. (“Hefei Zijin”), Huludao City Steel Pipe Industrial (“Huludao City Steel Pipe”), Hunan Great Steel Pipe Co., Ltd. (“Hunan Great”), Hunan Hengyang Steel Tube (Group) Co., Ltd. (“Hunan Hengyang”), Jiangsu Changbao Steel Tube Co., Ltd. (“Jiangsu Changbao”), Jiangsu Yulong Steel Pipe Co., Ltd. (“Jiangsu Yulong”), Liaoning Northern Steel Pipe Co., Ltd. (“Liaoning Northern”), Shanghai Zhongyou Tipu Steel (“Shanghai Zhongyou Tipu”), Shanghai Zhongyou TIPO Steel Pipe Co., Ltd. (“Shanghai Zhongyou TIPO”), Sichuan YNJ Industries Co., Ltd. (“Sichuan YNJ”), SteelFORCE Far East Ltd. (“SteelFORCE”), Tianjin Baolai International Trade Co., Ltd. (“Tianjin Baolai”), Tianjin Huilitong Steel Tube Co., Ltd. (“Tianjin Huilitong”), Tianjin Longshenghua Import & Export (“Tianjin Longshenghua”), Tianjin Shuangjie Steel Pipe Co., Ltd. (“Tianjin Shuangjie”), Tianjin Uniglory International Trade Co., Ltd. (“Tianjin Uniglory”), Weifang East Steel Pipe Co., Ltd. (“Weifang East”), Wuxi Fastube Industry Co., Ltd. (“Wuxi Fastube”), Zhejiang Kingland Pipeline Industry Co., Ltd. (“Zhejiang Kingland”), and Zhuji Tri-Union Import & Export Co., Ltd. (“Zhuji Tri-Union”). The Department initiated an administrative review of these companies. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 76 FR 53404 (August 26, 2011).

In a letter dated November 22, 2011, Petitioner withdrew its request for review of all of the companies for which it requested review, and requested that the Department rescind the review with respect to these companies. No other parties requested a review.

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the party

who requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Accordingly, Petitioners timely withdrew its requests for review of Adler Steel, Al Jazeera Steel, Baoshan, Benxi Northern, CNOOC Kingland, ETCO, Great River Trading, Guangzhou Juyi, Hebei Zhongyuan, Hefei Zijin, Huludao City Steel Pipe, Hunan Great, Hunan Hengyang, Jiangsu Changbao, Jiangsu Yulong, Liaoning Northern, Shanghai Zhongyou Tipu, Shanghai Zhongyou TIPO, Sichuan YNJ, SteelFORCE, Tianjin Baolai, Tianjin Huilitong, Tianjin Longshenghua, Tianjin Shuangjie, Tianjin Uniglory, Weifang East, Wuxi Fastube, Zhejiang Kingland, and Zhuji Tri-Union. Because no other party requested a review, pursuant to 19 CFR 351.213(d)(1), the Department is rescinding the entire administrative review of the antidumping duty order on CWP from the PRC for the period July 1, 2010, through June 30, 2011.

Assessment

The Department will instruct U.S. Customs and Border Protection (“CBP”) to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary’s presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (“APO”) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written

notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This notice is published in accordance with section 777(i) of the Act, and 19 CFR 351.213(d)(4).

Dated: December 5, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–31688 Filed 12–8–11; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–832]

Pure Magnesium From the People’s Republic of China: Final Results of the 2009–2010 Antidumping Duty Administrative Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 8, 2011, the Department of Commerce (“Department”) published in the **Federal Register** the preliminary results in the 2009–2010 antidumping duty administrative review of pure magnesium from the People’s Republic of China (“PRC”).¹ The period of review (“POR”) is May 1, 2009, through April 30, 2010. We initiated an administrative review of the antidumping duty order on pure magnesium from the PRC with respect to Tianjin Magnesium International Co., Ltd. (“TMI”). We determined that TMI did not make sales in the United States at prices below normal value (“NV”) in the Preliminary Results. We invited interested parties to comment on our Preliminary Results. Based on our analysis of the comments received, we made changes to the margin calculations for TMI. The final dumping margin for this review is listed in the “Final Results Margins” section below.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Eve Wang, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6231.

¹ See *Pure Magnesium from the People’s Republic of China: Preliminary Results of the 2009–2010 Antidumping Duty Administrative Review*, 76 FR 33194 (June 8, 2011) (“*Preliminary Results*”).

Background

On June 8, 2011, the Department published its *Preliminary Results* of the antidumping duty administrative review of pure magnesium from the PRC.²

On June 28, 2011, U.S. Magnesium LLC (“Petitioner”) and TMI submitted publicly available surrogate value (“SV”) data to value TMI’s factors of production (“FOPs”). On July 8, 2011, both Petitioner and TMI submitted rebuttal comments concerning valuation of FOPs.

On June 21, 2011, the Department determined that it would rely on a single surrogate country to value labor, and would use labor data from the International Labour Organization (“ILO”) Yearbook Chapter 6A as its primary data source.³ On July 12, 2011, the Department placed Chapter 6A Indian labor cost data and a new surrogate wage rate on the record for this review.

Pursuant to the bifurcated briefing schedule issued by the Department on June 21, 2011, Petitioner and TMI timely submitted case and rebuttal briefs on multiple issues.

On September 20, 2011, the Department rejected two of Petitioner’s submissions because the Department determined these submissions were untimely filed.⁴ On September 23, 2011, Petitioner requested that the Department reject certain content in TMI’s August 15, 2011 rebuttal brief, claiming that the content was an affirmative argument, rather than a rebuttal to Petitioner’s case brief, and thus untimely. TMI filed a response to Petitioner’s claim on September 26, 2011. On September 27, 2011, the Department declined to reject the information because it determined that TMI’s argument rebuts an argument raised by Petitioner in its case brief in accordance with the Department’s regulations.⁵

On September 16, 2011, the Department extended the deadline for the final results of review to November

² *Id.*

³ See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) (“*Labor Methodologies*”).

⁴ See Memorandum to the File, “Rejection of Certain Untimely Submitted Information from the Record of this 2009–2010 Administrative Review of Pure Magnesium From the People’s Republic of China,” dated September 20, 2011.

⁵ See Memorandum to the File, “Petitioner’s September 23, 2011 Request to Reject Certain Argument in Tianjin Magnesium International’s (“TMI”) August 15, 2011 Rebuttal Brief,” dated September 27, 2011.

21, 2011.⁶ The Department held a public hearing on September 27, 2011.⁷

Following the time period for case and rebuttal briefs, the Department discovered that it inadvertently omitted the underlying data used in making its preliminary determination of the surrogate value for truck freight as well as the financial statements of an Indian company. To remedy this oversight, the Department subsequently placed the data on the record⁸ and afforded interested parties an opportunity to comment on the data.⁹ Subsequently, the Department extended the deadline of the final results to December 5, 2011, to review the submitted comments.¹⁰

Analysis of Comments Received

All issues raised in the case and rebuttal briefs¹¹ filed by parties in this review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, “Pure Magnesium from the People’s Republic of China: Issues and Decision Memorandum for the Final Results of the 2009–2010 Administrative Review,” dated November 21, 2011 (“Issues and Decision Memorandum”), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum follows as an appendix to this notice. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendation in this public memorandum which is on file electronically via Import Administration’s Antidumping and Countervailing Duty Centralized Electronic Services System (“IA

⁶ See *Pure Magnesium from the People’s Republic of China; Extension of Time for the Final Results of the Antidumping Duty Administrative Review*, 76 FR 59111 (September 23, 2011).

⁷ Petitioner requested a hearing for issues raised in the case and rebuttal briefs on July 8, 2011; see Petitioner’s submission, “Pure Magnesium From The People’s Republic of China: Petitioner’s Request For A Hearing,” dated July 8, 2011.

⁸ See Memorandum to the File, “The 2006–2007 Financial Statements for Madras Aluminum Company (“MALCO”) and Infobanc Truck Freight Rate Data,” dated October 4, 2011.

⁹ See Memorandum to the File, “Soliciting Comments on the 2006–2007 Financial Statements for Madras Aluminum Company (“MALCO”) and Infobanc Truck Freight Rate Data,” dated November 1, 2011.

¹⁰ See *Pure Magnesium From the People’s Republic of China: Second Extension of Time for the Final Results of the Antidumping Duty Administrative Review*, 76 FR 70709 (November 15, 2011).

¹¹ Including comments timely filed in response to the Department’s release of certain information on October 4, 2011 and November 1, 2011.

ACCESS”). Access to IA ACCESS is available in the Central Records Unit (“CRU”) of the main Commerce Building, Room 7046. In addition, a complete version of the Issues and Decision Memorandum is accessible on the Web at <http://ia.ita.doc.gov/frn>. The paper copy and electronic versions of the Issues and Decision Memorandum are identical in content.

Period of Review

The POR is May 1, 2009, through April 30, 2010.

Scope of the Order

Merchandise covered by the order is pure magnesium regardless of chemistry, form or size, unless expressly excluded from the scope of the order. Pure magnesium is a metal or alloy containing by weight primarily the element magnesium and produced by decomposing raw materials into magnesium metal. Pure primary magnesium is used primarily as a chemical in the aluminum alloying, desulfurization, and chemical reduction industries. In addition, pure magnesium is used as an input in producing magnesium alloy. Pure magnesium encompasses products (including, but not limited to, butt ends, stubs, crowns and crystals) with the following primary magnesium contents:

- (1) Products that contain at least 99.95% primary magnesium, by weight (generally referred to as “ultra pure” magnesium);
- (2) Products that contain less than 99.95% but not less than 99.8% primary magnesium, by weight (generally referred to as “pure” magnesium); and
- (3) Products that contain 50% or greater, but less than 99.8% primary magnesium, by weight, and that do not conform to ASTM specifications for alloy magnesium (generally referred to as “off-specification pure” magnesium). “Off-specification pure” magnesium is pure primary magnesium containing magnesium scrap, secondary magnesium, oxidized magnesium or impurities (whether or not intentionally added) that cause the primary magnesium content to fall below 99.8% by weight. It generally does not contain, individually or in combination, 1.5% or more, by weight, of the following alloying elements: Aluminum, manganese, zinc, silicon, thorium, zirconium and rare earths.

Excluded from the scope of the order are alloy primary magnesium (that meets specifications for alloy magnesium), primary magnesium anodes, granular primary magnesium (including turnings, chips and powder) having a maximum physical dimension

(i.e., length or diameter) of one inch or less, secondary magnesium (which has pure primary magnesium content of less than 50% by weight), and remelted magnesium whose pure primary magnesium content is less than 50% by weight.

Pure magnesium products covered by the order are currently classifiable under Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings 8104.11.00, 8104.19.00, 8104.20.00, 8104.30.00, 8104.90.00, 3824.90.11, 3824.90.19 and 9817.00.90. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Changes Since the Preliminary Results

Based on an analysis of the comments received, the Department has made certain changes in TMI’s margin calculation. For the final results, the Department has made the following changes:

- We based our determination of the surrogate financial ratios on the financial statements of Hindalco Industries Limited rather than Bharat Aluminum Co., Ltd. See Comment 5 of the accompanying Issues and Decision Memorandum.
- Consistent with our current practice, we revised the surrogate value for direct labor, indirect labor and packing labor to account for industry-specific wage rates. See Comment 3 of the accompanying Issues and Decision Memorandum.
- We changed the source of the calculation of the SV for dolomite to GTA data. See Comment 7 of the accompanying Issues and Decision Memorandum.
- We revised our calculation of the SV for the by-product offsets of coal tar and magnesium waste to use the HTS 2706.00.10 and HTS 2620.99, respectively. See Comments 10 and 11 of the accompanying Issues and Decision Memorandum.
- We added three reported U.S. sales expense fields to the margin calculation program: Inland Freight from the Warehouse to the Customer (“INLFPWU”), U.S. Inventory (“INVENTORY”), and Warehouse Handling (“WHHANDLING”), which were inadvertently omitted in the *Preliminary Results*. See Comment 9 of the accompanying Issues and Decision Memorandum.

Final Results Margin

The weighted-average dumping margins for the final results are as follows:

Exporter	Weighted-average margin (percentage)
Tianjin Magnesium International Co. Ltd.	0.00

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and U.S. Customs and Border Protection (“CBP”) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review. Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer (or customer)-specific assessment rate is *de minimis* (i.e., less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer’s) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For TMI, the cash deposit rate will be the rate listed above; (2) for previously investigated or

reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 111.73 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. The deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary’s presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective orders (“APO”) of their responsibility concerning the return or destruction of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

We are issuing and publishing the final results and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 5, 2011.

Christian Marsh,

Acting Assistant Secretary for Import Administration.

Appendix I

- Comment 1: Whether the Department Should Apply Partial Adverse Facts Available to TMI
- Comment 2: Whether the Department Should Continue To Treat the Identity of TMI's Supplier and the Supplier's Business Operation as Business Proprietary Information
- Comment 3: Wage Rate
- Comment 4: Whether the Department Should Treat Retorts as a Direct Material
- Comment 5: Selection of Surrogate Financial Statements and Calculation of Financial Ratios
- Comment 6: Whether the Department Should Grant TMI By-Product Offsets for Magnesium Waste and Cement Clinker
- Comment 7: Valuation of Dolomite
- Comment 8: The Source of the Surrogate Value for Truck Freight
- Comment 9: Ministerial Errors in the Preliminary Results
- Comment 10: The Surrogate Value for Coal Tar
- Comment 11: Valuation of Magnesium Waste
- Comment 12: The Per-Unit Basis for Steel Bands
- Comment 13: Valuation of Flux

[FR Doc. 2011-31681 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-P-P

DEPARTMENT OF COMMERCE

International Trade Administration

[C-533-825]

Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On August 1, 2011, the Department of Commerce (the Department) issued the preliminary results of the administrative review of polyethylene terephthalate film, sheet and strip (PET Film) from India for Ester Industries Ltd. (Ester), covering the period of review (POR) from January 1, 2009, through December 31, 2009. Based on the results of our analysis of the comments received, we continue to find that subject merchandise produced and exported by Ester has benefitted from countervailable subsidies provided on the production and export of PET Film

from India. Also, based on our analysis of Ester's comments, we made certain revisions to the calculations of certain subsidy programs. The final subsidy rate for Ester is listed below in the section titled "Final Results of Administrative Review." The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties at the final subsidy rate.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Elfi Blum or Toni Page, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-0197 or (202) 482-1398.

SUPPLEMENTARY INFORMATION:

Background

Since the issuance of *Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results of Countervailing Duty Administrative Review*, 76 FR 47558 (August 5, 2011) (*Preliminary Results*), the following events have occurred. Ester filed its response to the Department's third supplemental questionnaire on September 8, 2011. On September 21, 2011, the Department issued a memorandum confirming a revised briefing schedule. See Memorandum To Interested Parties From Toni Page, International Trade Analyst, AD/CVD Operations, Office 6, Administrative Review of the Countervailing Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from India; Revised Briefing Schedule (September 21, 2011). Ester and the petitioners, DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc., timely filed case briefs on September 28, 2011. Both Ester and the petitioners timely filed their respective rebuttal briefs on October 3, 2011.

Scope of the Order

The products covered by the order are all gauges of raw, pretreated, or primed polyethylene terephthalate film, sheet and strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Imports of PET Film are classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for

convenience and customs purposes. The written description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in the case briefs and rebuttal briefs by parties to this administrative review are addressed in the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India (December 5, 2011) (Issues and Decision Memorandum), which is hereby adopted by this notice. The Issues and Decision Memorandum also contains a complete analysis of the programs covered by this review and the methodologies used to calculate the subsidy rates and discusses any changes to the subsidy rates from the Preliminary Results. A list of the comments raised in the briefs and addressed in the Issues and Decision Memorandum is appended to this notice. The Issues and Decision Memorandum is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at <http://www.trade.gov/ia/>. The signed and the electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments and information received, we have revised the calculations with respect to the benefit amount calculated for the Pre- and Post-Shipment Export Financing and Export Promotion Capital Goods Scheme programs. In addition, based on our analysis of information Ester provided in its third supplemental questionnaire response, we have made changes to the sales denominators for calculating the *ad valorem* rates for the programs used by Ester. These changes are discussed in more detail in the Issues and Decision Memorandum.

Final Results of Administrative Review

In accordance with section 777A(e)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(b)(5), we

calculated an individual *ad valorem* subsidy rate for Ester, for the POR for this administrative review.

Manufacturer/exporter	Subsidy rate (percent)
Ester Industries Ltd.	11.81

Disclosure

The Department will disclose to parties the calculations performed in connection with these final results within five days of the date of public announcement. See 19 CFR 351.224(b).

Assessment and Cash Deposit Instructions

The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review to liquidate shipments of subject merchandise produced and exported by Ester and entered, or withdrawn from warehouse, for consumption on or after January 1, 2009, through December 31, 2009 at 11.81 percent *ad valorem* of the entered value.

The Department intends to also instruct CBP to collect cash deposits of the estimated countervailing duties at the rate of 11.81 percent *ad valorem* of the entered value on shipments of the subject merchandise produced and exported by Ester, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. These cash deposit requirements, when imposed, shall remain in effect until further notice. The cash deposit rates for all companies not covered by this review are not changed by the results of this administrative review.

Return or Destruction of Proprietary Information

This notice serves as a reminder to parties subject to the administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under the APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 5, 2011.

Christian Marsh,
Acting Assistant Secretary for Import Administration.

Appendix I

List of Issues Addressed in the Issues and Decision Memorandum

- Comment 1: Respondent's Sales Figures.
Comment 2: Calculation of Respondent's DEPS Benefit.
Comment 3: Calculation of Respondent's EPCGS Benefit.
Comment 4: Calculation of Respondent's Pre- and Post-Export Financing Benefit.
Comment 5: The State of Uttar Pradesh Sales Tax Incentive Program.

[FR Doc. 2011-31691 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[File No. 14534]

RIN 0648-XR52

Marine Mammals

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

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that NOAA's Office of Science and Technology, Silver Spring, MD, (Brandon Southall, Ph.D.—Principal Investigator) has applied for an amendment to Scientific Research Permit No. 14534-01.

DATES: Written, telefaxed, or email comments must be received on or before January 9, 2012.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 14534 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213; phone (562) 980-4001; fax (562) 980-4018.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to NMFS.Pr1Comments@noaa.gov. Please include File No. 14534 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Carrie Hubard, (301) 427-8401.

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 14534 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222-226).

Permit No. 14534, issued on July 2, 2010 (75 FR 39665), authorizes the permit holder to harass marine mammals during studies of sound production, diving, responses to sound, and other behavior. The research is focused in the waters within the U.S. Navy's Southern California Range Complex, and primarily near the vicinity of San Clemente Island. The experimental design involves temporarily attaching individual recording tags to measure vocalization, behavior, and physiological parameters as well as sound exposure. Behavior is measured before, during, and after carefully controlled exposures of sound in conventional playback experiments. Target species include beaked whales and other odontocetes, key baleen whales, and pinniped species for which such data have not been previously obtained; other marine species may be incidentally impacted. Please refer to the tables in the issued permit for the numbers of marine mammals covered, by species and stock. The permit is valid through July 31, 2015.

A minor amendment, Permit No. 14534-01, was issued August 30, 2010, to combine the permitted takes of 60 long-beaked common dolphins (*Delphinus capensis*) and 3,540 short-beaked common dolphins (*D. delphis*) into a single "unidentified common dolphin" category for harassment

incidental to the playbacks because these species can co-occur and are difficult to distinguish from each other in the field and at the distances at which they are counted. The minor amendment did not change the expiration date.

The permit holder is requesting the permit be amended to include harassment takes of an additional 172 humpback whales (*Megaptera novaengliae*), 172 minke whales (*Balaenoptera acutorostrata*), and 902 killer whales (*Orcinus orca*). These three species are currently only taken incidental to activities directed at target species. The amendment would convert them to additional focal species subject to tagging and intentional exposure to sound playbacks with associated observations.

A draft environmental assessment (EA) has been prepared in compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit. The draft EA is available for review and comment simultaneous with the scientific research permit application.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 2, 2011.

Tammy C. Adams,

Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011-31564 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XA848

Endangered Species; File No. 16134

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Virginia Aquarium and Marine Science Center Foundation [Responsible Party: Mark Swingle], 717 General Booth Blvd. Virginia Beach, VA 23451, has applied in due form for a permit to take green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill

(*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), and loggerhead (*Caretta caretta*) sea turtles for purposes of scientific research.

DATES: Written, telefaxed, or email comments must be received on or before January 9, 2012.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 16134 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division,
Office of Protected Resources, NMFS,
1315 East-West Highway, Room
13705, Silver Spring, MD 20910;
phone (301) 427-8401; fax (301) 713-0376;

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281-9328; fax (978) 281-9394; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824-5312; fax (727) 824-5309.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division.

- By email to NMFS.Pr1Comments@noaa.gov (include the File No. in the subject line of the email),

- By facsimile to (301) 713-0376, or
- At the address listed above.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Kristy Beard or Amy Hapeman, (301) 427-8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

The applicant requests a five-year permit to conduct research on leatherback, loggerhead, green, hawksbill, and Kemp's ridley sea turtles in mid-Atlantic waters from North Carolina to New Jersey. The purposes of the research are to: (1) Update current

knowledge of loggerhead and Kemp's ridley sea turtle abundance, distribution, health, and nutrition in Chesapeake Bay and nearshore Virginia waters, (2) compare the relative abundance, size distribution, sex ratio, health parameters and genetic diversity of loggerhead and Kemp's ridley sea turtles in U.S. mid-Atlantic coastal waters, and (3) build baseline data on less common sea turtle species in the region. Researchers would directly capture turtles using tangle nets, trawl, or hand/dip net. Subject turtles would also be acquired from other legal sources: Virginia pound net fisheries and dredge mitigating trawls. The following procedures would be conducted on sea turtles: Epibiota removal, satellite tag, temporarily mark the carapace, attach flipper and passive integrated transponder tags, measure, photograph, oral swab, weigh, and sample blood, feces, keratin, and tissue. Sea turtles would then be released. A subset of animals would be transported back to the laboratory for laparoscopy, ultrasound, imaging, and muscle, lesion, and fat biopsy. Up to two sea turtles of any species could be lethally taken annually during trawling.

Dated: December 5, 2011.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011-31671 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XA861

Marine Mammals; File No. 16473

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that D. Ann Pabst, Ph.D., University of North Carolina Wilmington, has applied in due form for a permit to conduct research on marine mammals.

DATES: Written, telefaxed, or email comments must be received on or before January 9, 2012.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species (APPS) home page, <http://>

apps.nmfs.noaa.gov, and then selecting File No. 16473 from the list of available applications.

These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division,
Office of Protected Resources, NMFS,
1315 East-West Highway, Room
13705, Silver Spring, MD 20910;
phone (301) 427-8401; fax (301) 713-
0376;

Northeast Region, NMFS, 55 Great
Republic Drive, Gloucester, MA
01930; phone (978) 281-9328; fax
(978) 281-9394; and

Southeast Region, NMFS, 263 13th
Avenue South, Saint Petersburg, FL
33701; phone (727) 824-5312; fax
(727) 824-5309.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to *NMFS.PrComments@noaa.gov*. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT:
Kristy Beard or Carrie Hubbard, (301)
427-8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222-226).

The permit would be valid for five years from the date of issuance and would authorize level B harassment of marine mammals, including five species listed as endangered. Proposed research would take place throughout the year, from Delaware Bay to Cape Canaveral, Florida out to 120 nm offshore. The primary research objectives are: (1) To document the presence of North Atlantic right and humpback whales in the mid-Atlantic and (2) To describe the distribution and abundance of all cetaceans within specific geographic regions that are currently used for U.S. Navy training activities or may be in the

future. Research activities include aerial and vessel surveys to conduct counts, photo-identification, and behavioral observations. Up to 200 humpback (*Megaptera novaeangliae*), 100 fin (*Balaenoptera physalus*), 150 sperm (*Physeter macrocephalus*), 200 North Atlantic right whales (*Eubalaena glacialis*), 40 sei (*B. borealis*), 100 minke (*B. acutorostrata*), 100 dwarf and pygmy sperm (*Kogia spp.*), 100 unidentified beaked, 50 killer (*Orcinus orca*), 5,000 pilot (*Globicephala spp.*), 100 false killer (*Pseudorca crassidens*), 100 pygmy killer (*Feresa attenuata*), and 100 melon-headed (*Peponocephala electra*) whales, 8,000 bottlenose (*Tursiops truncatus*), 5,000 Atlantic spotted (*Stenella frontalis*), 2,500 Risso's (*Grampus griseus*), 100 Fraser's (*Lagenodelphis hosei*), 1,000 rough-toothed (*Steno bredanensis*), 100 pantropical spotted (*S. attenuata*), 500 striped (*S. coeruleoalba*), 250 clymene (*S. clymene*), 100 spinner (*S. longirostris*), and 1,000 short-beaked common dolphins (*Delphinus delphis*), and 100 harbor porpoise (*Phocoena phocoena*) would be taken annually.

A draft environmental assessment (EA) has been prepared in compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit. The draft EA is available for review and comment simultaneous with the scientific research permit application.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 6, 2011.

P. Michael Payne,

Chief, Permits and Conservation Division,
Office of Protected Resources, National
Marine Fisheries Service.

[FR Doc. 2011-31669 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) 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: United States Patent and Trademark Office (USPTO).

Title: Patent Prosecution Highway (PPH) Program.

Form Number(s): PTO/SB/20AT/AU/BR/CA/CN/DE/DK, PTO/SB/20EP/ES/FI/HU/IL/IS/JP/KR/MX/NO/RU/SG/TW/UK, and PTO/SB/20PCT-AT/PCT-AU/PCT-CA/PCT-CN/PCT-EP/PCT-ES/PCT-FI/PCT-JP/PCT-KR/PCT-NPI/PCT-RU/PCT-SE/PCT-US.

Agency Approval Number: 0651-0058.

Type of Request: Revision of a currently approved collection.

Burden: 7,800 hours annually.

Number of Respondents: 3,900 responses per year.

Avg. Hours per Response: The USPTO estimates that it will take the public approximately two hours to gather the necessary information, prepare the appropriate form, and submit a completed request to the USPTO.

Needs and Uses: Patent Prosecution Highway (PPH) pilot programs have been established between the USPTO and the intellectual property offices of several other countries. Some of the pilot programs, such as those with Japan, Canada, and South Korea, have become permanent.

The PPH program allows applicants whose claims are determined to be patentable in the office of first filing to have the corresponding application that is filed in the office of second filing be advanced out of turn for examination. At the same time, the PPH program allows the office of second filing to exploit the search and examination results of the office of first filing, which increases examination efficiency and improves patent quality. The PCT-PPH pilot program is an expansion to the PPH program based on the framework of the Patent Cooperation Treaty (PCT). Information collected for the PCT is approved under OMB control number 0651-0021.

This information collection is necessary so that patent applicants may participate in the PPH or PCT-PPH programs between the USPTO and other patent offices in order to receive the benefits of more efficient examination. The forms in this collection allow participants to file a request in a corresponding U.S. application and petition to make the U.S. application special under the PPH or PCT-PPH program.

The USPTO is proposing to add two forms to this collection (PTO/SB/20NO and PTO/SB/20IS) for new participants in the PPH pilot program. The USPTO launched the PPH pilot program with

the Norwegian Industrial Property Office (NIPO) on November 1, 2011, and the Icelandic Patent Office (IPO) on December 1, 2011.

Affected Public: Individuals or households; businesses or other for-profits; and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Nicholas A. Fraser, email: Nicholas_A_Fraser@omb.eop.gov.

Once submitted, the request will be publicly available in electronic format through the Information Collection Review page at www.reginfo.gov.

Paper copies can be obtained by:

- **Email:** InformationCollection@uspto.gov. Include "0651-0058 copy request" in the subject line of the message.

- **Mail:** Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313-1450.

Written comments and recommendations for the proposed information collection should be sent on or before January 9, 2012 to Nicholas A. Fraser, OMB Desk Officer, via email to Nicholas_A_Fraser@omb.eop.gov, or by fax to (202) 395-5167, marked to the attention of Nicholas A. Fraser.

Dated: December 5, 2011.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2011-31569 Filed 12-8-11; 8:45 am]

BILLING CODE 3510-16-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds products and a service to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Effective Date: January 9, 2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202-3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703)

603-7740, Fax: (703) 603-0655, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Additions

On 9/23/2011 (76 FR 59117-59118); 9/30/2011 (76 FR 60810); and 10/7/2011 (76 FR 62391-62393), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and service and impact of the additions on the current or most recent contractors, the Committee has determined that the products and service listed below are suitable for procurement by the Federal Government under 41 USC Chapter 85 and 41 CFR 51-2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and service to the Government.
2. The action will result in authorizing small entities to furnish the products and service to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 USC Chapter 85) in connection with the products and service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and service are added to the Procurement List:

End of Certification

Accordingly, the following products and service are added to the Procurement List:

Products:

NSN: M.R. 829—Meat Hammer, Tenderizing.
NPA: Cincinnati Association for the Blind, Cincinnati, OH.

Contracting Activity: Military Resale-Defense Commissary Agency (DeCA), Fort Lee, VA.

Coverage: C-List for the requirements of military commissaries and exchanges as aggregated by the Defense Commissary Agency.

NSN: M.R. 1018—Scrubber, Non Scratch, Tub and Shower.

NPA: Industries for the Blind, Inc., West Allis, WI.

Contracting Activity: Military Resale-Defense Commissary Agency (DeCA), Fort Lee, VA.

Coverage: C-List for the requirements of

military commissaries and exchanges as aggregated by the Defense Commissary Agency.

NSN: 1670-01-578-6776—Deployment Bag, Parachute, 24 Feet (T-10).

NSN: 1670-01-578-6771—Deployment Bag, Parachute, 35 Feet (T-10R).

NPA: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC.

Contracting Activity: Defense Logistics Agency Aviation, Richmond, VA.

Coverage: C-List for 100% of the requirement of the Department of Defense, as aggregated by the Defense Logistics Agency Aviation, Richmond, VA.

NSN: 8455-01-591-5248—Lapel Pin, Navy Retired, Dual Flag.

NPA: Industries for the Blind, Inc., West Allis, WI.

Contracting Activity: Defense Logistics Agency Troop Support, Philadelphia, PA.

Coverage: C-List for 100% of the requirement of the Department of the Navy, as aggregated by the Defense Logistics Agency Troop Support, Philadelphia, PA.

Service:

Service Type/Location: Custodial Service, Whiteman AFB, MO.

NPA: Portco, Inc., Portsmouth, VA

Contracting Activity: Dept of the Air Force, FA4625 509 CONS CC, Whitman AFB, MO.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2011-31615 Filed 12-8-11; 8:45 am]

BILLING CODE 6353-01-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Addition to the Procurement List.

SUMMARY: The Committee is proposing to add a service to the Procurement List that will be provided by a nonprofit agency employing persons who are blind or have other severe disabilities.

Comments Must Be Received On or Before: 1/9/2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202-3259.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Barry S. Lineback, Telephone: (703) 603-7740, Fax: (703) 603-0655, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 USC

8503(a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Addition

If the Committee approves the proposed addition, the entities of the Federal Government identified in this notice will be required to provide the service listed below from the nonprofit agency employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organization that will provide the service to the Government.
2. If approved, the action will result in authorizing small entities to provide the service to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. Chapter 85) in connection with the service proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following service is proposed for addition to the Procurement List for provision by the nonprofit agency listed:

Service

Service Type/Location: Furnishings Management, McConnell Air Force Base, KS.

NPA: Training, Rehabilitation & Development Institute, San Antonio, TX.

Contracting Activity: 22d Contracting Squadron, McConnell Air Force Base, KS.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2011-31616 Filed 12-8-11; 8:45 am]

BILLING CODE 6353-01-P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments [if any].

DATES: Comments must be submitted on or before January 9, 2012.

FOR FURTHER INFORMATION OR A COPY

CONTACT: Gary Martinaitis, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, (202) 418-5209; FAX: (202) 418-5527; email: gmartinaitis@cftc.gov and refer to OMB Control No. 3038-0015.

SUPPLEMENTARY INFORMATION:

Title: Copies of Crop and Market Information Reports (OMB Control No. 3038-0015). This is a request for extension of a currently approved information collection.

Abstract: Copies of Crop and Market Information Reports, OMB Control No. 3038-0015—Extension.

The information collected pursuant to this rule, 17 CFR 1.40, is in the public interest and is necessary for market surveillance. These rules are promulgated pursuant to the Commission's rulemaking authority contained in Sections 4a(a), 4i, and 8a(5) of the Commodity Exchange Act, 7 U.S.C. 6a(1), 6i, and 12a(5). 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 CFTC's regulations were published on December 30, 1981. See 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on September 6, 2011 (76 FR 55055).

Burden statement: The respondent burden for this collection is estimated to average .17 hours per response.

Respondents/Affected Entities: 15.

Estimated number of responses: 15.

Estimated total annual burden on respondents: 2.5 hours.

Frequency of collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038-0015 in any correspondence.

Gary Martinaitis, Division of Market Oversight, Commodity Futures

Trading Commission, 1155 21st Street NW., Washington, DC 20581; and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: December 5, 2011.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2011-31650 Filed 12-8-11; 8:45 a.m.]

BILLING CODE :P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, December 14, 2011; 10 a.m.–11 a.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

MATTER TO BE CONSIDERED:

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters. For a recorded message containing the latest agenda information, call (301) 504-7948.

CONTACT PERSON FOR MORE INFORMATION:

Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: December 6, 2011.

Todd A Stevenson,

Secretary.

[FR Doc. 2011-31709 Filed 12-7-11; 11:15 am]

BILLING CODE 6355-01-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD-2011-OS-0139]

Submission for OMB Review; Comment Request

Correction

In notice document 2011-31229 appearing on page 76149 in the issue of December 6, 2011, make the following correction:

On page 76149, in the first column, in the **DATES** section, in the second line, “[insert 15 days from publication in the **Federal Register]**”, should read “December 21, 2011”.

[FR Doc. C1-2011-31229 Filed 12-8-11; 8:45 am]

BILLING CODE 1505-01-D

DEPARTMENT OF DEFENSE**Office of the Secretary****Notice of Amendment No. 004 to the Solicitation for Cooperative Agreement Applications (SCAA) Issued on July 7, 2010**

AGENCY: Defense Logistics Agency, Department of Defense (DoD).

ACTION: Amended solicitation for cost sharing cooperative agreement applications.

SUMMARY: The Defense Logistics Agency (DLA) executes the Department of Defense (DoD) Procurement Technical Assistance Program by awarding cost sharing cooperative agreements to assist states, local governments, private nonprofit organizations, tribal organizations and economic enterprises in establishing or maintaining procurement technical assistance centers (PTACs) pursuant to Chapter 142 of title 10, United States Code.

The Solicitation for Cooperative Agreement Applications (SCAA) issued July 7, 2010 is amended to allow acceptance of applications for new programs in fiscal year (FY) 2012. For FY 2012, new applications will only be considered from entities proposing to provide service to an area that will not be covered by an existing program. Applications proposing to duplicate any portion of the service area of an existing program will neither be accepted nor considered.

Amendment No. 004 is not applicable to existing programs that have already received a base period award in FY 2011 under the amended solicitation.

As of the issue date of Amendment No. 004, significant areas not covered or expected to become uncovered in FY 2012 include, but may not be limited to, the States of Washington, North Dakota and Rhode Island, and Washington DC. There are also uncovered regional areas (*i.e.*, counties), but those areas have not been listed. Any entity contemplating submitting an application under this amendment, including those that propose to service an area identified, must first submit the inquiry discussed in Amendment No. 004 to ascertain if the proposed area is covered.

Funding of new programs for FY 2012 is contingent on the availability of funds. In addition, awards may not be made to all acceptable applicants. Award decisions will optimize the use of program funds while at the same time maximizing the availability of procurement technical assistance. DLA will make funding decisions on a case-by-case basis and in the best interest of the overall program. An award decision for any application submitted pursuant to this amendment will be made prior to October 1, 2012.

The SCAA issued on July 7, 2010 and Amendment Nos. 001–004 are available at <http://www.dla.mil/SmallBusiness/Pages/SCAA.aspx>. Additional details regarding this opportunity are provided in Amendment No. 004. Printed copies are not available for distribution. Applications must be submitted to DLA by 5 p.m., Eastern Standard Time, on January 31, 2012. Notwithstanding any other provision in the SCAA or in previous Amendments, late applications will be neither accepted nor evaluated.

FOR FURTHER INFORMATION CONTACT: DLA Office of Small Business Programs at PTAP@DLA.MIL.

Dated: December 5, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2011–31591 Filed 12–8–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE**Office of the Secretary**

[Transmittal Nos. 10–56]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 10–56 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 5, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P



DEFENSE SECURITY COOPERATION AGENCY
 201 12TH STREET SOUTH, STE 203
 ARLINGTON, VA 22202-5408

NOV 29 2011

The Honorable John A. Boehner
 Speaker of the House
 U.S. House of Representatives
 Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 10-56, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to the United Arab Emirates for major defense equipment estimated to cost \$304 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard A. Genaille, Jr.
Deputy Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)



BILLING CODE 5001-06-C

Transmittal No. 10-56

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* United Arab Emirates

(ii) *Total Estimated Value:*

Major Defense Equipment*	\$259 million.
Other	\$ 45 million.

Total \$304 million.

* As defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* 4900 JDAM kits which includes 304 GBU-54 Laser JDAM kits with 304 DSU-40 Laser Sensors, 3000 GBU-38(V)1 JDAM kits, 1000 GBU-31(V)1 JDAM kits, 600 GBU-31(V)3 JDAM kits, 3300 BLU-111 500lb General Purpose Bombs, 1000 BLU-117 2000lb General Purpose Bombs, 600 BLU-109 2000lb Hard Target Penetrator Bombs, and four BDU-50C inert bombs, fuzes, weapons integration, munitions trainers, personnel training and training

equipment, spare and repair parts, support equipment, U.S. government and contractor engineering, logistics, and technical support, and other related elements of program support.

(iv) *Military Department:* Air Force (YAC Amd #3).

(v) *Prior Related Cases, if any:*
 FMS case YAB-\$156M-31Aug02.
 FMS case YAC-\$699M-04Mar08.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or*

Defense Services Proposed to be Sold:
See Annex attached.

(viii) *Date Report Delivered to Congress:* 29 November 2011.

Policy Justification

United Arab Emirates—Joint Direct Attack Munitions

The Government of the United Arab Emirates (UAE) has requested a possible sale of 4900 JDAM kits which includes 304 GBU-54 Laser JDAM kits with 304 DSU-40 Laser Sensors, 3000 GBU-38(V)1 JDAM kits, 1000 GBU-31(V)1 JDAM kits, 600 GBU-31(V)3 JDAM kits, 3300 BLU-111 500lb General Purpose Bombs, 1000 BLU-117 2000lb General Purpose Bombs, 600 BLU-109 2000lb Hard Target Penetrator Bombs, and four BDU-50C inert bombs, fuzes, weapons integration, munitions trainers, personnel training and training equipment, spare and repair parts, support equipment, U.S. government and contractor engineering, logistics, and technical support, and other related elements of program support. The estimated cost is \$304 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a key partner that has been, and continues to be, an important force for political stability and economic progress in the Middle East. The UAE Government continues vital host-nation support of U.S. forces stationed at Al Dhafra Air Base, plays an important role in supporting U.S. regional interests, and has proven to be a valued partner in overseas operations.

The proposed sale will improve the UAE's capability to meet current and future regional threats. The UAE Air Force and Air Defense (AF&AD) continue to operate the F-16 Block 60 aircraft. These additional munitions will ensure operational capability and will help the UAE AF&AD become one of the most capable air forces in the region, thereby serving U.S. interests by deterring regional aggression. These munitions will be used to complement the normal war-readiness reserve stockpile of munitions and provide munitions for routine training requirements. The UAE will have no difficulty absorbing these munitions into its air force.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be The Boeing Company in Chicago, Illinois, and McAlester Army Ammunition Plant in McAlester, Oklahoma. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of additional U.S. Government or contractor representatives to the UAE. The number of U.S. Government and contractor representatives required to support the program will be determined in joint negotiations as the program proceeds through the development, production and equipment installation phases.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 10-56

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The GBU-54 is a 500lb JDAM variant that includes a DSU-40 Laser Sensor. The GBU-54 uses global position system aided inertial navigation and/or laser detection to guide to threat targets. The Laser sensor enhances standard JDAM's reactive target capability by allowing rapid prosecution of fixed targets with large initial target location errors (TLE). The DSU-40 Laser sensor also provides the capability to engage some mobile targets. The DSU-40 Laser sensor is attached to a MK-82 or BLU-111 bomb body in the forward fuze well. The addition of the DSU-40 Laser sensor combined with additional cabling and mounting hardware turns a standard GBU-38 JDAM into a GBU-54 Laser JDAM. Information that might reveal target designation tactics and associated aircraft maneuvers, the probability of destroying specific/peculiar targets, vulnerabilities regarding countermeasures and the electromagnetic environment is classified Secret.

2. The Joint Direct Attack Munition is actually a guidance kit that converts existing unguided free-fall bombs into precision-guided "smart" munitions. By adding a new tail section containing an Inertial Navigation System (INS) guidance/Global Positioning System (GPS) guidance to unguided bombs, the cost effective JDAM provides highly accurate weapon delivery in any "flyable" weather. The INS, using updates from the GPS, helps guide the bomb to the target via the use of movable tail fins.

3. Weapon accuracy is dependent on target coordinates and present position as entered into the guidance control unit. After weapon release, movable tail fins guide the weapon to the target coordinates. In addition to the tail kit,

other elements in the overall system that are essential for successful employment include:

Access to accurate target coordinates. INS/GPS capability.

Operational Test and Evaluation Plan.

4. If a technologically advanced adversary were to obtain knowledge of the specific hardware in the proposed sale, the information could be used to develop countermeasures which might reduce weapons system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011-31566 Filed 12-8-11; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD-2011-OS-0142]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Notice to amend a system of records.

SUMMARY: The Office of the Secretary of Defense is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 9, 2012 unless comments are received that would 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, East Tower, 2nd floor, 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: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon,

Washington, DC 20301-1155, or by phone at (571) 372-0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records 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 specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are 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: December 5, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DWHS P49

SYSTEM NAME:

Reasonable Accommodation Program Records (June 15, 2010, 75 FR 33789).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Human Resources Directorate, Labor and Management Employee Relations Division, 4800 Mark Center Drive, Suite 03D08, Alexandria, VA 20350-3200."

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Assistant Director, Labor and Management Employee Relations Division, Human Resources Directorate, Washington Headquarters Services, 4800 Mark Center Drive, Suite 03D08, Alexandria, VA 20350-3200."

NOTIFICATION PROCEDURE:

Delete entry and replace with "Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to Assistant Director, Labor and Management Employee Relations Division, Human Resources Directorate, Washington Headquarters Services, 4800 Mark Center Drive, Suite 03D08, Alexandria, VA 20350-3200.

Requests must contain individuals name and address."

* * * * *

DWHS P49

SYSTEM NAME:

Reasonable Accommodation Program Records.

SYSTEM LOCATION:

Human Resources Directorate, Labor and Management Employee Relations Division, 4800 Mark Center Drive, Suite 03D08, Alexandria, VA 20350-3200.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees of, and applicants for employment with, Washington Headquarters Services/Human Resources Directorate serviced components requesting a reasonable accommodation.

CATEGORIES OF RECORDS IN THE SYSTEM:

Employee's name, address and other contact information, disability or medical condition, reasonable accommodation requested, explanation of how a reasonable accommodation would assist the employee in the performance of his/her job, relevant medical documentation and other supporting documents, occupational series and grade, operating division/function, office location and address, office telephone numbers, deciding official's name and title, essential duties of the position, information relating to an individual's capability to satisfactorily perform the duties of the position currently held, estimated cost of accommodation, action by deciding official, and other supporting documents relating to reasonable accommodation.

Applicants name, contact information, disability or medical condition, reasonable accommodation requested, explanation of how a reasonable accommodation would assist the applicant in the application process and/or in the performance of the duties of the position applied for, relevant medical information and other supporting documents, occupational series and grade, operating division/function, office location and address, office telephone numbers, deciding official's name and title, essential duties of the position for which he/she is applying, information relating to an individual's capability to satisfactorily perform the duties of the position applied for, estimated cost of accommodation, action by deciding official, and other supporting documents relating to reasonable accommodation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

29 U.S.C. 791, Employment of Individuals with Disabilities; 42 U.S.C.

chapter 126, Equal Opportunity for Individuals with Disabilities; 29 CFR part 1630, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act; E.O. 13163, Increasing the Opportunities for Individuals with Disabilities to be Employed in the Federal Government; E.O. 13164, Requiring Federal Agencies to Establish Procedures to Facilitate the Provision of Reasonable Accommodation; DoD Directive 1020.1, Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of Defense.

PURPOSE(S):

To document requests for reasonable accommodation(s) (regardless of type of accommodation) and the outcome of such requests for employees of Washington Headquarters Services/Human Resources Directorate serviced components with known physical and mental impairments and applicants for employment with Washington Headquarters Services/Human Resources Directorate serviced components.

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 of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Office of the Secretary of Defense's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper file folders and electronic storage media.

RETRIEVABILITY:

Individual's name.

SAFEGUARDS:

Access is limited to staff members working the reasonable accommodation program, agency legal counsel, and Department of Defense healthcare providers. Case records are maintained in locked file cabinets. Automated records are controlled by limiting physical access to terminals and by the use of computer access cards. Work areas are controlled access requiring key cards. Security guards protect buildings. Staff members complete annual

Information Assurance and Privacy Act training.

RETENTION AND DISPOSAL:

Destroy three years after employee separation from the agency or all appeals are concluded whichever is later.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director, Labor and Management Employee Relations Division, Human Resources Directorate, Washington Headquarters Services, 4800 Mark Center Drive, Suite 03D08, Alexandria, VA 20350-3200.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to Assistant Director, Labor and Management Employee Relations Division, Human Resources Directorate, Washington Headquarters Services, 4800 Mark Center Drive, Suite 03D08, Alexandria, VA 20350-3200.

Requests must contain individuals name and address.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, Office of Freedom of Information; 1155 Defense Pentagon, Washington DC 20301-1155.

Requests must contain the name and number of this System of Records Notice, the individuals name and address and be signed.

CONTESTING RECORD PROCEDURES:

The Office of the Secretary of Defense rules for accessing records, for contesting contents and appealing initial agency determinations are published in Office of the Secretary of Defense Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual, social workers, rehabilitation counselors, and/or health care personnel.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011-31568 Filed 12-8-11; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD-2011-OS-0141]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Notice to Amend a System of Records.

SUMMARY: The Office of the Secretary of Defense is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 9, 2012 unless comments are received that would 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, East Tower, 2nd floor, 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: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington DC 20301-1155, or by phone at (571) 372-0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records 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 specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are 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: December 5, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DWHS P18

SYSTEM NAME:

Office of the Secretary of Defense Identification Badge System (April 8, 2010, 75 FR 17908).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Military Personnel Division, Human Resources Directorate, Washington Headquarters Services, Department of Defense, Room 5E564, 1155 Defense Pentagon, Washington, DC 20301-1155."

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Assistant Director, Military Personnel Division, Human Resources Directorate, Washington Headquarters Services, Department of Defense, Room 5E564, 1155 Defense Pentagon, Washington, DC 20301-1155."

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Individuals seeking access to information about themselves contained in this system should address written inquiries to Military Personnel Division, Human Resources Directorate, Washington Headquarters Services, Department of Defense, 1155 Defense Pentagon, Washington, DC 20301-1155.

Request must include the name and number of this system of records notice, along with the individual's name, grade, service, Social Security Number (SSN) and be signed."

* * * * *

DWHS P18

SYSTEM NAME:

Office of the Secretary of Defense Identification Badge System.

SYSTEM LOCATION:

Military Personnel Division, Human Resources Directorate, Washington Headquarters Services, Department of Defense, Room 5E564, 1155 Defense Pentagon, Washington, DC 20301-1155.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All permanent military personnel assigned to the Office of the Secretary of Defense.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), rank, service, date assigned and the Office of the Secretary of Defense component to which assigned.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 1125, Recognition for Accomplishment: Awards & Trophies; Recognition for accomplishments: Awards of trophies, DoD 1348.33-M, Manual of Military Decorations and Awards and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To be used by officials of the Military Personnel Division, Human Resources Directorate, Washington Headquarters Services to temporarily issue the badge at arrival and determine who is authorized permanent award after a one-year period and then prepare the certificate to recognize this event.

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 of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of Office Secretary of Defense's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

Paper and/or electronic storage media.

RETRIEVABILITY:

Information is retrieved by last name of recipient, Social Security Number (SSN), grade, and/or service.

SAFEGUARDS:

Accesses are authorized by system manager, granted by Information Technology Management Directorate to a secure computer application database and are Common Access Card enabled. Users receive annual Privacy Act and information assurance training, and only those individuals with an official "need to know" are provided access. Back-up data is stored in a locked room.

RETENTION AND DISPOSAL:

Records are retired to Washington National Records Center 3 years after cutoff. Destroy when 15 years old.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director, Military Personnel Division, Human Resources Directorate,

Washington Headquarters Services, Department of Defense, Room 5E564, 1155 Defense Pentagon, Washington, DC 20301-1155.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to Military Personnel Division, Human Resources Directorate, Washington Headquarters Services, Department of Defense, 1155 Defense Pentagon, Washington, DC 20301-1155.

Request must include the name and number of this system of records notice, along with the individual's name, grade, service, Social Security Number (SSN) and be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to Military Personnel Division, Human Resources Directorate, Washington Headquarters Services, Department of Defense, 1155 Defense Pentagon, Washington, DC 20301-1155.

Request must include the name and number of this system of records notice, along with the individual's name, grade, service, Social Security Number (SSN) and be signed.

CONTESTING RECORD PROCEDURES:

The Office of the Secretary of Defense rules for accessing records, for contesting contents and appealing initial agency determinations are published in Office of Secretary of Defense Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011-31567 Filed 12-8-11; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Office of the Secretary**

[Docket ID: DOD-2011-OS-0143]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Notice to Alter a System of Records.

SUMMARY: The Office of the Secretary of Defense proposes to alter a system of

records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action would be effective without further notice on January 9, 2012 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, East Tower, 2nd Floor, 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: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301-1155, or by phone at (571) 372-0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records 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 proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 2, 2011, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 5, 2011.

Aaron Siegel,

*Alternate OSD Federal Register Liaison
Officer, Department of Defense.*

DWHS D01

SYSTEM NAME:

DoD National Capital Region Mass Transportation Benefit Program (June 28, 2010, 75 FR 36640).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Washington Headquarters Services, Enterprise Information Technology Services Directorate, Department of Defense, 1155 Defense Pentagon, Washington, DC 20301-1155."

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "Name, last four of Social Security Number (SSN), point-to-point commuting expenses, type of mass transit used, city, state, and ZIP+4 of residence, organizational affiliation of the individual, office work number, DoD email address, duty/work address, Smartrip card number, and usage history from Washington Metropolitan Area Transit Authority (WMATA)."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "5 U.S.C. 7905, Programs to encourage commuting by means other than single-occupancy motor vehicles; 10 U.S.C. 113, Secretary of Defense; DoD Directive 5110.4, Washington Headquarters Services (WHS); DoD Instruction 1000.27, Mass Transportation Benefit Program (MTBP); E.O. 12191, Federal facility ridesharing program; E.O. 13150, Federal Workforce Transportation; and E.O. 9397 (SSN), as amended."

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with "In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of Transportation for purposes of administering the DoD National Capital Region Public Transportation Benefit Program and/or verifying the eligibility of individuals to receive a fare subsidy pursuant to the transportation benefit program operated by the DoD.

To the Washington Metro Area Transit Authority for the purpose of crediting fare subsidies directly to the Smartrip Card of DoD military or civilian employees participating in the SmartBenefit program.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of the Secretary of Defense compilation of systems of records notices apply to this system of records."

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with "Destroy applications of employees no longer in the program, superseded applications, certification logs, vouchers, spreadsheets and other forms used to document the disbursement of subsidies when three (3) years old."

* * * * *

DWHS D01

SYSTEM NAME:

DoD National Capital Region Mass Transportation Benefit Program.

SYSTEM LOCATION:

Washington Headquarters Services, Enterprise Information Technology Services Directorate, Department of Defense, 1155 Defense Pentagon, Washington, DC 20301-1155.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DoD military and civilian personnel assigned to the National Capital Region applying for and/or obtaining a public fare transportation subsidy.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, last four of Social Security Number (SSN), point-to-point commuting expenses, type of mass transit used, city, state, and ZIP+4 of residence, organizational affiliation of the individual, office work number, DoD email address, duty/work address, Smartrip card number, and usage history from Washington Metropolitan Area Transit Authority (WMATA).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 7905, Programs to encourage commuting by means other than single-occupancy motor vehicles; 10 U.S.C. 113, Secretary of Defense; DoD Directive 5110.4, Washington Headquarters Services (WHS); DoD Instruction 1000.27, Mass Transportation Benefit Program (MTBP); E.O. 12191, Federal facility ridesharing program; E.O. 13150, Federal Workforce Transportation; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To manage the DoD National Capital Region Mass Transportation Benefit

Program for DoD military and civilian personnel applying for and in receipt of fare subsidies.

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 of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of Transportation for purposes of administering the DoD National Capital Region Public Transportation Benefit Program and/or verifying the eligibility of individuals to receive a fare subsidy pursuant to the transportation benefit program operated by the DoD.

To the Washington Metro Area Transit Authority for the purpose of crediting fare subsidies directly to the Smartrip Card of DoD military or civilian employees participating in the SmartBenefit program.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Office of the Secretary of Defense compilation of systems of records notices apply to this system of records.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Individual's name and last four of Social Security Number (SSN).

SAFEGUARDS:

Records are stored in a secured area accessible only to authorized personnel. Records are accessed by the custodian of the record system and by persons responsible for using or servicing the system, who are properly screened and have a need-to-know. Computer hardware is located in controlled areas with access limited to authorized personnel.

RETENTION AND DISPOSAL:

Destroy applications of employees no longer in the program, superseded applications, certification logs, vouchers, spreadsheets and other forms used to document the disbursement of subsidies when three (3) years old.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Defense Facilities Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301-1155.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Chief, Defense Facilities Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301-1155.

Written requests for information should contain the full name of the individual and last four of Social Security Number (SSN).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301-1155.

Written requests for information should contain the full name of the individual, last four of Social Security Number (SSN), and include the name and number of this system of record notice and be signed by the individual.

CONTESTING RECORD PROCEDURES:

The Office of the Secretary of Defense rules for accessing records, for contesting contents and appealing initial agency determinations are published in Office of the Secretary of Defense Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Applications for mass transportation benefit program submitted by the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011-31570 Filed 12-8-11; 8:45 am]

BILLING CODE 5001-06-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 February 7, 2012.

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: December 5, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: Extension.

Title of Collection: Paul Douglas Teacher Scholarship Program Performance Report.

OMB Control Number: 1840-0787.

Agency Form Number(s): N/A.

Total Estimated Number of Annual Responses: 30.

Total Estimated Annual Burden Hours: 360.

Abstract: The purpose of this collection is to ensure that state education agencies are monitoring the fulfillment of the scholarship obligations by former Douglas scholars in accordance with legislation and regulations that governed the Paul Douglas Teacher Scholarship Program when the scholarships were granted.

The respondents to this collection are former participating State Education Agencies (SEAs). This performance report is the only vehicle by which Federal program officials may annually monitor, evaluate and ensure the compliance and enforcement of the program statute and regulations by state education agencies, that were shared with the SEAs at the time the scholarships were granted.

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 4762. 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. 2011-31666 Filed 12-8-11; 8:45 am]

BILLING CODE 4000-01-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: ER12-212-000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Supplemental Attachment of Midwest Independent Transmission System Operator, Inc. and American Transmission Company, LLC.

Filed Date: 11/30/2011.

Accession Number: 20111130-5353.

Comment Date: 5 p.m. ET 12/7/11.

Docket Numbers: ER12-495-000.

Applicants: Bangor Hydro Electric Company.

Description: Filing of an Amended Interconnection Agreement to be effective 11/1/2011.

Filed Date: 11/30/11.

Accession Number: 20111130-5236.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-496-000.

Applicants: New England Power Pool Participants Committee, ISO New England Inc.

Description: ISO New England Inc. and New England Power Pool, Filing of Installed Capacity Requirements, Hydro Quebec Interconnection Capability Credits and Related Values for 2012/2013 and 2013/2014 Annual Reconfiguration Auctions.

Filed Date: 11/30/11.

Accession Number: 20111130-5246.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-497-000.

Applicants: Pacific Gas and Electric Company.

Description: Western WDT November 2011 Biannual Filing to be effective 2/1/2012.

Filed Date: 11/30/2011.

Accession Number: 20111130-5245

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-498-000.

Applicants: Pacific Gas and Electric Company.

Description: Western IA November 2011 Biannual Filing to be effective 2/1/2012.

Filed Date: 11/30/11.

Accession Number: 20111130-5257.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-499-000.

Applicants: Southwestern Electric Power Company.

Description: ETEC and NTEC PSA to be effective 12/17/2010.

Filed Date: 11/30/11.

Accession Number: 20111130-5280.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-500-000.

Applicants: Southwestern Electric Power Company.

Description: TexLa ERCOT Restated PSA to be effective 12/17/2010.

Filed Date: 11/30/11.

Accession Number: 20111130-5285.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-501-000.

Applicants: New England Power Pool Participants Committee.

Description: Dec 2011 Membership Filing to be effective 11/1/2011.

Filed Date: 11/30/11.

Accession Number: 20111130-5319.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER12-502-000.

Applicants: California Independent System Operator Corporation

Description: 2011-11-30 CAISO GIP Phase II Amendment to be effective 1/31/2012.

Filed Date: 11/30/11.

Accession Number: 20111130-5325.

Comments Due: 5 p.m. ET 12/21/11.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM12-2-000.

Applicants: Public Service Company of New Mexico.

Description: Application to Terminate PURPA Purchase Obligation for Qualifying Facility of Public Service Company of New Mexico.

Filed Date: 11/30/11.

Accession Number: 20111130-5342.

Comments Due: 5 p.m. ET 12/28/11.

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: December 1, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011-31610 Filed 12-8-11; 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: ER10-1519-001; ER12-192-001.

Applicants: Liberty Electric Power, LLC.

Description: Triennial Clarification Letter of Liberty Electric Power, LLC.

Filed Date: 11/30/11.

Accession Number: 20111130-5359.

Comments Due: 5 p.m. ET 12/21/11.

Docket Numbers: ER11-4517-000.

Applicants: Puget Sound Energy, Inc.
Description: BPA NITSA Refund Report Compliance Filing to be effective N/A.

Filed Date: 12/1/11.

Accession Number: 20111201-5111.

Comments Due: 5 p.m. ET 12/22/11.

Docket Numbers: ER11-4518-000.

Applicants: Puget Sound Energy, Inc.
Description: BPA NOA 527 Refund Report Compliance Filing to be effective N/A.

Filed Date: 12/1/11.

Accession Number: 20111201-5120.

Comments Due: 5 p.m. ET 12/22/11.

Docket Numbers: ER12-327-000.

Applicants: L&L Energy LLC.
Description: Revised Petition to refile to be effective 11/16/2011.

Filed Date: 11/16/11.

Accession Number: 20111116-5003.

Comments Due: 5 p.m. ET 12/8/11.

Docket Numbers: ER12-346-000.

Applicants: Global Energy, LLC.
Description: Revised Petition to refile to be effective 11/10/2011.

Filed Date: 11/10/11.

Accession Number: 20111110-5072.

Comments Due: 5 p.m. ET 12/8/11.

Docket Numbers: ER12-503-000.

Applicants: NV Energy, Inc.
Description: Service Agreement No. 11-00141 NPC-CCWRD Network Integration Transmission Service to be effective 12/1/2011.

Filed Date: 12/1/11.

Accession Number: 20111201-5006.

Comments Due: 5 p.m. ET 12/22/11.

Docket Numbers: ER12-504-000.

Applicants: NorthWestern Corporation.

Description: Compliance Filing to Bring Accepted Reserve Energy Service Tariff into eTariff to be effective 12/1/2011.

Filed Date: 12/1/11.

Accession Number: 20111201-5012.

Comments Due: 5 p.m. ET 12/22/11.

Docket Numbers: ER12-505-000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: Regulation Pilot Program Re-Opener to be effective 2/10/2012.

Filed Date: 12/1/11.

Accession Number: 20111201-5045.

Comments Due: 5 p.m. ET 12/22/11.

Docket Numbers: ER12-506-000.

Applicants: Avista Corporation.
Description: Avista Corp Tariff 12 Revision to be effective 1/1/2012.

Filed Date: 12/1/11.

Accession Number: 20111201-5125.

Comments Due: 5 p.m. ET 12/22/11.

Docket Numbers: ER12-507-000.

Applicants: PacifiCorp.
Description: Amendment to FERC Volume No. 13 to be effective 1/1/2012.

Filed Date: 12/1/11.

Accession Number: 20111201-5152.

Comments Due: 5 p.m. ET 12/22/11.

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: December 1, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011-31611 Filed 12-8-11; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2011-0832; FRL-9328-1]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Chemical Substances Inventory (TSCA Inventory)) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of notices of commencement (NOC) to manufacture those chemicals. This document, which covers the period from September 26, 2011 to October 31, 2011, and provides the required notice and status report, consists of the PMNs and TMEs, both pending or expired, and

the NOC to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before January 9, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2011-0832, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

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

- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001.

- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564-8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: 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 www.regulations.gov or email. The www.regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through www.regulations.gov, your email 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, 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.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Bernice Mudd, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (202) 564-8951; fax number: (202) 564-8955; email address: mudd.bernice@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email 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. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the PMNs addressed in 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. 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 email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Why is EPA taking this action?

EPA classifies a chemical substance as either an “existing” chemical or a “new” chemical. Any chemical substance that is not on EPA’s TSCA Inventory is classified as a “new chemical,” while those that are on the TSCA Inventory are classified as an “existing chemical.” For more information about the TSCA Inventory go to: <http://www.epa.gov/opptintr/newchems/pubs/inventory.htm>. Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a

significant new use rule (SNUR) issued under TSCA section 5(a), for “test marketing” purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: <http://www.epa.gov/opt/newchems>.

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of NOCs to manufacture those chemicals. This status report, which covers the period from September 26, 2011 to October 31, 2011, consists of the PMNs and TMEs, both pending or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Reports

In Table I. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: The EPA case number assigned to the PMN, the date the PMN was received by EPA, the projected end date for EPA’s review of the PMN, the submitting manufacturer/importer, the potential uses identified by the manufacturer/importer in the PMN, and the chemical identity.

TABLE I—50 PMNs RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011

Case No.	Received date	Projected notice end date	Manufacturer/importer	Use	Chemical
P-11-0653	9/26/2011	12/24/2011	CBI	(G) Water and oil repellent.	(G) Perfluoroalkylethyl methacrylate copolymer.
P-11-0654	9/26/2011	12/24/2011	CBI	(G) Epoxy catalyst	(S) Phenol, 2-[[[3-(1h-imidazol-1-yl)propyl]imino]phenylmethyl]-5-(octyloxy)-.
P-11-0655	9/27/2011	12/25/2011	Miwon North America, Inc.	(S) Resins for industrial coating.	(G) Aliphatic epoxy acrylate.
P-11-0656	9/27/2011	12/25/2011	Omnova Solutions Inc ..	(S) Soil release coating for textiles used for non-consumer table linnen.	(S) 2-propenoic acid, 2-methyl-, dodecyl ester, polymer with 2-hydroxyethyl 2-propenoate, .alpha.-(2-methyl-1-oxo-2-propen-1-yl)-.omega.-methoxypoly(oxy-1,2-ethanediyl) and 3-methyl-3-[(2,2,3,3,3-pentafluoropropoxy)methyl]oxetane polymer with tetrahydrofuran mono[2-[(1-oxo-2-propen-1-yl)oxy]ethyl] ether.

TABLE I—50 PMNS RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/importer	Use	Chemical
P-11-0657	9/27/2011	12/25/2011	Omnova Solutions Inc ..	(S) Flow, wetting and leveling agent for commercial photographic film.	(S) Boron, trifluoro(tetrahydrofuran)-, (7-4)-, polymer with 3-methyl-3-[(2,2,3,3,3-pentafluoropropoxy)methyl]oxetane, ether with 2,2-dimethyl-1,3-propanediol (2:1), polymer with .alpha.-hydroxy-.omega.-hydroxypoly(oxy-1,2-ethanediyl) and 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethylcyclohexane.
P-11-0658	9/27/2011	12/25/2011	BASF Corporation	(G) Catalyst ingredient for plastics manufacture.	(G) Alkoxy alkanone fluorene.
P-11-0659	9/28/2011	12/26/2011	CBI	(G) Reactant to produce new chemical.	(G) Alkyl phosphonate.
P-11-0660	9/28/2011	12/26/2011	CBI	(G) Oil field additive	(G) Copolymer containing phosphonic, sulfonic and carboxylic acid groups.
P-11-0661	9/28/2011	12/26/2011	Great Plains Oil & Exploration, LLC.	(S) Feedstock for production of biofuel.	(S) Fats and glyceridic oils, camelina sativa.
P-11-0662	9/30/2011	12/28/2011	CBI	(G) Liquid moisture cure adhesive.	(G) Isocyanate-terminated prepolymer.
P-11-0663	9/30/2011	12/28/2011	CBI	(S) Curing agent for epoxy coating systems.	(G) Amides, from C ₁₈ -unsaturated fatty acids dimers, hydrogenated benzaldehyde -polyethylenepolyamines reaction products and tall-oil fatty acids.
P-12-0001	10/3/2011	12/31/2011	CBI	(G) Sealant additive	(G) Aromatic isocyanate, alkyl phenol-blocked.
P-12-0002	10/6/2011	1/3/2012	CBI	(G) Chemical intermediate.	(G) Polyalkoxylated aromatic amine.
P-12-0003	10/6/2011	1/3/2012	CBI	(G) Polymeric colorant	(G) Chromophore substituted polyoxyalkylene tint.
P-12-0004	10/11/2011	1/8/2012	CBI	(G) Polymeric colorant	(G) Substituted polymeric aromatic amine azo colorant.
P-12-0005	10/11/2011	1/8/2012	Sika Corporation	(G) A dispersant for neutralizing electrical charges and separating particles when grinding cement.	(S) 2-propanol, 1,1',1''-nitrotris-, acetate (1:1).
P-12-0006	10/13/2011	1/10/2012	CBI	(G) Adhesive	(G) Alkyldioic acid, polymer with alkyldiol, aromatic isocyanate and alkyloxirane polymer with oxirane ether with alkyltrio(3:1).
P-12-0007	10/13/2011	1/10/2012	CBI	(G) Adhesive	(G) Alkyldioic acid, polymer with alkyldiol, .alpha.-hydro-.omega.-hydroxypoly[oxy(alkyldiyl)], aromatic isocyanate and alkyloxirane polymer with oxirane ether with alkyltrio(3:1).
P-12-0008	10/13/2011	1/10/2012	CBI	(G) Open non dispersive coating.	(G) Aliphatic polyurethane resin.
P-12-0009	10/12/2011	1/9/2012	CBI	(G) Open, non-dispersive use; ingredient in liquid paint.	(G) Metal complex, copolymer of substituted acrylic acid, substituted methacrylate, substituted acrylate, and ethylene glycol substituted acrylate alkyl ether.
P-12-0010	10/14/2011	1/11/2012	Reichhold, Inc	(S) Carrier resin for paints and coatings.	(G) Amine salt of vegetable oil esters, polymer with alkanedioic acid, hydroxy substituted alkylamine, hydroxy substituted carboxylic acid, alkanediol, isocyanates, hydroxy substituted alkane.
P-12-0011	10/17/2011	1/14/2012	BASF Corporation	(G) Additive	(G) Hydroxy, halogen substituted diaromatic ether.

TABLE I—50 PMNS RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/importer	Use	Chemical
P-12-0012	10/17/2011	1/14/2012	Dow Chemical Company.	(S) Reactant for polyurethane cast elastomers.	(G) Polyester polyol.
P-12-0013	10/17/2011	1/14/2012	CBI	(G) Additive in printing inks.	(G) Crosslinked polyalkyl methacrylate.
P-12-0014	10/18/2011	1/15/2012	Dow Chemical Company.	(S) Reactant for polyurethane cast elastomers.	(G) Blocked toluene diisocyanate prepolymer.
P-12-0015	10/17/2011	1/14/2012	Spectra Colors Corporation.	(G) Dye for washable ink systems.	(G) Substituted aniline, benzenesulfonic acid salt.
P-12-0016	10/18/2011	1/15/2012	Innovative Science Technology.	(S) Plasticizer for polyvinyl chloride resin.	(S) Waste plastics, poly(ethylene terephthalate), depolymerized with by-products from prod. of 2-butoxyethanol, and isotridecanol, ethylene glycol-free fraction.
P-12-0017	10/19/2011	1/16/2012	Sud-Chemie Inc	(G) Raw material in manufacturing.	(S) Phosphoric acid, iron(2+) lithium salt (1:1:1).
P-12-0018	10/20/2011	1/17/2012	CBI	(S) A component of industrial epoxy adhesive formulations.	(G) Rubberized epoxy resin.
P-12-0019	10/20/2011	1/17/2012	Henkel Corporation	(S) Glue stick	(S) Starch carboxymethyl 2-hydroxypropyl ether.
P-12-0020	10/21/2011	1/18/2012	CBI	(G) A component of leather finishing treatment.	(G) Polyurethane aqueous dispersion.
P-12-0021	10/19/2011	1/16/2012	CBI	(S) Petroleum fuel blend and distillation/fractionation feedstock.	(G) Petroleum distillate heavies.
P-12-0022	10/24/2011	1/21/2012	CBI	(G) The new chemical will be used as a photoluminescent pigment. The pigment will be shipped to our customers who will incorporate the pigment into fluids, paints, coatings, inks, injection molding etc. for, but not limited to: Emergency signs, traffic indication signs, switches, military applications, high visibility signs, safety location markings and any other application where a long afterglow and/or lighting is needed.	(G) Complex strontium aluminate rare earth doped".

TABLE I—50 PMNS RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/importer	Use	Chemical
P-12-0023	10/24/2011	1/21/2012	CBI	(G) The new chemical will be used as a photoluminescent pigment. The pigment will be shipped to our customers who will incorporate the pigment into fluids, paints, coatings, inks, injection molding etc. for, but not limited to: Emergency signs, traffic indication signs, switches, military applications, high visibility signs, safety location markings and any other application where a long afterglow and/or lighting is needed.	(G) Complex strontium aluminate rare earth doped".
P-12-0024	10/24/2011	1/21/2012	CBI	(G) The new chemical will be used as a photoluminescent pigment. The pigment will be shipped to our customers who will incorporate the pigment into fluids, paints, coatings, inks, injection molding etc. for, but not limited to: Emergency signs, traffic indication signs, switches, military applications, high visibility signs, safety location markings and any other application where a long afterglow and/or lighting is needed.	(G) Complex strontium aluminate rare earth doped".
P-12-0025	10/24/2011	1/21/2012	CBI	(G) The new chemical will be used as a photoluminescent pigment. The pigment will be shipped to our customers who will incorporate the pigment into fluids, paints, coatings, inks, injection molding etc. for, but not limited to: Emergency signs, traffic indication signs, switches, military applications, high visibility signs, safety location markings and any other application where a long afterglow and/or lighting is needed.	(G) Complex strontium aluminate rare earth doped".

TABLE I—50 PMNS RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/importer	Use	Chemical
P-12-0026	10/24/2011	1/21/2012	CBI	(G) The new chemical will be used as a photoluminescent pigment. The pigment will be shipped to our customers who will incorporate the pigment into fluids, paints, coatings, inks, injection molding etc. for, but not limited to: Emergency signs, traffic indication signs, switches, military applications, high visibility signs, safety location markings and any other application where a long afterglow and/or lighting is needed.	(G) Complex strontium aluminate rare earth doped".
P-12-0027	10/26/2011	1/23/2012	Colonial Chemical, Inc	(S) Dispersant—pigment in water based paint; hard water cleaning.	(S) D-glucopyranose, oligomeric, C ₁₀₋₁₆ -alkyl glycosides, 2,3-dihydroxypropyl ethers, hydrogen maleates, sodium salts, polymers with 1,3-dichloro-2-propanol.
P-12-0028	10/26/2011	1/23/2012	Colonial Chemical, Inc	(S) Dispersant—pigment in water based paint; hard water cleaning.	(S) D-glucopyranose, oligomeric, C ₁₀₋₁₆ -alkyl glycosides, 2,3-dihydroxypropyl ethers, hydrogen succinates, sodium salts, polymers with 1,3-dichloro-2-propanol.
P-12-0029	10/26/2011	1/23/2012	Colonial Chemical, Inc	(S) Dispersant—pigment in water based paint; hard water cleaning.	(S) D-glucopyranose, oligomeric, decyl octyl glycosides, 2,3-dihydroxypropyl ethers, hydrogen maleates, sodium salts, polymers with 1,3-dichloro-2-propanol.
P-12-0030	10/27/2011	1/24/2012	CBI	(G) Open, non-dispersive textile finish.	(G) Modified fluorinated acrylate.
P-12-0031	10/27/2011	1/24/2012	CBI	(G) Open, non-dispersive textile finish.	(G) Modified fluorinated acrylate.
P-12-0032	10/27/2011	1/24/2012	CBI	(G) Open, non-dispersive textile finish.	(G) Modified fluorinated acrylate.
P-12-0033	10/27/2011	1/24/2012	Aceto Corporation	(S) Intermediate used in the manufacture of an imaging/media product.	(S) Benzoic acid, 4-(1,1-dimethylethyl)-, methyl.
P-12-0034	10/27/2011	1/24/2012	CBI	(G) A component of leather finishing treatment.	(G) Polyacrylate aqueous dispersion.
P-12-0035	10/29/2011	1/26/2012	CBI	(G) Ferrite dispersion ink additive to ensure magnetic performance characteristics.	(G) Cobalt iron manganese oxide, carboxylic acid-modified.
P-12-0036	10/31/2011	1/28/2012	CBI	(S) Fluorescent brightener for use in cellulosic paper applications.	(G) Triazinylaminostilbene.
P-12-0037	10/28/2011	1/25/2012	CBI	(G) Sizing for glass fibre.	(G) Epoxy-novolac resin in non-ionic water emulsion.
P-12-0038	10/28/2011	1/25/2012	CBI	(G) Synthetic leather	(G) Elastomer polyurethane.
P-12-0039	10/31/2011	1/28/2012	CBI	(G) Open, non-dispersive use.	(G) Acrylic polymer.

In Table II. of this unit, EPA provides the following information (to the extent that such information is not claimed as

CBI) on the TMEs received by EPA during this period: The EPA case number assigned to the TME, the date

the TME was received by EPA, the projected end date for EPA's review of the TME, the submitting manufacturer/

importer, the potential uses identified by the manufacturer/importer in the TME, and the chemical identity.

TABLE II—2 TMEs RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011

Case No.	Received date	Projected notice end date	Manufacturer /importer	Use	Chemical
T-12-0001	10/19/2011	12/2/2011	CBI	(S) Petroleum fuel blend and distillation/fractionation.feedstock.	(G) Petroleum distillate heavies.
T-12-0002	10/25/2011	12/8/2011	Innovative Science Technology.	(S) Plasticizer for polyvinyl chloride resin.	(S) Waste plastics, poly(ethylene terephthalate), depolymerized, with by-products from manufacture of 2-butoxyethanol, and isotridecanol, ethylene glycol-free fraction.

In Table III. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs received by EPA during this period: The EPA case number assigned to the NOC, the date the NOC was received by EPA, the projected end date for EPA's review of the NOC, and chemical identity.

TABLE III—55 NOCs RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011

Case No.	Received date	Commencement notice end date	Chemical
P-04-0190	10/4/2011	9/20/2011	(G) Polyester acrylate.
P-07-0143	9/26/2011	9/23/2011	(G) Alkanoldioic acid, dialkyl ester.
P-07-0666	10/8/2011	9/26/2011	(G) Poly(ethylene oxide).
P-08-0354	10/12/2011	9/8/2011	(G) 2-propenoic acid, 2-methyl-, methyl ester, polymer with butyl propenoate and substituted-propyl 2-methyl-2-propenoate, 2,2'-(1,2-diazenediyl)bis[2-methylbutanenitrile]-initiated.
P-08-0419	10/14/2011	9/21/2011	(G) Aromatic dimethaneamine, reaction products with aromatic glycidyl ether.
P-09-0009	10/7/2011	9/10/2011	(G) Glycolate ester.
P-09-0168	9/27/2011	9/9/2011	(G) Substituted styrene acrylate copolymer.
P-09-0410	10/4/2011	9/13/2011	(G) Carbonic acid di-alkyl ester polymer with polyether polyol, alkyl isocyanate and glycol ether.
P-10-0106	10/20/2011	10/3/2011	(G) Hydroxyl-terminated aliphatic polycarbonate.
P-10-0111	10/24/2011	10/6/2011	(G) Benzene dicarboxylic acid, polyester with glycol and polyethylene glycol.
P-10-0150	10/20/2011	9/29/2011	(G) Hydroxy-terminated; aliphatic polycarbonate.
P-10-0286	10/20/2011	9/28/2011	(G) Hydroxyl-terminated aliphatic polycarbonate.
P-10-0287	10/20/2011	9/26/2011	(G) Hydroxyl-terminated aliphatic polycarbonate.
P-10-0288	10/20/2011	9/23/2011	(G) Hydroxyl-terminated aliphatic polycarbonate.
P-10-0289	10/20/2011	9/22/2011	(G) Hydroxyl-terminated aliphatic polycarbonate.
P-10-0354	10/28/2011	10/17/2011	(G) Acrylonitrile-acrylate copolymer.
P-10-0426	9/26/2011	9/2/2011	(G) Halo substituted sulfamidylbenzyluracil.
P-10-0451	10/14/2011	10/10/2011	(G) Acrylic silane polymer.
P-10-0529	9/27/2011	9/13/2011	(G) Copolymer containing phosphonic, sulfonic and carboxylic acid groups.
P-11-0036	10/12/2011	10/10/2011	(G) Alkyl alkoxy sulfate sodium salt.
P-11-0043	10/12/2011	7/21/2011	(S) Disiloxane, 1-butyl-1,1,3,3-tetramethyl-*
P-11-0045	10/12/2011	7/21/2011	(S) Pentasiloxane, 1-butyl-1,1,3,3,5,5,7,7,9,9-decamethyl-*
P-11-0046	10/12/2011	7/21/2011	(S) Siloxanes and silicones, di-me, bu group- and hydrogen-terminated*.
P-11-0169	10/22/2011	10/11/2011	(G) Alkyl aryl substituted pyrrolo benzotriazole dione.
P-11-0172	9/28/2011	9/27/2011	(G) Methacrylated C ₈₋₁₈ fatty acids; methacrylate fatty acids; mc818.
P-11-0179	10/4/2011	8/21/2011	(G) Water dispersed blocked isocyanate.
P-11-0233	10/7/2011	7/14/2011	(G) Phenol, 4,4'-(1-methylethylidene)bis-, polymer with 2-(chloromethyl)oxirane, reaction products with N3-(3-(dimethylamino)propyl)-N1,N1-dimethyl-alkanepolyamine, compds. with formaldehyde-phenol polymer.
P-11-0235	10/11/2011	9/19/2011	(G) Polyacrylate oligomer product from saturated dimer acid, propoxylated glycerol and acrylic acid.
P-11-0258	10/17/2011	10/6/2011	(G) Epoxy and isocyanate modified aliphatic polyamine.
P-11-0260	10/14/2011	9/27/2011	(G) Isocyanate-terminated prepolymer.
P-11-0285	10/25/2011	10/7/2011	(G) Acid anhydride, polymer with aromatic isocyanate and polyalkyleneglycol, alkanol and diazole alkanamine and lactone homopolymer alkyl ester-blocked.
P-11-0305	10/31/2011	9/29/2011	(G) Polyester diol.

TABLE III—55 NOCS RECEIVED FROM SEPTEMBER 26, 2011 TO OCTOBER 31, 2011—Continued

Case No.	Received date	Commencement notice end date	Chemical
P-11-0326	10/25/2011	10/20/2011	(G) Glycerylether.
P-11-0337	10/25/2011	10/7/2011	(S) 4,7-decadienal.
P-11-0362	9/28/2011	9/26/2011	(G) Phosphonium-substituted heteroaromatic sulfate salt.
P-11-0369	10/17/2011	9/20/2011	(G) Alkyl polyester-acrylic copolymer.
P-11-0372	10/17/2011	9/19/2011	(G) Polyesterurethane.
P-11-0373	9/26/2011	8/26/2011	(G) 1,1'-methylenebis[isocyanatobenzene], polymer with polyester polyols and polypropylene glycol.
P-11-0393	9/28/2011	9/21/2011	(G) Waterborne aliphatic polyurethane.
P-11-0398	10/12/2011	10/10/2011	(S) Poly(oxy-1,2-ethanediyl), .alpha.-(1-oxooctyl)-.omega.-methoxy-*
P-11-0399	10/12/2011	10/10/2011	(S) Poly(oxy-1,2-ethanediyl), .alpha.-(1-oxodecyl)-.omega.-methoxy-*
P-11-0403	9/29/2011	9/22/2011	(G) Fatty acid esters.
P-11-0409	10/11/2011	9/23/2011	(G) Multifunctional polycarbodiimide.
P-11-0410	10/27/2011	10/11/2011	(G) Methacrylic resin containing cyclic structure unit.
P-11-0423	10/13/2011	9/27/2011	(G) Acrylate copolymer.
P-11-0425	9/30/2011	9/22/2011	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P-11-0426	10/5/2011	9/22/2011	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P-11-0427	9/30/2011	9/22/2011	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P-11-0428	9/30/2011	9/22/2011	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P-11-0429	9/30/2011	9/22/2011	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P-11-0430	10/5/2011	9/22/2011	(G) Poly (3-hydroxybutyrate-co-3-hydroxyhexanoate).
P-11-0434	9/26/2011	9/15/2011	(G) Cashew, nutshell liquid, polymer with arylalkylamine, bisphenol A, epichlorohydrin and formaldehyde.
P-11-0446	10/21/2011	10/15/2011	(G) Carbopolycycle-bis(diazonium), dihalo, chloride (1:2), reaction products with metal sulfate, calcium carbonate, N-(2-alkylphenyl)-oxoalkanamide, potassium 4-[dioxoalkylamino]substituted benzene (1:1) and sodium hydroxide.
P-11-0467	10/28/2011	10/26/2011	(G) Polyether sulfate salt derivative.
P-11-0470	10/10/2011	10/7/2011	(G) Polyester substituted polycyclic aromatic colorant.

If you are interested in information that is not included in these tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Imports, Notice of commencement, Premanufacturer, Reporting and recordkeeping requirements, Test marketing exemptions.

Dated: November 16, 2011.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2011-31645 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9504-3]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the State of Montana's request to revise its EPA-authorized program to allow electronic reporting.

DATES: EPA's approval is effective December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566-1697, huffer.evi@epa.gov, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566-1175, seeh.karen@epa.gov.

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as Part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under Subpart

D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the Subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable Subpart D requirements.

On July 8, 2011, the Montana Department of the Environmental Quality (MT DEQ) submitted an application for its Network Discharge

Monitoring Report (NetDMR) electronic document receiving system for revision of its EPA-authorized program under title 40 CFR. EPA reviewed MT DEQ's request to revise its EPA-authorized program and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Montana's request for revision to its 40 CFR part 123—National Pollutant Discharge Elimination System (NPDES) State Program Requirements EPA-authorized program for electronic reporting of information submitted under 40 CFR part 122 is being published in the **Federal Register**.

MT DEQ was notified of EPA's determination to approve its application with respect to the authorized program listed above.

Dated: December 1, 2011.

Andrew Battin,

Director, Office of Information Collection.

[FR Doc. 2011-31656 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9504-4]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Arkansas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the State of Arkansas's request to revise its EPA-authorized program to allow electronic reporting.

DATES: EPA's approval is effective December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566-1697, huffer.evi@epa.gov, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566-1175, seeh.karen@epa.gov.

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR)

was published in the **Federal Register** (70 FR 59848) and codified as Part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under Subpart D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR Part 3, Subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the Subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable Subpart D requirements.

On January 13, 2010, the Arkansas Department of Environmental Quality (AR DEQ) submitted an application for its Hazardous Waste Annual Reporting (HWAR) program electronic reporting system for revision of its EPA-authorized program under title 40 CFR. EPA reviewed AR DEQ's request to revise its EPA-authorized program and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions set out in 40 CFR part 3, subpart D, for electronic submissions that do *not* include an electronic signature, but instead provide for an acceptable handwritten signature on a separate paper submission. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Arkansas's request for revision to its 40 CFR Part 272—Approved State Hazardous Waste Management EPA-authorized program for electronic reporting of annual hazardous waste information submitted under 40 CFR parts 262, 264, and 265 is being published in the **Federal Register**.

AR DEQ was notified of EPA's determination to approve its application

with respect to the authorized program listed above.

Dated: December 1, 2011.

Andrew Battin,

Director, Office of Information Collection.

[FR Doc. 2011-31657 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9504-5]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the State of Indiana's request to revise its EPA-authorized programs to allow electronic reporting.

DATES: EPA's approval is effective December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566-1697, huffer.evi@epa.gov, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, or Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566-1175, seeh.karen@epa.gov.

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as Part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Under Subpart D of CROMERR, state, tribe or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D also provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in

§ 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the Subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable Subpart D requirements.

On July 20, 2011, the Indiana Department of the Environmental Management (IDEM) submitted an application for its Network Discharge Monitoring Report (NetDMR) electronic document receiving system for revision of its EPA-authorized programs under title 40 CFR. EPA reviewed IDEM's request to revise its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Indiana's request for revision to its 40 CFR Part 123—National Pollutant Discharge Elimination System (NPDES) State Program Requirements and Part 403—General Pretreatment Regulations for Existing and New Sources of Pollution EPA-authorized programs for electronic reporting of information submitted under 40 CFR parts 122 and 403 is being published in the **Federal Register**.

IDEM was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Dated: December 1, 2011.

Andrew Battin,

Director, Office of Information Collection.

[FR Doc. 2011-31659 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-9000-4]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564-1399 or <http://www.epa.gov/compliance/nepa/>.

Weekly receipt of Environmental Impact Statements
Filed 11/28/2011 through 12/02/2011

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EIS are available at: <http://www.epa.gov/compliance/nepa/eisdata.html>.

EIS No. 20110409, Final EIS, BLM, NM, Taos Resource Management Plan, To Provide Broad-Scale Guidance for the Management of Public Lands and Resource Administered by Taos Field Office, Colfax, Harding, Los Alamos, Mora, Rio Arriba, Santa Fe, Taos and Union Counties, NM, *Review Period Ends:* 01/09/2012, *Contact:* Brad Higdon (575) 751-4725.

EIS No. 20110410, Draft EIS, FAA, CA, Gness Field Airport Project, Proposed Extension to Runway 13/31/, Funding, Marin County, CA, *Comment Period Ends:* 02/06/2012, *Contact:* Doug Pomeroy (680) 827-7612.

EIS No. 20110411, Final Supplement, USFS, 00, Programmatic—Kootenai, Idaho Panhandle, and Lolo National Forest Plan Amendments for Access Management within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones, Alternative E Updated has been Identified as the Forest Service's Preferred Alternative, ID, WA, MT, *Review Period Ends:* 01/09/2012, *Contact:* Kark Dekome (208) 765-7479.

EIS No. 20110412, Final EIS, USFS, CA, Lake Tahoe Basin Management Unit South Shore Fuel Reduction and Healthy Forest Restoration, To Manage Fuel Reduction and Forest health in the Wildland Urban Intermit (WUI), El Dorado County, CA, *Review Period Ends:* 01/09/2012, *Contact:* Duncan Leao (530) 543-2660.

EIS No. 20110413, Final EIS, BR, CO, Windy Gap Firing Project, Construct a New Water Storage Reservoir to Deliver Water to Front Range and West Slope Communities and Industries, Funding, NPDES and US Army COE Section 404 Permit, Grand and Larimer Counties, CO, *Review Period Ends:* 01/09/2012, *Contact:* Lucy Maldonado (970) 962-4369.

EIS No. 20110414, Draft EIS, NOAA, 00, Amendment 18A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region, To Limit Participation and Effort in the Black Sea Bass Pot Fishery, South Atlantic Region, NC, SC FL and GA, *Comment Period Ends:* 01/23/2012, *Contact:* Roy E. Crabtree (727) 824-5301.

EIS No. 20110415, Final EIS, RUS, GA, Biomass Power Plant Project, Application for Financial Assistance To Construction 100 Megawatt (MW) Biomass Plant and Related Facilities, Warren County, GA, *Review Period Ends:* 01/09/2012, *Contact:* Stephanie A Strength (970) 403-3559.

EIS No. 20110416, Final EIS, USACE, FL, Everglades Restoration Transition Plan (ERTP), To Defined Water Management Operating Criteria for Central and Southern Florida Project (C&SF) features and the Constructed features of the Modified Water Deliveries and Canal-III Project until a Combined Operational Plan is Implemented, Broward and Miami-Dade Counties, FL, *Review Period Ends:* 01/16/2012, *Contact:* Dr. Gina Paduano Ralph (904) 232-2336.

Amended Notices

EIS No. 20110381, Draft EIS, WAPA, AZ, Quartzsite Solar Energy Project and Proposed Yuma Field Office Resource Management Plan Amendment, Implementation, Right-of-Way Application to the BLM, La Paz County, AZ, *Comment Period Ends:* 02/10/2012, *Contact:* Liana Reilly (720) 962-7253. Revision to FR Notice 11/10/2011: Extending Comment from 02/08/2012 to 02/10/2012.

Dated: December 6, 2011.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2011-31670 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2010-0108; FRL-9502-8]

Release of Final Integrated Review Plan for the National Ambient Air Quality Standards for Lead

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: On or about November 18, 2011, the EPA will make available to the public the final document, *Integrated Review Plan for the National Ambient Air Quality Standards for Lead*. This document contains the plans for the review of the air quality criteria and national ambient air quality standards (NAAQS) for lead (Pb). The Pb NAAQS provide for the protection of public health and the environment from Pb emitted to ambient air.

FOR FURTHER INFORMATION CONTACT: Dr. Deirdre Murphy, Office of Air Quality

Planning and Standards (Mail code C504-06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; *telephone number*: (919) 541-0729; *fax number*: (919) 541-0237; *email address*: murphy.deirdre@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How can I get copies of this document and related information?

1. Docket. The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2010-0108. A separate docket established for the Integrated Science Assessment being prepared for this action (EPA-HQ-ORD-2011-0051) is also incorporated into the rulemaking docket for this review. Publicly available docket materials are available electronically through <http://www.regulations.gov> or may be viewed at the Air and Radiation Docket and Information Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566-1742.

2. The document announced today and related information will be available via the Internet at the EPA's Technology Transfer Network (TTN) Web site at http://www.epa.gov/ttn/naaqs/standards/pb/s_pb_index.html. The document announced today will be accessible in the "Documents from Current Review" section under "Planning Documents."

II. Information Specific to This Document

Two sections of the Clean Air Act govern the establishment and revision of the NAAQS. Section 108 (42 U.S.C. section 7408) directs the Administrator to identify and list certain air pollutants and then to issue air quality criteria for those pollutants. The Administrator is to list those air pollutants that in her "judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;" "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources;" and "for which * * * [the Administrator] plans to issue air quality criteria * * *". Air quality criteria are intended to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all

identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air * * *." 42 U.S.C. 7408(b). Under section 109 (42 U.S.C. 7409), the EPA establishes primary (health-based) and secondary (welfare-based) NAAQS for pollutants for which air quality criteria are issued. Section 109(d) requires periodic review and, if appropriate, revision of existing air quality criteria. The revised air quality criteria reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. The EPA is also required to periodically review and revise the NAAQS, if appropriate, based on the revised criteria. Section 109(d)(2) requires that an independent scientific review committee "shall complete a review of the criteria * * * and the national primary and secondary ambient air quality standards * * * and shall recommend to the Administrator any new * * * standards and revisions of existing criteria and standards as may be appropriate * * *." Since the early 1980's, this independent review function has been performed by the Clean Air Scientific Advisory Committee (CASAC).

Presently, the EPA is reviewing the NAAQS for Pb.¹ The document announced today has been developed as part of the planning phase for the review. This phase began with a science policy workshop to identify issues and questions to frame the review. Drawing from the workshop discussions, a draft integrated review plan (IRP) was prepared jointly by the EPA's National Center for Environmental Assessment, within the Office of Research and Development, and the EPA's Office of Air Quality Planning and Standards, within the Office of Air and Radiation. The draft IRP was the subject of a consultation with CASAC on May 5, 2011, and was available for public comment (76 FR 20347). The final IRP announced today has been prepared after consideration of CASAC and public comments. This document presents the EPA's current plans for the schedule for the entire review, the process for conducting the review, and the key policy-relevant science issues that will guide the review. This document does not represent and should not be construed to represent any final EPA policy, viewpoint, or determination.

¹ The EPA's call for information for this review was issued on February 26, 2010 (75 FR 8934).

Dated: December 5, 2011.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2011-31683 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9503-2]

Good Neighbor Environmental Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, Public Law 92463, EPA gives notice of a meeting of the Good Neighbor Environmental Board (Board). The Board usually meets three times each calendar year, twice at different locations along the U.S. border with Mexico, and once in Washington, DC. It was created in 1992 by the Enterprise for the Americas Initiative Act, Public Law 102-532, 7 USC Section 5404. Implementing authority was delegated to the Administrator of EPA under Executive Order 12916. The Board is responsible for providing advice to the President and the Congress on environmental and infrastructure issues and needs within the States contiguous to Mexico in order to improve the quality of life of persons residing on the United States side of the border. The statute calls for the Board to have representatives from U.S. Government agencies; the states of Arizona, California, New Mexico and Texas; and tribal and private organizations with experience in environmental and infrastructure issues along the U.S.-Mexico border.

The purpose of the meeting is to begin discussion on the Board's 15th report, which will focus on the need for implementation of environmental and infrastructure projects within the States of the United States contiguous to Mexico. A copy of the meeting agenda will be posted at <http://www.epa.gov/ocem/gneb>.

DATES: The Good Neighbor Environmental Board will hold an open meeting on Wednesday, December 14, from 9 a.m. (registration at 8:30 a.m.) to 12:15 p.m. and resume again from 5 p.m. to 6 p.m. The following day, December 15, the Board will meet from 8:30 a.m. until 2 p.m. Due to an unanticipated change of venue, EPA is announcing the meeting with less than 15 days public notice.

ADDRESSES: The meeting will be held at the J.W. Marriott Hotel located at 1331

Pennsylvania Avenue NW., Washington, DC 20004. The meeting is open to the public, with limited seating on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Mark Joyce, Acting Designated Federal Officer, joyce.mark@epa.gov, (202) 564-2130, U.S. EPA, Office of Federal Advisory Committee Management and Outreach (1601M), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: If you wish to make oral comments or submit written comments to the Board, please contact Mark Joyce at least five days prior to the meeting.

General Information: Additional information concerning the GNEB can be found on its Web site at <http://www.epa.gov/ocem/gneb>.

Meeting Access: For information on access or services for individuals with disabilities, please contact Mark Joyce at (202) 564-2130 or by email at joyce.mark@epa.gov. To request accommodation of a disability, please contact Mark Joyce at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

Dated: December 2, 2011.

Mark Joyce,

Acting Designated Federal Officer.

[FR Doc. 2011-31685 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2011-0837; FRL-9504-6]

Notice of Receipt of, and Opportunity To Comment on, a Plan by Fiberright of Blairstown LLC for Separation of Recyclable Material From Municipal Solid Waste Intended for Use as a Feedstock for Renewable Fuel Production at a Blairstown, IA Biorefinery

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is issuing notice of receipt of, and opportunity to comment on, a plan by Fiberright of Blairstown LLC to remove recyclables from municipal solid waste (MSW) prior to its use as a feedstock for renewable fuel production at their biorefinery in Blairstown, Iowa. Submission of a separation plan is a registration requirement under the Renewable Fuel Standard Program regulations established under Clean Air Act section 211(o) for producers seeking to make qualifying renewable fuel from MSW-derived feedstock. The separation plan

must demonstrate ongoing verification that there is separation of recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass wastes to the extent reasonably practicable. MSW-derived feedstock collected according to a separation plan approved by EPA may qualify as "separated MSW" in biofuel production pathways authorized for generation of Renewable Identification Numbers (RINs) under the Renewable Fuel Standard Program.

DATES: Comments must be received on or before January 9, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2011-0837, by one of the following methods:

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

- *Email:* a-and-r-docket@epa.gov.

- *Fax:* (202) 566-1741.

- *Mail:* Air and Radiation Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. Please include a total of two copies."

- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2011-0837. 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>. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov> your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in

the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: The complete plan and all supporting materials are available for public review in the docket. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1741.

FOR FURTHER INFORMATION CONTACT: Madison Le, Office of Transportation and Air Quality, Mailcode: 6406J, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343-9094; fax number: (202) 343-2802; email address: le.madison@epa.gov.

SUPPLEMENTARY INFORMATION:

(A) Request for Comments

On October 11, 2011, Fiberright Blairstown Operating, LLC ("Fiberright") submitted a plan to EPA pursuant to 40 CFR 80.1450(b)(1)(viii) for the separation of recyclable material from municipal solid waste (MSW) prior to its use as a feedstock for renewable fuel production under the Renewable Fuels Standard Program of Clean Air Act Section 211(o). The Fiberright separation plan has been placed in the public docket and is available for public comment.

Fiberright seeks EPA approval that their plan will demonstrate ongoing verification that there is separation from MSW of recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass wastes to the extent reasonably

practicable before the separated MSW is used as a feedstock for biofuel production. EPA has outlined registration requirements for producers of renewable fuel made from separated MSW in 80.1450(b)(1)(viii), including the requirement for submission of a separation plan. EPA has also developed supplemental questions to better understand where the recyclable materials will be diverted after separation, the recycle goals of the local community, and the existing recycling programs and infrastructure in the region. Fiberright provided responses to these supplemental questions in their plan (referenced in pages 13 to 16 of their plan). EPA solicits comments and information to assist EPA in evaluating the Fiberright separation plan for possible approval.

Although EPA's approval or disapproval of the Fiberright separation plan will not be conducted through rulemaking, and an opportunity for public comment is not legally required prior to EPA action on the plan, EPA is soliciting public comment at this time because the Fiberright separation plan is the first such plan to be submitted to EPA for approval. EPA believes that public comment on this first plan submission would be beneficial, but EPA may not seek public comment prior to approval or disapproval of future separation plan submissions.

The public is specifically invited to comment whether Fiberright's separation plan incorporates all of the elements required in the regulations and provides for the separation of recyclable cardboard, plastics, rubber, textiles, metals, and glass from MSW to the extent that is reasonably practicable.

Dated: December 5, 2011.

Margo Tsirigotis Oge,

Director, Office of Transportation and Air Quality.

[FR Doc. 2011-31661 Filed 12-8-11; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 10:59 a.m. on Wednesday, December 7, 2011, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate, and resolution activities.

In calling the meeting, the Board determined, on motion of Director

Thomas J. Curry (Appointive), seconded by Director John G. Walsh (Acting Comptroller of the Currency), and concurred in by Acting Chairman Martin J. Gruenberg, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550-17th Street NW., Washington, DC.

Dated: December 7, 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011-31788 Filed 12-7-11; 4:15 pm]

BILLING CODE P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting Notice

AGENCY: Federal Election Commission.

DATE: Wednesday, December 14, 2011 at 10 a.m.

PLACE: 999 E Street NW., Washington, DC.

STATUS: This hearing will be closed to the public.

ITEMS TO BE DISCUSSED: Audits conducted pursuant to 2 U.S.C. .437g, .438(b), and Title 26, U.S.C.

* * * * *

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694-1220.

Shelley E. Garr,

Deputy Secretary of the Commission.

[FR Doc. 2011-31760 Filed 12-7-11; 4:15 pm]

BILLING CODE 6715-01-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000-0062; Docket 2011-0079; Sequence 25]

Federal Acquisition Regulation; Information Collection; Material and Workmanship

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, the Regulatory Secretariat 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 material and workmanship.

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 February 7, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000-0062, Material and Workmanship, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "Information Collection 9000-0062, Material and Workmanship" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "Information Collection 9000-0062, Material and Workmanship." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000-0062,

Material and Workmanship” 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 9000-0062, Material and Workmanship.

Instructions: Please submit comments only and cite Information Collection 9000-0062, Material and Workmanship, 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: Mr. Curtis E. Glover, Sr., Procurement Analyst, Federal Acquisition Policy Division, GSA, telephone (202) 501-1448, or via email at curtis.glover@gsa.gov.

SUPPLEMENTARY INFORMATION:

A. Purpose

Under Federal contracts requiring that equipment (e.g., pumps, fans, generators, chillers, etc.) be installed in a project, the Government must determine that the equipment meets the contract requirements. Therefore, the contractor must submit sufficient data on the particular equipment to allow the Government to analyze the item.

The Government uses the submitted data to determine whether or not the equipment meets the contract requirements in the categories of performance, construction, and durability. This data is placed in the contract file and used during the inspection of the equipment when it arrives on the project and when it is made operable.

B. Annual Reporting Burden

Respondents: 3,160.

Responses Per Respondent: 1.5.

Annual Responses: 4,740.

Hours Per Response: .25.

Total Burden Hours: 1,185.

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. 9000-0062, Material and Workmanship, in all correspondence.

Dated: November 21, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2011-31627 Filed 12-8-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-12-12BT]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call (404) 639-5960 or send comments to Daniel Holcomb, CDC Reports Clearance Officer, 1600 Clifton Road, MS D-74, Atlanta, GA 30333 or send an email to omb@cdc.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 shall have practical utility; (b) the accuracy of the agency's estimate of the burden 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. Written comments should be received within 60 days of this notice.

Proposed Project

Community Transformation Grants: Use of System Dynamic Modeling and Economic Analysis in Select Communities—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The American Recovery and Reinvestment Act (ARRA) of 2009 was signed into law on February 17, 2009,

Public Law 11-5 (“Recovery Act”). The Department of Health and Human Services (HHS) has developed an initiative in response to ARRA—the Patient Protection and Affordable Care Act (ACA)—that is helping to reorient the U.S. health care system from primarily treating disease to promoting population health and well-being. The ACA created a new Prevention and Public Health Fund designed to expand and sustain the necessary infrastructure to prevent disease, detect it early, and manage conditions before they become severe. Section 4002 of the ACA authorized the Community Transformation Grants (CTG) program to promote the development of healthier communities through strategies designed to reduce chronic disease rates, prevent the development of secondary conditions, reduce health disparities, and develop a stronger evidence base for effective prevention programming.

In September 2011, CDC funded 61 CTG cooperative agreements with state, local and tribal government agencies, and nonprofit organizations. Twenty-six awardees are focused on capacity building efforts, and 35 awardees are working to implement sustainable, broad, evidence- and practice-based policy, environmental, programmatic and infrastructure changes to improve public health. Each CTG implementation awardee is developing a work plan for its jurisdiction or service area that focuses on one or more of the following five strategic directions: (1) Tobacco-free living, (2) active lifestyles and healthy eating, (3) high impact evidence-based clinical and other preventive services, (4) social and emotional well-being, and (5) healthy and safe physical environments.

As part of a multi-component evaluation plan for the CTG program, CDC is seeking OMB approval to collect the information needed to conduct cost and cost-benefit analyses relating to the implementation of CTG-funded community interventions. Using a system dynamics approach, CDC also plans to conduct simulation modeling which will integrate the cost data with other data to predict selected chronic disease outcomes and their associated monetary impacts under various scenarios. CDC and NIH have previously collaborated on the development of analytic tools for system dynamics modeling under more limited conditions. The collection and analysis of actual cost data from CTG awardees will support the expansion and refinement of these analytic tools with respect to short-, intermediate- and long-term outcomes for large-scale,

community-based programs that employ multiple policy and environmental change strategies.

Information to be collected from participating CTG awardees includes the interventions to be implemented; expenditures for labor, personnel, consultants, materials, travel, services, and administration; in-kind contributions; and partner organizations and their expenditures. Information will be collected electronically via a user-friendly, Web-based CTG Cost Study Instrument (CTG–CSI). Respondents will be a subset of 30 out of 35 CTG

awardees funded specifically for implementation activities. CDC will select awardees for participation in the cost data collection based on a list of priority interventions appropriate for cost analysis.

Results of this data collection and planned analyses, including improvements in CDC’s analytic and modeling tools, will be used to assist CTG awardees, CDC, and HHS in choosing intervention approaches for particular populations that are both beneficial to public health and cost-effective.

OMB approval is requested for the first three years of a five-year project with first data collection beginning approximately July 2012. CDC plans to seek an extension of OMB approval to support information collection through the end of the five-year award period.

Information will be collected electronically on a quarterly schedule. The estimated burden per response is 11 hours and there are no costs to respondents except their time to participate in the survey.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)	Total burden (in hrs)
CTG Awardee	CTG–CSI	30	4	11	1,320

Dated: December 2, 2011.

Daniel Holcomb,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–31622 Filed 12–8–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Low Income Home Energy Assistance Program LIHEAP Leveraging Report.

OMB No.: 0970–0121.

Description: The LIHEAP leveraging incentive program rewards LIHEAP grantees that have leveraged non-federal home energy resources for low-income households. The LIHEAP leveraging report is the application for leveraging incentive funds that these LIHEAP grantees submit to the Department of Health and Human Services for each fiscal year in which they leverage countable resources. Participation in the leveraging incentive program is voluntary and is described at 45 CFR 96.87. The LIHEAP leveraging report obtains information on the resources leveraged by LIHEAP grantees each fiscal year (as cash, discounts, waivers, and in-kind); the benefits provided to low-income households by these

resources (for example, as fuel and payments for fuel, as home heating and cooling equipment, and as weatherization materials and installation); and the fair market value of these resources and benefits.

HHS needs this information in order to carry out statutory requirements for administering the LIHEAP leveraging incentive program, to determine countability and valuation of grantees leveraged non-federal home energy resources, and to determine grantees shares of leveraging incentive funds. HHS proposes to request a three-year extension of OMB approval for the currently approved LIHEAP leveraging report information collection.

Respondents: State, Local or Tribal Governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
LIHEAP Leveraging Report	70	1	38	2,660

Estimated Total Annual Burden Hours: 2,660.

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. *Email 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; (d) ways to minimize the burden information to be collected; and (e) 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. 2011-31572 Filed 12-8-11; 8:45 am]

BILLING CODE 4184-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2011-N-0457]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Experimental Study of Comparative Direct-to-Consumer Advertising

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 January 9, 2012.

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 emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910—New and title, “Experimental Study of Comparative Direct-to-Consumer Advertising.” 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.

Experimental Study of Comparative Direct-to-Consumer Advertising—(OMB Control Number 0910—New)

Section 1701(a)(4) of the Public Health Service Act (42 U.S.C.

300u(a)(4)) authorizes FDA to conduct research relating to health information. Section 903(d)(2)(C) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 393(d)(2)(C)) authorizes FDA to conduct research relating to drugs and other FDA regulated products in carrying out the provisions of the FD&C Act.

Regulations specify that sponsors cannot make comparative efficacy claims in advertising for prescription drugs without substantial evidence, most often in the form of well-controlled clinical trials, to support such claims (21 CFR 202.1(e)(6)(ii); 21 CFR 314.126). FDA has permitted some comparisons based on labeled attributes, such as indication, dosing, and mechanism of action. When substantial evidence does not yet exist, sponsors have used communication techniques that invite implicit comparisons, such as making indirect comparisons, using comparative visuals, and using vaguer language. This study is designed to apply the existing comparative advertising literature to direct-to-consumer (DTC) advertising, where little research has been conducted to date.

Moreover, as part of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), the Agency for Healthcare Research and Quality is in the process of securing a large compendium of information on the comparative effectiveness of medical treatments in 14 priority medical conditions, including arthritis, cancer, dementia, depression, diabetes, and substance abuse (Ref. 1). As part of this process, they will fund a set of CHOICE (Clinical and Health Outcomes Initiative in Comparative Effectiveness) studies designed to explore comparative effectiveness. When this large project is completed, FDA will have additional information to consider when regulating DTC advertising. It is possible that more DTC advertising will be comparative in nature. In preparation for this change, FDA is embarking on the proposed research to ensure that it has adequate information to assess whether comparative DTC ads provide truthful and nonmisleading information to consumers.

A. Comparative Advertising

Comparative advertisements typically compare two or more named or recognizably presented brands of the same product category, although some comparative advertisements implicitly compare a product to other brands by making superiority statements (e.g., “Only Brand A can be cooked in five minutes or less.”). These ads are

frequently used for commercial products, such as electronics, food products, and automobiles.

Marketing and advertising studies have investigated the influence of comparative ads, particularly in contrast to noncomparative ads (Refs. 2 to 5). Research specifically investigating the effects of comparative advertising on consumer attitudes—including attitudes toward the ad, the brand, and product use—has produced mixed results (Refs. 4 and 6). The research findings on the superiority of comparative versus noncomparative ads on purchase intentions, however, have been more conclusive. Relative to noncomparative ads, comparative ads were shown to result in greater purchase intentions (Refs. 2 to 4 and 7). Finally, other evidence suggests that there may be more potential for consumers to confuse brands when viewing comparative versus noncomparative ads. Brands advertised in a comparative format were shown to be more likely to be perceived as similar to the leading brand than brands advertised in a noncomparative format (Refs. 8 to 10).

B. Comparative Prescription Drug Advertisements

Despite extensive research on comparative advertising of consumer products and a limited number of studies on how DTC ads could help consumers compare drugs (Refs. 11 and 12), very little research has been conducted on comparative prescription drug advertisements (Ref. 13). Consequently, it is unclear whether these findings are applicable to comparative drug ads or how such claims influence consumers' perceived efficacy of advertised drugs.

Currently, most DTC ad comparisons focus on drug attributes, such as differences in dosing or administration method (see 21 CFR 314.126). Because few head-to-head clinical trials have been conducted, very few DTC ads include efficacy-based comparisons (Ref. 13). The present study aims to investigate how consumers interpret and react to DTC comparative drug ads. Specifically, the study will explore two types of drug comparisons in DTC ads: (1) Drug efficacy comparisons and (2) other evidence-based comparisons, such as dosing, mechanism of action, and indication. The study findings will inform FDA of relevant consumer issues relating to comparative DTC advertising.

C. Design Overview

The proposed research will occur in two concurrent phases. The goal of Phase I is to: (1) Explore how consumers understand and interpret print and

broadcast ads that explicitly compare the efficacy of two similar drugs; and (2) learn whether named comparisons are more likely than unnamed comparisons to promote accurate recall, comprehension, and perceptions. For the purposes of the research described here, named comparisons are ones in which the ad explicitly compares the

drug's efficacy to another named medication (e.g., Drug A was shown to be more effective than Drug B at lowering high cholesterol). Unnamed comparisons are ones in which the ad implicitly compares the drug's efficacy to other medications (e.g., Compared to other medications, Drug A lowered cholesterol in more patients). These

different types of comparisons will be examined in print and television ads and will include appropriate control conditions in a 2 (ad type: print or broadcast) x 3 (comparison type: named, unnamed, or none) design as shown below.

TABLE 1—DESIGN

Ad type	Named comparison	Unnamed comparison	Control group
Print Ad	Arm #1	Arm #3	Arm #5.
Broadcast Ad	Arm #2	Arm #4	Arm #6.

The goal of Phase II is to (1) determine if consumers infer that one drug is better or more effective than another from ads that include different types of drug label comparisons (*i.e.*, indication, dosing, mechanism of action, drug risk), and (2) if consumers consider switching medications based on these comparisons in advertisements. We will examine four types of drug comparisons that are currently being used in DTC prescription drug ads. An indication-to-indication comparison highlights the approved indications of the advertised drug and the comparator drug (e.g., Drug X is approved to prevent and treat osteoporosis; Drug B is approved to treat

osteoporosis). Dosing comparisons are those that compare the dosing schedule or dosing characteristics of two drugs (e.g., You can take Drug A in pill form; Drug B must be injected in a medical office). Mechanism of action comparisons involve differences in the way the two drugs work (e.g., Drug A works by targeting the build up of fat in the arteries; Drug B works by targeting that fat and by disintegrating tangier cells in the esophagus). Finally, risk comparisons involve ads that compare the risk profiles of more than one drug or the specific risks of more than one drug (e.g., Drug A has been known to

cause liver failure in rats; Drug B has not shown liver damage in rats).

We will also explore whether conveying these comparisons with visual images moderates these results. Half of the participants will examine a print ad and the other half will view a television ad. We propose two fully-factorial 2 (comparison type: named or unnamed) x 2 (visual: present or absent) x 4 (drug aspect: indication, dosing, mechanism of action, drug risk) designs, one for print ads and one for television ads, as shown below. This design also includes two appropriate control groups.

For print ads:

TABLE 2—DESIGN FOR PRINT ADS

Comparison type	Visual type	Indication	Dosing	Mechanism of action	Drug risks	Control group
Named	Visual	Arm #1	Arm #5	Arm #9	Arm #13	Arm #17.
Unnamed	Visual	Arm #2	Arm #6	Arm #10	Arm #14.	
Named	No Visual	Arm #3	Arm #7	Arm #11	Arm #15.	
Unnamed	No Visual	Arm #4	Arm #8	Arm #12	Arm #16.	

For television ads:

TABLE 3—DESIGN FOR TELEVISION ADS

Comparison type	Visual type	Indication	Dosing	Mechanism of action	Drug risks	Control group
Named	Visual	Arm #1	Arm #5	Arm #9	Arm #13	Arm #17.
Unnamed	Visual	Arm #2	Arm #6	Arm #10	Arm #14.	
Named	No Visual	Arm #3	Arm #7	Arm #11	Arm #15.	
Unnamed	No Visual	Arm #4	Arm #8	Arm #12	Arm #16.	

All parts of this study will be administered over the Internet. Participants will be randomly assigned to view one version of a DTC prescription drug print ad or a prescription drug television ad. Following their perusal of this document or video, they will answer questions about their recall and understanding of the benefit and risk

information, their perceptions of the benefits and risks of the drug, and their intent to ask a doctor about the medication. The entire procedure is expected to last approximately 20 minutes. A total of 9,560 participants will be involved in the study. This will be a one-time (rather than annual) information collection.

In the **Federal Register** of July 1, 2011 (76 FR 38663), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received two public comments. One commenter failed to attach any comment, and the other commenter discussed issues far outside the scope of the proposed research (*i.e.*, about morning-after contraception). Thus, the

design presented in this notice reflects only changes suggested by external peer reviewers and further discussion among research team members. FDA estimates the burden of this collection of information as follows:

TABLE 4—ESTIMATED ANNUAL REPORTING BURDEN ¹

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Screener	19,120	1	19,120	0.03 (2 min.)	637
Pretest	900	1	900	0.33 (20 min.)	300
Main Study	8,660	1	8,660	0.33 (20 min.)	2,887
Total					3,824

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

IV. References

The following references have been placed on display in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday. (FDA has verified the Web site addresses, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

- Agency for Healthcare Research and Quality (AHRQ), AHRQ Home Page, "Fact Sheets on Recovery Act Investments in Comparative Effectiveness Research" (<http://www.ahrq.gov/fund/cerfactsheets/>). Last accessed May 23, 2011.
- Ang, S.H. and S.B. Leong, "Comparative Advertising: Superiority Despite Interference?" *Asia Pacific Journal of Management*, vol. 11, pp. 33-46, 1994.
- Demirdjian, Z.S., "Sales Effectiveness of Comparative Advertising: An Experimental Field Investigation," *Journal of Consumer Research*, vol. 10, pp. 362-364, 1983.
- Grewal, D., S. Kavanoor, E.F. Fern, et al., "Comparative Versus Noncomparative Advertising: A Meta-Analysis," *Journal of Marketing*, vol. 61, pp. 1-15, 1997.
- Priester, J.R., J. Godek, D.J. Nayakankuppum, et al., "Brand Congruity and Comparative Advertising: When and Why Comparative Advertisements Lead to Greater Elaboration," *Journal of Consumer Psychology*, vol. 14, pp. 115-123, 2004.
- Rogers, J.C. and T.G. Williams, "Comparative Advertising Effectiveness: Practitioners' Perceptions Versus Academic Research Findings," *Journal of Advertising Research*, vol. 29, pp. 22-37, 1989.
- Miniard, P.W., M.J. Barone, R.L. Rose, et al., "A Re-Examination of the Relative Persuasiveness of Comparative and Noncomparative Advertising," *Advances in Consumer Research*, vol. 21, pp. 299-303, 1994.
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Dated: December 5, 2011.

Leslie Kux,
Acting Assistant Commissioner for Policy.
[FR Doc. 2011-31609 Filed 12-8-11; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2011-N-0769]

Notice of Listing of Members of the Food and Drug Administration's Senior Executive Service Performance Review Board

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of members who may be named to serve on FDA's Senior Executive Performance Review Board or Panels, which oversee the evaluation of performance appraisals of FDA's Senior Executive Service (SES) members. The Civil Service Reform Act of 1978 requires that the appointment of Performance Review Board Members be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mary Wathen, Office of Management Programs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, rm. 4310, Silver Spring, MD 20993, (301) 796-8848.

SUPPLEMENTARY INFORMATION: The Civil Service Reform Act of 1978 (5 U.S.C. 4314(c)(4)) (Public Law 95-454) requires that the appointment of Performance Review Board Members be published in the **Federal Register**. The following persons may be named to serve on FDA's Performance Review Board or Panels.

SES	Non-SES
Jeanne Anson Deborah Autor Jane Axelrad Lawrence Bachorik Glenda Barfell	Dennis Baker Norman Baylor Nega Beru Gail Costello Lawrence Deyton

SES	Non-SES
Catherine Beck Susan Bernard Malcolm Bertoni Eric Blumberg Beverly Chernaik Dara Corrigan Kathleen Crosby L'Tonya Davis David Elder Denise Esposito Tracy Forfa Lillian Gill Deborah Henderson Kimberly Holden Jeanne Ireland	Bernadette Dunham Ted Elkin Jeff Farrar William Flynn Christy Foreman Malcolm Frazier Alberto Gutierrez Sheryl Lard-Whiteford Murray Lumpkin William Maisel Karen Midthun Ellen Morrison Steven Musser Steven Pollack Jonathan Sackner-Bernstein
Melanie Keller Michael Landa Caroline Lewis Eric Lindblom Mary Anne Marlarkey Diane Maloney Daniel McChesney William McConagha Patrick McGarey Ruth McKee Alfred R. Miller Theresa Mullin Deanna Murphy Melinda Plaisier Lynne Rice Mark Roh James Sigg Steven Silverman Howard Sklamberg Philip Spiller Nancy Stade John Taylor Michael Taylor Brian Trent Mary Lou Valdez Steven Vaughn Stephen Veneruso Helen Winkle Ann Wion	Barbara Schneeman Rachel Sherman Jeffrey Shuren Ann Simoneau William Slikker Roberta Wagner David White Carolyn Wilson Janet Woodcock Robert Yetter Donald Zink

Dated: December 1, 2011.

Margaret A. Hamburg,

Commissioner of Food and Drugs.

[FR Doc. 2011-31579 Filed 12-8-11; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals 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 and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, NCI SPORE in Prostate and Gastrointestinal Cancers.

Date: February 15-16, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Caron A Lyman, PhD, Scientific Review Officer, National Cancer Institute, NIH, Division of Extramural Activities, Research Programs Review Branch, 6116 Executive Blvd., Room 8119, Bethesda, MD 20892-8328, (301) 451-4761, lymanca@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel, International Tobacco and Health Research and Capacity Building Program.

Date: February 28-29, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Gerald G. Lovinger, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8055A, Bethesda, MD 20892-8329, (301) 496-7987, lovingeg@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel, Small Grants Program for Cancer Epidemiology.

Date: March 22-23, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Jeffrey E. DeClue, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8059, Bethesda, MD 20892-8329, (301) 496-7904, decluej@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel, Nanotechnology Reformulations for Cancer Drugs.

Date: April 12, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate contract proposals.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Jeffrey E. DeClue, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8059, Bethesda, MD 20892-8329, (301) 496-7904, decluej@mail.nih.gov.

Information is also available on the Institute's/Center's home page: <http://deainfo.nci.nih.gov/advisory/sep/sep.htm>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 5, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011-31679 Filed 12-8-11; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS-2011-0115]

Request for Public Comments Concerning U.S.-Canada Action Plan for Perimeter Security and Economic Competitiveness

AGENCY: Office of Policy, DHS.

ACTION: Notice.

SUMMARY: The United States and Canada are staunch allies, vital economic partners, neighbors, and steadfast friends. We share common values, communities, and deep links among our citizens. The extensive mobility of people, goods, capital, and information between our two countries has helped ensure that our societies remain open, democratic, prosperous, and secure.

On February 4, 2011, President Barack Obama and Canadian Prime Minister Stephen Harper announced *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*. This declaration describes a perimeter approach to security in which the United States and Canada share responsibility for the security and resilience of our nations.

Our countries will seek to jointly address threats at the earliest point possible, while working together to facilitate the flows of legitimate travel and trade.

Beyond the Border identifies four key areas of cooperation: Addressing Threats Early; Trade Facilitation, Economic Growth, and Jobs; Integrated Cross-Border Law Enforcement; and Critical Infrastructure and Cybersecurity. Progress in these areas will be underpinned by a respect for the sovereignty, civil rights and civil liberties, privacy protections, and legal frameworks of both countries.

On December 7, 2011, President Barack Obama and Prime Minister Harper announced the *Beyond the Border Action Plan*, which describes specific initiatives our countries intend to undertake to achieve *Beyond the Border's* goals of perimeter security and economic competitiveness. With this notice, the United States Department of Homeland Security (DHS), on behalf of the Administration, is seeking public input on the *Beyond the Border Action Plan*.

DATES: The agency must receive comments on or before January 9, 2012.

ADDRESSES: Interested parties are invited to submit comments on the BTB Action Plan. You may submit comments, identified by the docket number DHS-2011-0115 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Electronic comment submissions should be emailed to BeyondtheBorder@hq.dhs.gov. Please direct written submissions to Beyond the Border Coordinator, U.S. Department of Homeland Security, Mailstop 0455, Washington, DC 20016. The public is strongly encouraged to file submissions electronically rather than by mail.

FOR FURTHER INFORMATION CONTACT: BeyondtheBorder@hq.dhs.gov or visit <http://www.dhs.gov/files/publications/beyond-the-border.shtm>.

SUPPLEMENTARY INFORMATION: None.

Requirements for Submissions: In order to ensure the timely receipt and consideration of comments, the White House and DHS strongly encourage commenters to make submissions via email to BeyondtheBorder@hq.dhs.gov.

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters "BC". The top of any page containing business confidential information must clearly be marked "BUSINESS CONFIDENTIAL".

Any person filing comments that contain business confidential information must also file in a separate submission a public version of the comments. The file name of the public version of the comments should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity submitting the comments. If a comment contains no business confidential information, the file name should begin with the character "P", followed by the name of the person or entity submitting comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

Luis Alvarez,

Deputy Assistant Secretary for International Affairs.

[FR Doc. 2011-31598 Filed 12-8-11; 8:45 am]

BILLING CODE 9110-9L-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I-130, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I-130, Petition for Alien Relative.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. An information collection notice was published in the **Federal Register** on September 30, 2011, at 76 FR 60852, allowing for a 60-day public comment period. USCIS did not receive any comments in connection with that notice.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until January 9, 2012. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding any item contained in this

notice, especially those regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, 20 Massachusetts Avenue, Washington, DC 20529-2020. Comments may also be submitted to DHS via facsimile to (202) 272-8352 or via email at uscisfrcomment@dhs.gov, and to the OMB USCIS Desk Officer via facsimile at (202) 395-5806 or via email at oira_submission@omb.eop.gov. When submitting comments by email please make sure to add OMB Control Number 1615-0012 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Petition for Alien Relative.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-130; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form allows citizens or lawful permanent residents of the United States to petition on behalf of certain alien relatives who wish to immigrate to the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 690,520 responses at 1.5 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,035,780 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: <http://www.regulations.gov>.

We may also be contacted at: USCIS, Regulatory Products Division, 20 Massachusetts Avenue NW., Washington, DC 20529-2020; Telephone (202) 272-8377.

Dated: November 5, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011-31582 Filed 12-8-11; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security

ACTION: 30-Day notice and request for comments; Extension of an existing information collection: 1651-0013.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release (CBP Form 7523). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (76 FR 62086) on October 6, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is

conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 9, 2012.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to oir_submission@omb.eop.gov or faxed to (202) 395-5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104-13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate of Release.

OMB Number: 1651-0013.

Form Number: CBP Form 7523.

Abstract: CBP Form 7523, *Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate of Release*, is used by carriers and importers as a manifest for the entry of merchandise free of duty under certain conditions. CBP Form 7523 is also used by carriers to show that articles being imported are to be released to the importer or consignee, and as an inward foreign manifest for vehicles of less than 5 tons arriving from Canada or Mexico with merchandise conditionally free of duty. CBP uses this form to authorize the entry of such merchandise. CBP Form 7523 is authorized by 19 USC 1484 and

provided for by 19 CFR 123.4 and 19 CFR 143.23. This form is accessible at http://forms.cbp.gov/pdf/CBP_Form_7523.pdf.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 4,950.

Estimated Number of Responses per Respondent: 20.

Estimated Total Annual Responses: 99,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 8,247.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229-1177, at (202) 325-0265.

Dated: December 5, 2011

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011-31617 Filed 12-8-11; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: NAFTA Regulations and Certificate of Origin

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the NAFTA Regulations and Certificate of Origin. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

DATES: Written comments should be received on or before February 7, 2012, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and

Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229-1177.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street, NW., 5th Floor, Washington DC 20229-1177, at (202) 325-0265.

SUPPLEMENTARY INFORMATION:

CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: NAFTA Regulations and Certificate of Origin.

OMB Number: 1651-0098.

Form Number: CBP Forms 434, 446, and 447.

Abstract: On December 17, 1992, the U.S., Mexico and Canada entered into an agreement, "The North American Free Trade Agreement" (NAFTA). The provisions of NAFTA were adopted by the U.S. with the enactment of the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. 103-182).

CBP Form 434, *North American Free Trade Certificate of Origin*, is used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA. This form is completed by exporters and/or producers and furnished to CBP upon request. CBP

Form 434 is provided for by 19 CFR 181.11 and is accessible at: http://forms.cbp.gov/pdf/CBP_Form_434.pdf.

The CBP Form 446, *NAFTA*

Verification of Origin Questionnaire, is a questionnaire that CBP personnel use to gather sufficient information from exporters and/or producers to determine whether goods imported into the United States qualify as originating goods for the purposes of preferential tariff treatment under NAFTA. CBP Form 446 is provided for by 19 CFR 181.72 and is accessible at: http://forms.cbp.gov/pdf/CBP_Form_446.pdf.

CBP is also seeking approval of Form 447, *North American Free Trade Agreement Motor Vehicle Averaging Election*, in order to gather information required by 19 CFR part 181 Appendix, Section 11, (2) "Information Required When Producer Chooses to Average for Motor Vehicles". This form is provided to CBP when a manufacturer chooses to average motor vehicles for the purpose of obtaining NAFTA preference.

Current Actions: This submission is being made to extend the expiration date for CBP Forms 434 and 446, and to add Form 447.

Type of Review: Revision.

Affected Public: Businesses.

Form 434, NAFTA Certificate of Origin:

Estimated Number of Respondents: 40,000.

Estimated Number of Responses per Respondent: 3.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 30,000.

Form 446, NAFTA Questionnaire:

Estimated Number of Respondents: 400.

Estimated Number of Responses per Respondent: 1.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 300.

Form 447, NAFTA Motor Vehicle Averaging Election:

Estimated Number of Respondents: 11.

Estimated Number of Responses per Respondent: 1.28.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 14.

Dated: December 6, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011-31668 Filed 12-8-11; 8:45 a.m.]

BILLING CODE 9111-14-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5477-N-49]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT:

Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 708-1234; TTY number for the hearing- and speech-impaired (202) 708-2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at (800) 927-7588.

SUPPLEMENTARY INFORMATION:

In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where

property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Division of Property Management, Program Support Center, HHS, room 5B-17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1-(800) 927-7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: **ARMY**: Ms. Veronica Rines, Department of the Army, Office of the Assistant Chief of Staff for Installation Management, DAIM-ZS, Room 8536, 2511 Jefferson Davis Hwy, Arlington, VA 22202: (571)

256-8145; **COAST GUARD**: Commandant, United States Coast Guard, *Attn*: Jennifer Stomber, 2100 Second St. SW., Stop 7901, Washington, DC 20593-0001; (202) 475-5609; **COE**: Mr. Scott Whiteford, Army Corps of Engineers, Real Estate, CEMP-CR, 441 G Street NW., Washington, DC 20314; (202) 761-5542; **ENERGY**: Mr. Mark Price, Department of Energy, Office of Engineering & Construction Management, MA-50, 1000 Independence Ave. SW., Washington, DC 20585; (202) 586-5422; **GSA**: Mr. Gordon Creed, Acting Deputy Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th & F Streets NW., Washington, DC 20405; (202) 501-0084; **NAVY**: Mr. Albert Johnson, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (202) 685-9305 (These are not toll-free numbers).

Dated: December 1, 2011.

Mark R. Johnston,

Deputy Assistant Secretary for Special Needs.

Title V, Federal Surplus Property Program Federal Register Report for 12/09/2011

Suitable/Available Properties

Buildings

Georgia

4 Bldgs.

Hunter Army Airfield

Savannah GA 31409

Landholding Agency: Army

Property Number: 21201140011

Status: Excess

Directions: 1228, 125, 128, 1158

Comments: off-site removal only; sq. ft. varies; current use: varies; fair to poor conditions—bldgs. need repairs; possible asbestos

5 Bldgs.

Hunter Army Airfield

Savannah GA 31409

Landholding Agency: Army

Property Number: 21201140012

Status: Excess

Directions: 1208, 1209, 1211, 1212, 1221

Comments: Off-site removal only; sq. ft. varies; current use: varies; fair conditions—bldgs. need repairs; possible asbestos

Bldg. 1201

685 Horace Emmet Wilson Blvd.

Savannah GA 31409

Landholding Agency: Army

Property Number: 21201140013

Status: Excess

Comments: off-site removal only; 8,736 sq. ft.; current use: Administrative office; fair conditions—bldg. need repairs; possible asbestos

Bldgs. 1154 and 1157

Hunter Army Airfield

Savannah GA 31409

Landholding Agency: Army

Property Number: 21201140014

Status: Excess

Comments: off-site removal only; sq. ft. varies; current use: CO HQ Bldg; fair conditions—bldgs. need repair

Bldgs. 140 and 150

Hunter Army Airfield

Savannah GA 31409

Landholding Agency: Army

Property Number: 21201140015

Status: Excess

Comments: off-site removal only; Bldg 140= 4,863 sq. ft.; Bldg. 150= 6,090 sq. ft.; poor conditions—bldgs. need repairs; current use: BDE HQ Bldg.

Kentucky

11 Bldgs.

Ft. Knox

Ft. Knox KY 40121

Landholding Agency: Army

Property Number: 21201140002

Status: Unutilized

Directions: 02422, 02423, 02424, 02425, 02956, 02960, 00173, 02197, 02200, 00097, 00098

Comments: off-site removal only; possible lead based paint, asbestos, and mold in all bldgs.; sq. ft. varies; current use: office

5 Bldgs.

Ft. Knox

Ft. Knox KY 40121

Landholding Agency: Army

Property Number: 21201140003

Status: Unutilized

Directions: 02317, 02323, 02324, 02349, 02421

Comments: off-site removal only; possible lead base paint, asbestos, and mold; sq. ft. varies; current use: office

10 Bldgs.

Ft. Knox

Ft. Knox KY 40121

Landholding Agency: Army

Property Number: 21201140016

Status: Unutilized

Directions: 120, 161, 166, 171, 101, 114, 115, 116, 117, 1196

Comments: off-site removal only; sq. ft. varies; current use: office space to storage; possible asbestos and mold

Maryland

13 Bldgs.

Naval Support Facility

Larderock MD

Landholding Agency: Navy

Property Number: 77201140004

Status: Excess

Directions: 008, 030, 111, 112, 113, 117, 121, 125, 126, 128, 129, 159, 196

Comments: off-site removal only; sq. ft. varies; current use: varies; buildings in fair condition—need repairs

New York

21 Bldgs.

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140026

Status: Unutilized

Directions: 10280, 10281, 10282, 10283, 10284, 10285, 10286, 10288, 10289, 10290, 10291, 10503, 10504, 10505, 10506, 10590, 10591, 10592, 10593, 10594, 10595

Comments: off-site removal only; sq. ft. varies; current use: concrete pad

Bldg. 02713

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140028

Status: Underutilized

Comments: off-site removal only; 1,029 sq. ft.; need major repairs; current use: Administrative office

2 Bldgs.

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140030

Status: Underutilized

Directions: 1444 and 1445

Comments: off-site removal only; bldg. 1444 = 4,166 sq. ft.; bldg. 1445 = 7,219 sq. ft.; current use: varies; need extensive repairs to both bldgs.

South Carolina

Bldg. M7511

Ft. Jackson

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201140017

Status: Unutilized

Comments: 220 sq. ft.; current use: sep/toil/shower; needs repairs; control access gates

Bldg. 3499

Ft. Jackson

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201140018

Status: Underutilized

Comments: 1,871 sq. ft.; current use: office space; need repairs; control access gates

Bldg. 02464

Ft. Jackson

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201140021

Status: Underutilized

Comments: 27,048 sq. ft.; current use: lodging; limitations w/Ft. Jackson controlled access points

Bldg. 02785

Ft. Jackson

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201140022

Status: Unutilized

Comments: 80,130 sq. ft.; current use: UOQ military; limitations w/Ft. Jackson controlled access points

6 Bldgs.

Ft. Jackson

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201140023

Status: Underutilized

Directions: 02102, 02103, 02105, 02106, 02107, 02108

Comments: sq. ft. varies; current use: classroom to trainee bks.; need repairs; limitations w/controlled access points

M7512

Ft. Jackson

Ft. Jackson SC 29207

Landholding Agency: Army

Property Number: 21201140025

Status: Underutilized

Comments: 220 sq. ft.; current use: sep/toil/shower; need repairs; control access gates

Suitable/Unavailable Properties

Building

Idaho

Moscow Federal Bldg.

220 East 5th Street

Moscow ID 83843

Landholding Agency: GSA

Property Number: 54201140003

Status: Surplus

GSA Number: 9-G-ID-573

Comments: 11,000 sq. ft.; current use: office

Unsuitable Properties

Building

Colorado

7 Bldgs.

Ft. Carson

Ft. Carson CO 80913

Landholding Agency: Army

Property Number: 21201140005

Status: Unutilized

Directions: 1382, 1383, 1384, 1385, 1386, 1387, 1389

Comments: Friable asbestos identified in Bldg. 1382

Reasons: Contamination, Within airport runway clear zone

2 Bldgs.

Ft. Carson

Ft. Carson CO 80913

Landholding Agency: Army

Property Number: 21201140006

Status: Unutilized

Directions: 1380 and 1381

Comments: Bldg. 1380 has flammable explosive materials

Reasons: Extensive deterioration, Within 2000 ft. of flammable or explosive material

Georgia

Bldg. 610

Hunter Army Airfield

Savannah GA 31409

Landholding Agency: Army

Property Number: 21201140010

Status: Excess

Reasons: Within 2000 ft. of flammable or explosive material

Illinois

4 Bldgs.

Naval Station

Great Lakes IL 60088

Landholding Agency: Navy

Property Number: 77201140005

Status: Underutilized

Directions: 712, 713, 747, 6801

Reasons: Secured Area

Naval Station

Bldg. 130H

Great Lakes IL 60088

Landholding Agency: Navy

Property Number: 77201140006

Status: Underutilized

Reasons: Secured Area

Bldg. 5103

Naval Station

Great Lakes IL 60088

Landholding Agency: Navy

Property Number: 77201140007

Status: Underutilized

Reasons: Secured Area

Bldg. 5602

Naval Station

Great Lakes IL 60088

Landholding Agency: Navy

Property Number: 77201140008

Status: Underutilized

Reasons: Secured Area

Bldg. 5615

Naval Station

Great Lakes IL 60088

Landholding Agency: Navy

Property Number: 77201140012

Status: Underutilized

Reasons: Secured Area

Minnesota

Haz Mat Storage Bldgs.

1201 Minnesota Ave

Duluth MN 55802

Landholding Agency: COE

Property Number: 31201140001

Status: Excess

Directions: OV9 and OV10

Reasons: Secured Area

New Jersey

13 Bldgs.

Trng Ctr-Storage Sheds

Cape May NJ 08204

Landholding Agency: Coast Guard

Property Number: 88201140001

Status: Excess

Directions: 1740, 1741, 1750, 1760, 1761,

1710, 1711, 1720, 1724, 1730, 1731, 1734, 1754

Reasons: Extensive deterioration

New York

Bldg. 2709

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140004

Status: Underutilized

Reasons: Extensive deterioration, Within 2000 ft. of flammable or explosive material

Bldg. 1446

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140027

Status: Underutilized

Reasons: Extensive deterioration

Bldg. 2466

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140029

Status: Underutilized

Reasons: Extensive deterioration

Bldgs. 02710 and 02743

Ft. Drum

Ft. Drum NY 13602

Landholding Agency: Army

Property Number: 21201140031

Status: Unutilized

Reasons: Extensive deterioration, Within 2000 ft. of flammable or explosive material

North Carolina

10 Bldgs.

Ft. Bragg

Ft. Bragg NC 28310

Landholding Agency: Army

Property Number: 21201140009

Status: Unutilized
 Directions: 32039, K1846, K2106, X7163,
 X7169, X7269, X7362, X7369, X7462, and
 X7665
 Reasons: Secured Area, Extensive
 deterioration

Puerto Rico

Bldg. 2034
 USARC
 Army Reserve Ctr. PR 00735
 Landholding Agency: Army
 Property Number: 21201140007
 Status: Excess
 Reasons: Extensive deterioration

12 Bldgs.
 Ft. Buchanan
 Ft. Buchanan PR 00934
 Landholding Agency: Army
 Property Number: 21201140008
 Status: Excess
 Directions: 13, 15, 30, 517, 556, 576, 1315,
 1316, 1319, 1320, 1323, 1324
 Reasons: Extensive deterioration

South Carolina

4 Bldgs.
 Ft. Jackson
 Ft. Jackson SC 29207
 Landholding Agency: Army
 Property Number: 21201140019
 Status: Unutilized
 Directions: J8632, F2558, 03058, 02494
 Comments: Reasons for unsuitability varies
 among properties
 Reasons: Within airport runway clear zone,
 Extensive deterioration, Secured Area

Bldg. 02451
 Ft. Jackson
 Ft. Jackson SC 29207
 Landholding Agency: Army
 Property Number: 21201140020
 Status: Unutilized
 Reasons: Secured Area, Extensive
 deterioration

Bldg. 02101
 Ft. Jackson
 Ft. Jackson SC 29207
 Landholding Agency: Army
 Property Number: 21201140024
 Status: Underutilized
 Reasons: Secured Area

Tennessee
 13 Bldgs.
 Y-12 Nat'l Security Complex
 Oak Ridge TN 37830
 Landholding Agency: Energy
 Property Number: 41201140003
 Status: Unutilized
 Directions: 9949-56, 9949-57, 9949-58,
 9722-05, 9949-43, 9949-44, 9949-45,
 9999-07, 9946-50, 9949-59, 9722-06,
 9949-51, 9949-48
 Reasons: Secured Area

Washington

Bldgs. 73 and 894
 Naval Base Kitsap
 Keyport WA
 Landholding Agency: Navy
 Property Number: 77201140009
 Status: Underutilized

Reasons: Secured Area, Within 2000 ft. of
 flammable or explosive material

[FR Doc. 2011-31242 Filed 12-8-11; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. FWS-R9-ES-2011-0031;
 FXES11130900000C6-123-FF09E32000;
 DOC Docket No. 110131072-1277-01]

RIN 1018-AX49; 0648-BA78

Draft Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species"

AGENCY: Fish and Wildlife Service,
 Interior; National Marine Fisheries
 Service, NOAA, Commerce.

ACTION: Notice of draft policy; request
 for public comments.

SUMMARY: We, the United States Fish
 and Wildlife Service (FWS) and the
 National Marine Fisheries Service
 (NMFS) (collectively, the Services),
 announce a draft policy to provide our
 interpretation of the phrase "significant
 portion of its range" in the Endangered
 Species Act's (Act's) definitions of
 "endangered species" and "threatened
 species." The purpose of this notice is
 to provide a draft interpretation and
 application of "significant portion of its
 range" that reflects a permissible
 reading of the law and its legislative
 history and minimizes undesirable
 policy outcomes, while fulfilling the
 conservation purposes of the Act. We
 seek public comments on this draft
 policy. It is our intent to publish a final
 policy that will provide a consistent
 standard for interpretation of the phrase
 and its role in listing determinations
 that will be accorded deference by the
 federal courts.

DATES: We will consider comments and
 information we receive from all
 interested parties on or before February
 7, 2012.

ADDRESSES: You may submit comments
 by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on docket number FWS-R9-ES-2011-0031.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R9-

ES-2011-0031; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042; 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 Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Rick Sayers, U.S. Fish and Wildlife Service, Endangered Species Program, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone (703) 358-2171; facsimile (703) 358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone (301) 713-1401; fax (301) 713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

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I. Background

A. Introduction

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act) provides for the classification (i.e., the listing) and protection of “endangered species” and “threatened species.” It is implemented jointly by the Services. Where language in the Act is ambiguous and open to interpretation, the Secretaries of the Interior and Commerce (Secretaries) have the discretion to provide a reasonable interpretation of that language. One such ambiguity is the meaning of the phrase “significant portion of its range” (SPR) found in the Act’s definitions of “endangered species” and “threatened species.”

Despite the fact that the definitions of “endangered species” and “threatened species” have been part of the Act since its enactment in 1973, prior to 2007, neither agency had adopted a regulation or binding policy defining or explaining the application of the phrase “significant portion of its range,” an element common to both definitions. Specifically, the Services have never addressed in their regulations: (1) The consequences of a determination that a “species”¹ 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.” To address this, the Solicitor of the Department of the Interior (DOI) issued a legal opinion in 2007 addressing several issues regarding the meaning of the SPR phrase (referred to as the “M-Opinion”) (DOI 2007). The M-Opinion’s conclusion regarding the interpretation of the SPR phrase that provided for applying the Act’s

¹ The term “species” is specifically defined as a term of art in the Act to include “subspecies” and, for vertebrate species, “distinct population segments,” in addition to taxonomic species. 16 U.S.C. § 1532(16). Therefore, when we use the term “species” in this draft policy, with or without quotation marks, we generally mean to refer to this statutory usage. In some instances, however, where we intend to place specific emphasis on the term, we will use quotation marks. Where, on the other hand, the Services intend to use the biological meaning of the term, we will use the term “taxonomic species.”

protections to a listed species in only a portion of its range was rejected by subsequent court rulings, as explained below, and the M-Opinion was withdrawn on May 4, 2011 (DOI 2011). Following withdrawal of the M-Opinion, neither agency has had a policy providing a uniform interpretation of the phrase “significant portion of its range.”

Here we notify the public of a draft policy regarding the interpretation and application of the SPR phrase. Specifically, this draft policy includes: (1) An explanation of the consequences of a species being in danger of extinction or likely to become so in an SPR, but not throughout all of its range; (2) a definition of the term “significant” as it applies to SPR; (3) an interpretation of the term “range” and explanation of how historical range is considered as it applies to SPR; and (4) a means of reconciling our draft interpretation of SPR with the inclusion of “distinct population segment” (DPS) in the Act’s definition of “species.” This draft policy is preceded by a detailed explanation of the conclusions reached in the draft policy, as well as the alternatives we considered.

Our intent is to finalize a legally binding policy that will set forth the Services’ interpretation of “significant portion of its range” and its place in the statutory framework of the Act. This draft policy has been jointly developed by the Services and will be finalized after full consideration of alternatives and public comments.

B. The Statute

A policy interpretation of the SPR phrase must consider not only the definitions in which the phrase occurs but also other relevant parts of the statute. As noted above, the Act provides for the classification (i.e., the listing) and protection of “endangered species” and “threatened species.” The Act defines the terms “endangered species” and “threatened species” as follows:

The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range * * * (16 U.S.C. 1532(6)).

The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)).

The Act contains no definition of the phrase “significant portion of its range.” The definition of “species” is also relevant to this discussion. Section 3 defines the term “species” as follows:

The term “species” includes any subspecies of fish or wildlife or plants, and

any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)).

The Act’s definition of “species” originally included taxonomic species, subspecies, “and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature” (Pub. L. 93–205, 87 Stat. 884 (1973)). The quoted clause was a precursor for what in 1978 would become, through amendment, the current language: “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature” (Pub. L. 95–632, 92 Stat. 3751 (1978)). In 1996, the Services jointly adopted a policy to guide implementation of the “distinct population segment” (DPS) concept in listings, delistings, and reclassifications (DPS Policy; 61 FR 4722, February 7, 1996). The DPS Policy looks to the discreteness and significance of populations, as well as their conservation status, to determine whether they qualify for listing. The DPS language is relevant to considering an interpretation of the SPR phrase because they both involve analysis of less than the entire range of a taxonomic species or subspecies in making listing determinations, although the consequences may differ as discussed further in this Policy.

Both prior to and in the years between the issuance of the DPS Policy and the advent of a string of court decisions discussing SPR issues beginning in 2001 (see Case Law below), it had generally been understood (although not expressly articulated) by the Services that, given the Act’s definition of “species,” the only way to list less than a taxonomic species or subspecies was as a DPS. For example, in 1976 the FWS listed the U.S. population of the Bahama swallowtail butterfly (41 FR 17736). When the Act was amended in 1978 to limit population listings only to vertebrates, the Service removed the subspecies from the list because the U.S. population was not a distinct subspecies from the Bahama populations and the subspecies to which the U.S. population belonged itself was not threatened (49 FR 34501). Thus, the FWS did not believe the Act allowed listing units below taxonomic species or subspecies, except in the case of vertebrate DPSs. As discussed below, the M-Opinion took the contrary position.

Finally, section 4(c)(1) of the Act states that the lists of endangered species and threatened species “shall refer to the species contained therein by scientific and common name or names,

if any, [and] *specify with respect to each such species over what portion of its range it is endangered or threatened* (emphasis added)” (16 U.S.C. 1533(c)(1)). The intent of this language must also be considered in determining the regulatory consequences of an interpretation of the SPR phrase.

C. The Legislative History

Interpretation of the statutory language can be assisted at times by reading the legislative history. However, in this case, the legislative history is somewhat contradictory and is not particularly conclusive as to the role Congress intended the SPR phrase to play.

The precursor to the Endangered Species Act of 1973 was the Endangered Species Conservation Act of 1969 (Pub. L. 91–135, 83 Stat. 275) (ESCA). The ESCA defined an “endangered species” by stating: “A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction whenever the Secretary determines, based on the best scientific and commercial data available to him, * * * that the continued existence of such species or subspecies of fish or wildlife is * * * endangered * * *” (section 3(a)). Thus, to be protected under the ESCA, a species had to be endangered worldwide.

In the 1973 Act, Congress addressed what it saw as limitations in the ESCA. As explained in more detail in a summary developed by DOI explaining the origins of the SPR phrase and its current placement in the Act (DOI 2010) and available for viewing at <http://www.regulations.gov>, the SPR language originated in proposed endangered species legislation drafted by DOI and introduced the previous year as H.R. 13111. (This language was also included in the bill H.R. 37 introduced in the 93rd Congress that would ultimately become the Endangered Species Act of 1973.) It was included in a single sentence that combined aspects of the provisions currently found in sections 3(6), (16), and (20), and 4(a)(1), and (b)(1) of the Act. Section 2(c)(1) of the DOI bill provided that

A species or subspecies of fish or wildlife shall be regarded as an endangered species whenever, in his discretion, the Secretary determines, based on the best scientific and commercial data available to him and after consultation, as appropriate, with the affected States, and, in cooperation with the Secretary of State, the country or countries in which such fish and wildlife are normally found or whose citizens harvest the same on the high seas, and to the extent practicable, with interested persons and organizations, and other interested Federal agencies, that the continued existence of such species or

subspecies of fish or wildlife is, in the judgment of the Secretary, either presently threatened with extinction or will likely within the foreseeable future become threatened with extinction, *throughout all or a significant portion of its range*, due to any of the following factors: (i) The destruction, drastic modification, or severe curtailment of its habitat; or (ii) its overutilization or commercial, sporting, scientific, or educational purposes; or (iii) the effect on it of disease or predation; or (iv) the inadequacy of existing regulatory mechanisms; or (v) other nature or manmade factors affecting its continued existence.

(Emphasis added.) That sentence was immediately followed by language now found in section 4(c)(1) of the Act:

[T]he Secretary shall publish * * * a list, by scientific and common name of such endangered species, indicating as to each species and subspecies so listed whether such species or subspecies is presently threatened with extinction or likely within the foreseeable future to become threatened with extinction and, in either case, over what portion of the range of such species this condition exists.

A “Final Environmental Statement” (DOI 1972) on that bill prepared by DOI indicated that DOI intended the SPR language to play the role eventually played by the precursor to the Act’s current DPS language. According to the Final Environmental Statement, “[t]he term ‘significant portion’ of its range is used in the definition of endangered to provide the Secretary with the authority to protect a population unique to some portion of the country without regard to its taxonomic status, or a population that is now endangered over a large portion of its range even if the population inhabiting that portion of the range is not recognized as a distinct subspecies from a more abundant population occurring [sic] elsewhere.” In response to comments, the Final Environmental Statement also states “The term ‘a significant portion of its range’ allows the Secretary to use discretion in listing a distinct population which may be a subspecies, race, form, or a unique or disjunct segment of a species without regard to whether it is a recognized subspecies or not.”

The DOI bill did not include a definition of “species” or the language that was the precursor to the Act’s current DPS language (H.R. 4758, 93d Cong. (1972)). However, in the bill that eventually became the 1973 Act, Congress split up the single sentence from the DOI bill into multiple pieces and placed them in different portions of the Act. Simultaneously, it added the DPS precursor language to the definition of “species,” but did not delete the SPR language. Instead Congress moved the

SPR language, without explanation, to the definitions of “endangered species” and “threatened species.”

As a general matter, the various committee reports note a number of problems with the prior legislation that the 1973 Act was intended to fix. *See generally* S. Rep. No. 93–307 (1973); H.R. Rep. No. 93–412 (1973). Unfortunately, the reports did not clearly state which language in the new law was intended to address which problem. Thus, it is unclear what role Congress intended the SPR language (as opposed to the definition of “species” or the addition of the new “threatened species” category) to play. Consequently, the legislative history is not determinative.

D. Case Law

Past judicial opinions can provide insight into possible statutory interpretations and indicate where courts find support for them in the statutory text, legislative history, and purposes of the Act. Nonetheless, an agency may interpret a statute in a way inconsistent with past judicial opinions if (1) the agency’s interpretation is otherwise entitled to judicial deference, and (2) the court did not conclude that the court’s interpretation was required by the unambiguous terms of the statute, leaving no room for agency discretion. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Because it is our intent that judicial deference will apply to the final policy that results from this draft policy, as provided in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and because we conclude, as have a number of courts, that the relevant statutory provisions are ambiguous, our conclusions ultimately may differ from some of the conclusions reached by the various courts, as discussed below.

Beginning in 2001, a number of judicial opinions have addressed this statutory language. The seminal case was *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (*Defenders (Lizard)*). The court held that the SPR language was “inherently ambiguous,” finding that it was something of an oxymoron to speak of a species being at risk of extinction in only a portion of its range (*id.* at 1141), and because the Act does not define a “significant portion,” the Secretary has wide discretion to delineate it (*id.* at 1145).

However, the court found that the interpretation FWS offered in that particular litigation was unacceptable because it would allow for listing only when a species “is in danger of extinction everywhere” (*id.* at 1141).

The approach FWS described there, which has come to be called the “clarification interpretation,” viewed the SPR language as merely clarifying that a portion of the range of a species could be so important to its conservation that threats there could determine the status of the species overall. Thus, the only circumstance in which a species would be in danger of extinction in a significant portion of its range is one in which it was in fact in danger of extinction throughout all of its range.

The court held that every part of the language of the Act’s definition of “endangered species” must be given meaning. In particular, the SPR phrase, “or a significant portion of its range,” must be given some independent meaning to avoid being rendered superfluous to the “throughout all” language. The court rejected the clarification interpretation because, under that interpretation, there would be no circumstance in which a species that was in danger of extinction in a significant portion of its range would not also be in danger of extinction throughout all of its range. Thus, the SPR language would be superfluous, or redundant to the other language in the Act. The court also rejected the Plaintiff environmental organization’s argument that a specific percentage loss of habitat should automatically qualify a species for listing.

At the conclusion of a chain of reasoning that appears to some extent to have blurred the line between loss of historical range and current threats to habitat, the court concluded that “where * * * it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a ‘significant portion of its range’” (*id.* at 1145). The court suggested that, had FWS done such an analysis, it might have concluded that “enhanced protections” or “different degrees of protection” might be needed for some parts of the species (*id.* at 1146).

In the years after the *Defenders (Lizard)* decision was issued, a number of district courts have addressed issues relating to the SPR language. Most have purported to follow one or more aspects of the Ninth Circuit’s opinion (*see, e.g., Ctr. for Biological Diversity v. Kempthorne*, 2007 U.S. Dist. LEXIS 4816 (N.D. Cal. Jan. 19, 2007); but *see Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005), *vacated by* No. 06–2049 (10th Cir. May 14, 2007); *Ctr. for Biological Diversity v.*

U.S. Fish & Wildlife Serv., 2007 U.S. Dist. LEXIS 16175 (D. Colo. Mar. 7, 2007), *vacated by* No. 07–1203 (10th Cir. Oct. 22, 2007)).

In 2007, the Solicitor of DOI issued the M-Opinion (DOI 2007). The M-Opinion accepted the primary holding of the *Defenders (Lizard)* decision and concluded that FWS should interpret the SPR language to have independent meaning. The opinion also interpreted the SPR phrase to authorize FWS to consider application of the Act’s protections to less than all members of a taxonomic species, subspecies, or DPS (DOI 2007, p. 15). The M-Opinion drew support for this position from section 4(c)(1) (*see Statute above*), interpreting the language of 4(c)(1) as having substantive effect rather than being merely a recordkeeping provision.

Two recent district court decisions have addressed whether the SPR language allows the Services 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 FWS’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 FWS’s 2008 finding on a petition to list the Gunnison’s prairie dog (73 FR 6660, Feb. 5, 2008). FWS had asserted in both of these determinations, based on the M-Opinion, that it had authority, in effect, to protect under the Act only some members of a species, as defined by the Act (*i.e.*, taxonomic species, subspecies, or DPS). Both courts ruled that the determinations were arbitrary and capricious on the grounds that the M-Opinion 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,” which forecloses listing any population that does not qualify as a taxonomic species, subspecies, or DPS.

These two decisions hold that the SPR language may not be used as a basis for listing less than all members of a species. According to these courts, the SPR language requires rangewide listing of species whenever they are endangered or threatened in an SPR, even if they are healthy in other areas. Thus, the courts concluded that the SPR language “does not qualify where a species is endangered, but rather it qualifies when it is endangered” (729 F. Supp. 2d at 1218). The SPR language is intended to ensure that a species receives protection even if threats are not so widespread that the species is

threatened with worldwide extinction (which was the standard under the ESCA of 1969). The courts concluded that once a determination is made that a species meets the definition of an “endangered species” or “threatened species,” it must be placed on the list in its entirety and the Act’s protections applied to all members throughout its range (which protections are thereafter subject to modification through other provisions of the Act, such as sections 4(d), 4(f), and 10(j)).

According to the Montana district court in *Defenders of Wildlife v. Salazar*, it is the DPS concept in the definition of “species,” not the SPR language in the other definitions, that allows the Services flexibility to provide different levels of protection for populations of the same taxonomic species or subspecies. Because the M-Opinion interpretation sought to anchor flexibility in the SPR language, it would impermissibly render the DPS language redundant. 729 F. Supp. 2d at 1225. The court further concluded that the M-Opinion interpretation would thwart the intent of Congress to limit listings below the subspecies level to only vertebrate fish and wildlife by allowing the SPR language to side-step the DPS mechanism and allow flexible listings of invertebrates and plants. *Id.* at 1225–26.

The Montana district court in *Defenders of Wildlife v. Salazar* also found that the section 4(c)(1) language (*see Statute above*), which the M-Opinion had emphasized as supporting the FWS approach, cannot reasonably be read to create substantive ambiguity in the statute, but rather was a publishing requirement that comes into play only after a listing determination has been made. *Id.* at 1220–21.

II. Policy Explanation

A. Purpose

The purpose of this draft policy is to offer an interpretation and application of “significant portion of its range” that reflects a permissible reading of the law and its legislative history, while fulfilling the purposes of the Act. The various relevant statutory provisions together create a variety of tensions and ambiguities. Here, we propose to adopt a reasonable interpretation of these statutory provisions. We conclude that (1) if a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act’s protections apply across the species’ entire range; (2) 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; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination; and (4) if the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

As discussed above and in more detail in DOI (2010) and FWS and NMFS SPR Working Group (2010), the role of the SPR language in the context of the entire statutory scheme created by the Act is not clear from the text itself or the legislative history. However, the Ninth Circuit Court’s ruling in *Defenders (Lizard)* indicates that we should give the phrase on either side of the “or” in these definitions operational meaning (see *Defenders (Lizard)* 258 F.3d at 1141–42). We now agree with this interpretation, and we have therefore developed a policy that would give operational effect to the SPR language instead of treating it as merely a clarification of the “throughout all” language. Thus, under our draft policy, a species would be able to qualify as an endangered species in two different situations: (1) If it is in danger of extinction throughout all of its range, or (2) if it is in danger of extinction in a significant portion of its range. The same is true for threatened species.

There are two separate, but interrelated, components to giving the phrase “a significant portion of its range” operational meaning. First, we establish what the consequence would be of a species being endangered or threatened in an SPR. Second, we define “significant,” thereby providing a standard for determining when a portion of a species’ range constitutes an SPR, and thus when that consequence may be triggered. (We address the consequences issue first because the Services have greater discretion in defining “significant,” and those consequences play an important role in the Services’ decision as to how to exercise that discretion.) We address each of these in turn.

We note that throughout this policy when discussing SPR and “portion of the range” and similar phrases, we are referring to the species within that portion of the range. As explained further below, when analyzing portions

of ranges we consider the contribution of the individuals in that portion to the viability of the species in determining whether a portion is significant, and we consider the status of the species in that portion. Thus, when we refer to “portion of its range,” we most often intend to mean the individuals of the species that occupy that portion. However, for the sake of readability, in this policy we sometimes refer to “a portion of the range” or similar phrases as a short hand for the “species in that portion of its range.”

B. The First Component: Consequences of a Species Being in Danger of Extinction or Likely To Become So in an SPR

Given that we have determined that this draft policy would recognize that a species may be an endangered species or threatened species if it is in danger of extinction (endangered) or likely to become so (threatened) in an SPR, but not throughout all of its range, we considered what consequences under the Act flow from such a determination. In particular, we considered two alternative interpretations: A species that is endangered or threatened in an SPR is protected throughout all of its range, or a species that is endangered or threatened in an SPR is protected only in that SPR. The M-Opinion took the latter view. We conclude that the former view is the best interpretation of the Act. Our conclusion is based on an examination of (1) The statutory text, (2) the purposes of the Act, (3) the legislative history, (4) past agency practice, and (5) relevant case law.

First, protection throughout the range of the species is most consistent with the plain meaning of the text of the Act itself. Under section 3(6) of the Act, “any *species* which is in danger of extinction throughout * * * a significant portion of its range (emphasis added)” is an “endangered species.” Thus, if a species is in danger of extinction throughout an SPR, then that species is an “endangered species.” The same analysis applies to “threatened species.” Moreover, the protections of section 7 and section 9 of the Act make no distinction between portions of range and species; those protections apply to “endangered species” and, in the case of section 7, “threatened species.”

In addition, the Act has a separate definition of “species.” The most logical way to interpret the roles of the three definitions at issue is for the definition of “species” to determine what may be protected, and the definitions of “endangered species” and “threatened species” to be limited to the question of

whether a species must be protected. The courts in the Northern Rocky Mountain gray wolf and Gunnison’s prairie dog cases (*Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1218 (D. Mont. 2010); *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253, *16 (D. Ariz. Sept. 30, 2010) held that “species” is limited to the three items included in the scope of the definition of that term. For the purposes of making listing determinations under the Act, we agree with that view. See also *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001) (“Congress expressly limited the Secretary’s ability to make listing distinctions among species below that of subspecies or a DPS of a species.”). A related point is that the definition of “species” expressly provides for the protection of less than a full taxonomic species under certain circumstances (i.e., when a group of organisms qualifies as a subspecies or DPS). Interpreting the SPR language to allow protections to apply only in the SPR creates unnecessary tension between the SPR language and the DPS language.

The primary difficulty in the text of the statute with interpreting the SPR language to provide rangewide protection is section 4(c)(1) of the Act. That provision directs the Secretary, when publishing a list of those species found by the Services to be endangered or threatened, to “specify with respect to such species over what portion of its range it is endangered or threatened.” The M-Opinion relied primarily on this provision in concluding that a species listed pursuant to the SPR language was protected only within the SPR within which the species is in danger of extinction or likely to become so (endangered or threatened) concluding that section 4(c)(1) created an ambiguity as to the effect of the SPR language. The alternative to interpreting section 4(c)(1) as supporting the position taken in the M-Opinion is that section 4(c)(1) is in effect a bookkeeping provision that should not be viewed as undermining the plain meaning of the key substantive provisions of the Act. Under this interpretation, the “portion of its range” language in section 4(c)(1) (see *The Statute* above) serves an informational purpose, providing the public with information either as to the portion of the range that led to the species being in danger of extinction or likely to become so (and protected throughout its range), or as to where protections vary below the taxonomic species or subspecies level based on the authority of substantive provisions of the Act (i.e., a DPS under the definition of “species”

or an experimental population under section 10(j)).

In fact, since 1980 the FWS has implemented this language in section 4(c)(1) using a column in the published list of Endangered and Threatened Wildlife entitled "Vertebrate population where endangered or threatened." See 50 CFR 17.11(h); see also 45 FR 13010 (Feb. 27, 1980) (instituting current format of § 17.11(h)). The FWS thus equated section 4(c)(1)'s requirement to specify the endangered or threatened portion of a species' range with the DPS language in the definition of "species" ("vertebrate population"). And prior to the issuance of the M-Opinion, the FWS used that column to identify listed DPSs.

On balance, we conclude that treating the "portion of its range" language in section 4(c)(1) as informational rather than substantive is the best way to harmonize the various provisions of the Act. See *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d at 1220–21 (section 4(c)(1) is a publishing requirement that cannot alter a substantive determination; "over what portion of its range it is endangered or threatened" relates to specifying a "species" below the taxonomic level, i.e., a DPS). The conclusion that section 4(c)(1) is itself informational and is not the basis for finding ambiguity in the definitions of "endangered species" and "threatened species" in no way affects the substantive differences in protection that can result from application of other provisions of the Act, such as sections 4(d) and 10(j).

A related argument from the text of the Act is that this interpretation makes irrelevant the "all or" language in the definitions of "threatened species" and "endangered species." According to that argument, the Services would never need to address the question of threats throughout all of the range of the species, as they would be required to list the species if it is in danger of extinction or likely to become so in any SPR.

That argument, however, fails to take into account the practical way in which the Services actually determine the status of a species. As discussed below in the *Implementation of the policy* section, the first step in our analysis is to determine the status of the species throughout all of its range. Indeed, the analysis at this level will be determinative unless there is a particular reason in the record to analyze the status in something less than the entire range. The Services will only engage in a detailed analysis of portions of the range of the species if they have substantial information

suggesting both that a portion of the range is significant and that the species may be in danger of extinction there or likely to become so due to, for instance, the concentration of threats in an important geographic area. Moreover, if such an analysis is done, the range-wide analysis will provide important context for the SPR analysis. Thus, the "all or" language will also retain independent meaning and play an important role in status determinations.

This conclusion is consistent with both cases that have addressed this argument. In *WildEarth Guardians*, the court rejected the argument that interpreting the Act to protect species range-wide when in danger of extinction in a significant portion of its range made the "all of" language superfluous. 2010 U.S. Dist. LEXIS 105253 at *11–13 (stating that, in this context, "all" provides an indication of what would make a portion of a species' range significant"). Moreover, the court suggested that it is reasonable to infer that Congress meant "throughout all or a significant portion" to function as a single concept solely designed to ensure that the extent of impacts across the range was considered. *Id.* at *12–13 ("Moreover, common English usage accepts some level of redundancy without violating a canon of statutory construction. It was more natural for Congress to say 'all or a significant portion' than to just say 'a significant portion.' That is the way we speak."). *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1219.

Second, the formal purposes and policies included in the text of the Act itself do not help resolve this interpretive question (see 16 U.S.C. 1531). Although those provisions speak to the necessity and importance of protecting endangered species, they do not shed light on what should be considered an endangered species. More broadly, however, protecting the entire species when it is endangered or threatened in a significant portion of its range is consistent with the congressional intent of the 1973 Act, an important aspect of which was to expand the protection of its predecessors so that action could be taken before a species was threatened with worldwide extinction (S. Rep. No. 93–307 (1973); H.R. Rep. No. 93–412 (1973)). We recognize that this interpretation may lead to application of the protections of the Act in areas in which a species is not currently endangered or threatened with extinction, and in some circumstances may lead to the expenditure of resources without concomitant conservation

benefits; however, this concern is reduced by interpreting the word "significant" within the SPR phrase relatively strictly, as discussed below. We have the discretion to implement the Act, where possible, to avoid or minimize expending resources on actions that either do not address threats that led to the species warranting listing or do not advance recovery of the species. While all the provisions of the Act would apply throughout the range of the species, as we discuss under the section *Effects of Policy*, below, we have many tools available to us to focus implementation of the Act on those actions with greatest effect on the conservation of the species. For example, we may modify prohibitions for threatened species through use of special rules under section 4(d) of the Act, focus recovery planning and implementation efforts on specific areas where threats are acting on the species, and use various mechanisms to streamline permitting and consultation processes under sections 7 and 10 of the Act. Thus, we conclude that interpreting the SPR language to protect species rangewide is consistent with the purposes of the Act.

Third, as discussed above, the legislative history does not provide significant insight into the meaning or effect of the SPR phrase. The M-Opinion cites the remarks of Senator Tunney in the floor debate regarding the Act, which suggest that he understood that the SPR language would allow for a species to be subject to different levels of protection in different portions of its range (119 Cong. Rec. 25,669 (1973)). This provides some support for the position reflected in the M-Opinion. Other items in the legislative history could be read to support this position as well, but taken as a whole, the legislative history is unclear as to the specific meaning and application of the SPR phrase. However, for all the reasons discussed herein, we (and the courts that have thus far considered the matter) do not find this statement, or anything else in the legislative history, to be dispositive.

Fourth, our interpretation does not conflict with an established past agency practice, as no consistent, long-term agency practice has been established. The conclusion reached in this draft policy is, as noted above, inconsistent with the M-Opinion, and, consequently, a number of listing determinations made by FWS since the issuance of the M-Opinion. Of course, that opinion has now been withdrawn. Prior to the decision in *Defenders (Lizard)*, neither FWS nor NMFS had explained its interpretation of the SPR language, or

expressly explained how it implemented or used that authority in its individual determinations under section 4 of the Act. The Ninth Circuit surmised that a number of the determinations we made in the past that protected only part of the range of a taxonomic species did so on the basis of the SPR language. 258 F.3d at 1145. However, these listings can also be explained as relying on the authority of the DPS language in the definition of “species” or the precursor of that language.

Finally, our interpretation is also consistent with the judicial opinions that have most closely examined this issue. In both *Defenders of Wildlife v. Salazar* and *WildEarth Guardians v. Salazar*, the district courts rejected the argument that the Act allows for protections for listed species to be limited to portions of the range within which a species is determined to be endangered or threatened and held that such an interpretation would be contrary to the plain meaning of the Act. Instead, the courts found that the authority to provide a taxonomic species with different levels of protection stems from the definition of “species” (*i.e.*, the DPS language).

We recognize that previous judicial opinions lend some support to the conclusion that the Secretaries have the authority to list or protect species only in portions of their range. In *Defenders (Lizard)*, although the court did not expressly direct FWS to consider listing or protecting only some members of a species, its discussion implied that FWS could apply varying degrees of protection in different portions of the lizard’s range (258 F.3d at 1144–45; *see also Roosevelt Campobello Intl. Park Comm’n v. U.S. Env’tl Protection Agency*, 684 F.2d 1041, 1050 n.5 (1st Cir. 1982)). However, the question of the authority to provide varying degrees of protection was not briefed in *Defenders (Lizard)*, nor was it central to the court’s decision to vacate the FWS’s listing determination, and both of the district court cases cited above found the Ninth Circuit Court’s reasoning on this particular issue was not applicable. In any event, the Ninth Circuit Court issued its decision without the benefit of a formal agency position, which this policy, when finalized, will constitute (*see Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983–85 (2005)).

C. Second Component: The Definition of “Significant” as It Relates to SPR

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 defining “significant” to establish a standard for when such an independent basis for listing exists. This draft policy includes the following definition of “significant” as it relates to SPR: a portion is “significant” in the context of the Act’s “significant portion of its range” phrase if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction. In this section, we explain why the draft policy defines the term “significant” in this way. This definition of “significant” addresses two questions: (1) How we will measure or on what basis we will determine whether a portion is “significant”; and (2) at what threshold or level of importance we will determine a portion is “significant”? We first explain why we have chosen a biological basis to define “significant.” We then describe our definition’s threshold, or level of importance, a portion must meet for it to be considered “significant” and why that threshold is appropriate.

The Act does not define “significant” as it relates to SPR, and the legislative history does not elucidate Congressional intent. Dictionary definitions of “significant” provide a number of possible meanings; one of the most prominent is “important.” *E.g.*, Random House Dictionary of the English Language at 1326 (unabridged ed. 1967). We conclude that “important” is the most relevant meaning, but that it provides little guidance as to precisely what “significant” means in the context of the definitions of “endangered species” and “threatened species.” We note that one district court interpreted “significant” to mean “a noticeably or measurably large amount.” *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19 (D.D.C. 2002) (addressing whether FWS had adequately explained its conclusion that three of the four areas in the contiguous United States that historically supported Canada lynx populations were not collectively a significant portion of the range of the lynx DPS’s range). The court did so without analysis or any reference to alternate meanings, such as “important.” Even if this is a plausible definition, nothing in that Court’s decision explains why there are no other reasonable interpretations. Moreover, we believe that a standard of “noticeably or measurably large” provides little meaningful guidance to the Services or to the public.

Case law and relevant principles of statutory construction and judicial review suggest that the Services have broad discretion in defining

“significant,” particularly in the context of creating a policy related to SPR after public notice and comment (*see Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983–85 (2005)). In fact, the Ninth Circuit expressly noted that “[t]he Secretary necessarily has a wide degree of discretion in delineating ‘a significant portion of its range,’ since the term is not defined in the statute” (*Defenders (Lizard)*, 258 F.3d at 1145). In exercise of this discretion, the Services have sought to establish a standard that would give meaningful guidance regarding when a portion of a species’ range is significant. To establish such a standard, we must determine first the basis upon which an evaluation of significance must be grounded (*i.e.*, what the portion must be significant for), and second the threshold at which the portion becomes significant on that basis.

1. Biological Basis for “Significant”

This subsection describes the first part of the definition of “significant”—it lays out the criteria for determining the portion’s contribution to the viability of the species. Although there are potentially many ways to determine which portions of a species’ range could be considered important, and therefore “significant,” we conclude that a definition of “significant” that is biologically based best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species’ conservation. This draft policy’s definition would emphasize the biological importance of the portion to the conservation of the species as the measure for determining whether the portion is “significant.” It would for that reason describe the threshold for “significant” in terms of an increase in the risk of extinction for the species. By recognizing the species itself as the reference point for determining whether a portion of the range is “significant,” we properly give priority to the use of science and biology for decision-making in status determinations, consistent with the Act’s requirement to use the best available scientific and commercial data in determining the status of a species (16 U.S.C. 1533(b)(1)(A)). This definition based on the principles of conservation biology is well within the expertise of FWS and NMFS to apply. Finally, the result of using a biological- or conservation-importance approach would be to apply protections and resources to those species in greatest need of conservation and thus this approach would meet the purposes of the Act.

Analyzing “significant” in terms of the conservation of the species at issue is consistent with the Services’ past practices, to the limited extent that the Services have addressed the issue. In those instances where the Services have addressed whether a portion of a species’ range may be “significant” in a status determination, we have based consideration on the conservation or biological importance of the portion to the species. NMFS examples include: The proposed rule for bearded seal (75 FR 77496, 77507 (December 10, 2010)); the proposed rule for two coral species (70 FR 24359, 24360 (May 9, 2005)); the proposed rule for green sturgeon (70 FR 17386, 17387, 17395 (April 6, 2005)); and the proposed rule for spotted seal (74 FR 53683, 53692–93 (October 20, 2009)). Similarly, FWS has generally considered the contribution to the conservation of the species when evaluating whether a portion constitutes a significant portion of its range. Examples include the proposed rule for the Colorado portion of the range of Preble’s meadow jumping mouse (72 FR 62992, 63017 (Nov. 7, 2007)); final rule for the Wyoming portion of Northern Rocky Mountains DPS of gray wolf (74 FR 15123, 15153 (Apr. 2, 2009)); the 12-month finding for the montane portion of the range of Gunnison’s prairie dog (73 FR 6660, 6675 (Feb. 5, 2008)); the Campbell Plateau portion of the New Zealand/Australia DPS of the southern rockhopper penguin (73 FR 77264, 77275 (Dec. 18, 2008)); and the Queen Charlotte Island portion of the British Columbia DPS of Queen Charlotte goshawk (72 FR 63123, 63128 (Nov. 8, 2007)). More generally, the Services as a matter of common practice routinely analyze the biological or conservation importance of areas to listed species in carrying out activities under the Act. It is in fact a long-standing and central component to implementing the Act. For example, the Services consider and analyze conservation importance to the species when establishing recovery units, recovery criteria, and site-specific management actions in recovery plans; when designating critical habitat; and when evaluating the impacts of Federal activities during section 7 consultation. Considering biological or conservation importance is the common central theme necessary to meet the purposes of the Act. Moreover, it is consistent with the little case law that exists on the subject (*see Greater Yellowstone Coalition v. Servheen*, 672 F. Supp. 2d 1105, 1124 (D. Mont. 2009) (approving definition of “significant” based on a variety of factors that indicate the importance of the range to the species’

survival and the preservation of the species’ ecosystem’’).

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation (Schaffer and Stein 2000). These concepts also can be expressed in terms of the four viability characteristics used more commonly by NMFS: Abundance, spatial distribution, productivity, and diversity of the species. Resiliency (abundance, spatial distribution, productivity) describes the characteristics of a species that allow it to recover from periodic disturbance. Redundancy (having multiple populations distributed across the landscape; abundance, spatial distribution) 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; spatial distribution, diversity) 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). Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological significance of a portion of the range of a species. Therefore, the information that determines whether a portion of a range is significant may include, but is not limited to, the concepts described in this paragraph. Further, 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.

2. The Threshold for “Significant”

This subsection describes the second part of the significance definition: what threshold the Services would use to determine that a portion’s biological contribution to the conservation of the species is so important that the portion qualifies as “significant.” Under this draft policy, to determine if a portion of a species’ range is significant, FWS or NMFS would ask whether, *without that*

portion, the representation, redundancy, or resiliency of the species—or the four viability characteristics used more commonly by NMFS—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”). If so, the portion is significant. For example, the population in the remainder of the species’ range without the population in the SPR might not be large enough to be resilient to environmental catastrophes or random variations in environmental conditions. Or, if the viability of the species depends on the productivity of the population in the SPR, the population in the remainder of the range might not be able to maintain a high-enough growth rate to persist in the face of threats without that portion. Further, without the population in the SPR, the spatial structure of the entire species could be disrupted, resulting in fragmentation that could preclude individuals from moving from degraded habitat to better habitat. If habitat loss is extensive, especially in core areas, remaining populations become isolated and fragmented, and demographic and population dynamic processes within the species can be disrupted to the extent that the entire species is at risk of extinction (*e.g.*, Waples *et al.* 2007). Finally, if the population in the SPR contains important elements of genetic diversity, without it, the remaining population may not be genetically diverse enough to allow for adaptations to changing environmental conditions. Diversity is generally thought to buffer a species against environmental fluctuations in the short term and to provide evolutionary resilience to meet future environmental changes (*e.g.*, Hilborn *et al.* 2003).

In evaluating whether a species qualifies for listing because of its status in only a portion of its range, the Services first determine whether that portion is so important to the species as a whole that its hypothetical loss would render the species endangered rangewide. If the answer is negative, that is the end of the inquiry: the portion in question is not significant and the species does not qualify for listing on the basis of the SPR language. If, on the other hand, the answer is affirmative, then the portion in question is significant, and the Service undertakes a detailed analysis of the threats to the species in that portion to determine if the species is endangered or threatened there. That analysis would evaluate current and anticipated threats acting on the species now and into the

foreseeable future, the impacts that these threats are expected to have, and the species' anticipated responses to those impacts.

Note that this draft policy's definition establishes a threshold for "significant" 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 not to use a threshold for "significant" that is too low (e.g., a portion of the range is "significant" if its loss would result in any increase in the species' extinction risk, even a negligible one). Although we recognize that most portions of a species' range contribute at least incrementally 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 a portion of the range of minor conservation importance to the species is imperiled. Conversely, a threshold for "significant" that is too high (e.g., a portion of the range is "significant" only if threats in that portion result in the entire species' being currently endangered or threatened) would not give the SPR phrase independent meaning.

The definition of "significant" in this draft policy 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" does not have independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by FWS in the *Defenders* litigation (termed the "clarification interpretation" in the M-Opinion). Under that interpretation, the portion of the range must be so important that *current* imperilment there would mean that the species would be *currently* imperiled everywhere. Under this draft policy, 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 draft policy we ask whether the species would be in danger of extinction everywhere without that

portion, *i.e.*, if that portion were completely extirpated.

Another way to look at it is that, unlike the clarification interpretation at issue in *Defenders (Lizard)*, this draft policy does not by definition limit the SPR phrase to situations in which it is unnecessary. The clarification interpretation defined "significant" in such a way that a portion of a species' range could be significant only if the current status of the species throughout its range were endangered or threatened (in particular, as a result of the endangered or threatened status of the species in that portion of its range). But if the current status of the species throughout its range is endangered or threatened, then the species could be listed even without the SPR phrase. Thus, that definition of "significance" inherently made the statutory SPR phrase unnecessary and redundant. In contrast, the definition in this draft policy does not inherently make the statutory phrase redundant. Under this draft policy, a portion of a species' range is significant when the species would be in danger of extinction rangewide if the species were extirpated in that portion; but that will not be the case at the time of the analysis because by definition an SPR is a portion of the current range of the species, and therefore the species cannot yet be extirpated there. In other words, this draft policy's definition leaves room for listing a species that is not currently imperiled throughout all of its range.

Two examples illustrate the difference between the draft policy's definition and the clarification interpretation. First, a species might face severe threats only in the portions of the range it uses in one part of its life cycle (Portion A). Because the species cannot complete its life cycle without Portion A, threats in Portion A affect all individuals of the species even if other portions of the species' range are free of direct threats. In other words, if the species is endangered in Portion A, it is in fact endangered throughout all of its range. Portion A would be an SPR under the clarification interpretation. Under this policy's interpretation, we would still list this species, but its listing would be based on its status throughout all its range rather than its status in a significant portion of its range.

In contrast, another species may have two main populations. The first of those populations (found in Portion Y) currently faces only moderate threats, but that population occurs in an area that is so small or homogeneous that a stochastic (*i.e.*, random, unpredictable, due to chance) event could devastate that entire area and the population

inhabiting it. Therefore, if it were the only population, the species would be so vulnerable to stochastic events that it would be in danger of extinction. (With two main populations, it is unlikely that both would be affected by the same stochastic events, so the severity of the threats to each population would be reduced, because there would be exchange with the other population following a stochastic event that would help to stabilize the population that has suffered declines.) Thus, without the portion of the range currently occupied by the second population (Portion X), the species would be in danger of extinction. In such a situation, even severe threats to the species in Portion X, as long as they did not in fact result in the extirpation of the species in Portion X, would *not* cause the species currently to be in danger of extinction throughout all of its range. Portion X would not be an SPR under the clarification interpretation, but it would be an SPR under this draft policy.

More broadly, and as a logical corollary to the reasoning of *Defenders (Lizard)*, any interpretation of the definitions of "endangered species" and "threatened species" must afford practical meaning to each part of the statutory language. None of the four discrete bases, or categories, for listing set forth in the plain language of the statute (that a species is: endangered throughout all of its range; threatened throughout all of its range; endangered in a significant portion of its range; or threatened in a significant portion of its range) may be rendered irrelevant. We conclude that this draft policy's threshold for determining biological significance will give meaning to all four discrete bases, or categories, for listing. Under our interpretation, there is at least one set of facts that would uniquely fall within each of the four categories or routes to listing (and would not simultaneously fit the standard of another category).

The prototypical scenario in which a species would be considered endangered throughout all of its range would be one in which a species is currently affected by threats to such a degree that they affect the species, directly or indirectly, throughout its entire range and the entire species is rendered in danger of extinction. Similarly, the prototypical scenario whereby a species would be "threatened throughout all of its range" would be one in which a species is currently affected by threats to such a degree that they affect the species, directly or indirectly, throughout its entire range and the entire species is rendered likely to become in danger of extinction in the

foreseeable future. Note that fitting the “endangered” or “threatened” category on the basis of impacts “throughout the range” does not necessarily mean that threats must be found to be equally distributed throughout all of the species’ range as a geographical matter. The status of the entire species may be affected if threats are acting in an area that is so critical to the species’ overall status that the threats indirectly affect the entire species, such that any finding that a species is imperiled in the area where the threat is acting directly is in fact tantamount to a finding that the species is endangered overall. For example, when a species’ only breeding population is affected, the entire range is actually affected, because a species cannot continue to exist if it cannot breed successfully.

The prototypical scenario in which a species would be considered endangered based on a significant portion of its range would be one in which the species faces a concentration of threats or impacts (to the degree that the members in that portion are in danger of extinction) in a portion of the range that is biologically very important to the species but not so important that the threats there are currently determinative of the status of the species throughout its range. Similarly, the prototypical situation where a species would be considered threatened based on a significant portion of its range would be one in which the species faces a concentration of threats or impacts that renders the members in a portion that is biologically very important likely to become endangered within the foreseeable future (but threats there are not currently determinative of the status of the entire species).

The Services recognize that, although each of the four categories retains unique and independent meaning under our draft policy, in practice there is likely to be much overlap among these four categories. In many cases, a species that is endangered in a significant portion of its range would also qualify as endangered in a rangewide review of its status. In other cases, because the determination that a portion of a species’ range is significant is largely independent of the determination of the species’ current status rangewide, the best available scientific and commercial information may simultaneously support determinations that a species appears to have the status of “endangered” in a significant portion of its range and also to have the status of “threatened” throughout its range. This would occur if a species is found to be not only currently endangered in, but

also likely in the foreseeable future to become extirpated from, a significant portion of its range. (This is not necessarily the case, because “endangered” means only that the species is in danger of extinction throughout its range (or in danger of extirpation in a portion of its range, in the context of an SPR), not necessarily that it is likely to become extinct (or extirpated, in the context of an SPR). Because a determination of significance means that, without that portion, the species would be endangered throughout its range, a determination that the species is in fact likely to be without that portion (that is, likely to be extirpated from it) within the foreseeable future is also a determination that the species is likely to become endangered throughout its range in the foreseeable future. The species would therefore currently also meet the definition of threatened throughout its range. In such a situation, the best available information would support both listing the species as endangered rangewide (because it is endangered in a significant portion of its range) and listing the species as threatened rangewide (because it is likely to become extirpated in a significant portion of its range, and therefore likely to become in danger of extinction throughout all of its range, in the foreseeable future).

While this partial overlap among categories could potentially be confusing to the public or to biologists conducting status evaluations, we conclude that in practice it will not be a significant hurdle to implementing our draft policy. This is because, consistent with the recent court decisions discussed in *Case Law* above, under our interpretation of the statutory definitions, the Services would list and protect a species throughout its range if it meets the categories of endangered or threatened in a significant portion of its range. Viewed against the backdrop of the four categories for listing created in the definitions of “endangered species” and “threatened species,” this leads us to conclude that a species should be afforded, at the rangewide level, the highest level of protection for which the best available science indicates it is qualified in any significant portion of its range. In the last example in the preceding paragraph, the species would be listed as an endangered species.

Therefore, if a species is determined to be endangered in an SPR, under this draft policy, the species would be listed as endangered throughout all of its range, even in situations where the facts simultaneously support a determination that the species is threatened

throughout all of its range. However, we recognize that this approach may raise concerns that the Services will be applying a higher level of protection where a lesser level of protection might arguably fit if viewed across a species’ range. The Services are particularly interested in public comments on this issue.

We also recognize that the Services could choose to set a lower standard or threshold for “significant” by incorporating the concept of being *likely to become* in danger of extinction in the foreseeable future (the threatened standard), rather than being in danger of extinction (the endangered standard), in the definition of “significant.” However, this draft definition of “significant” uses the endangered standard to promote a simpler, more straight-forward definition and to avoid the added complexity of the temporal component introduced by the “foreseeable future” language. We specifically request input on whether this draft policy’s definition of “significant” should include both the endangered standard and threatened standard, or just the endangered standard. It is important to understand that this does not affect whether our analysis will lead to a listing of “endangered” or “threatened,” as that determination is based on the status of the species within the SPR. That is a separate question from whether the portion of the range is sufficiently biologically significant to constitute an SPR in the first place.

D. Range and Historical Range

When considering an interpretation of the SPR phrase, we must also consider the meaning of the term “range.” The Services interpret the term “range” to be the general geographical area within which the species is currently found and to include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis. We consider the “current” range of the species to be the range occupied by the species at the time the Services make a determination under section 4 of the Act.

Some have questioned whether lost historical range may constitute a significant portion of the range of a species, such that the Services must list the species rangewide because of the extirpation in that portion of the historical range. We conclude that while loss of historical range must be considered in evaluating the current status of the species, lost historical range cannot be a significant portion of the range. In other words, we cannot base a determination to list a species on

the status of the species in lost historical range.

We reach this conclusion based on the text of the Act. As defined in the Act, a species is endangered only if it “is in danger of extinction” in all or a significant portion of its range. The phrase “is in danger” denotes a present-tense condition of being at risk of a current or future, undesired event. Hence, to say a species “is in danger” in an area where it no longer exists—i.e., in its historical range where it has been extirpated—would be inconsistent with common usage. Thus, “range” must mean “current range,” not “historical range.” This interpretation of “range” is further supported by the fact that when determining whether a species is an endangered species, the Secretary must consider the “present” or “threatened” (i.e., future), rather than the past, “destruction, modification, or curtailment” of a species’ habitat or range (16 U.S.C. 1533(a)(1)(A)). Additional support for this interpretation is found in the Act’s requirement that a summary of a proposed listing regulation be published in a newspaper “in each area of the United States in which the species is believed to occur” (16 U.S.C. 1533(b)(5)(D)). There is no requirement to publish such notice in areas where the species no longer occurs. Therefore, to determine whether a species is presently “in danger of extinction throughout * * * a significant portion of its range,” we must focus on the range in which the species currently exists.

Lost historical range may, however, be an important factor in evaluating the current status of the species. The effect of loss of historical range on the viability of the species can be an important consideration in our status determination, and could prompt us to list a species because the loss of historical range has contributed to its present status as endangered or threatened throughout all or a significant portion of its range. In such a case, we do not list a species because it is “endangered” or “threatened” in its lost historical range, but rather because it is “endangered” or “threatened” throughout all or a significant portion of its current range because that loss of historical range is so substantial that it undermines the viability of the species as it exists today. For example, the loss of historical range may have resulted in a species for which distribution and abundance is restricted, gene flow is inhibited, or population redundancy is reduced to such a level that the entity is now vulnerable to extinction or likely to become so within the foreseeable

future throughout all or a significant portion of its current range. Conversely, a species suffering a similar loss of historical range would not be listed if viability of the remaining individuals was not compromised to the point of endangering or threatening the species.

In addition to considering the effects that loss of historical range has had on the current and future viability of the species, we must also consider the causes of that loss. If the causes of the loss are still continuing, then that loss is evidence of the effects of an ongoing threat. Loss of historical range for which causes are not known or well understood may be evidence of the existence of threats to the remaining range.

We make listing determinations with respect to current range regardless of the point in time at which we examine the status of the species (12-month listing finding, proposed listing or delisting rule, 5-year reviews, and so forth). However, examining the current status of the species in its current range in no way constrains or limits use and application of the tools of the Act to the species’ current range. In fact, reducing a species’ vulnerability to threats and ultimately to extinction often requires recovering the species in some or all of its lost historical range. Indeed, the Act’s definition of “conserve,” the Act’s definition of “critical habitat,” and the provisions of section 10(j) of the Act all indicate that Congress specifically contemplated that recovering species in lost historical range may be needed to bring a species to the point that it no longer needs the protections of the Act. Thus, examining a species’ status in its current range does not set the bar for recovery; rather it is simply the approach that the Act requires us to apply when we examine a species’ current and future vulnerability to extinction.

We acknowledge that the Ninth Circuit Court has held that the FWS must consider whether lost historical range is a significant portion of a species’ range (*Defenders (Lizard)*, 258 F.3d at 1145) (“where * * * it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a ‘significant portion of its range’”). This appears to have been based at least in part on a misunderstanding of FWS’s position, which the Ninth Circuit Court interpreted as a denial of the relevance of lost historical range (see *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 876 (9th Cir. 2009) (“On

appeal, the Secretary clings to his argument that lost historical habitat is largely irrelevant to the recovery of the species, and thus the [Act] does not require him to consider it.”). As explained above, the fact that historical range has been lost can be highly relevant to the conservation status of the species in its current range. The Services also consider historical range during recovery planning. For the reasons described above, however, we respectfully disagree with this holding of the Ninth Circuit Court, and conclude that the status of lost historical range should not be separately evaluated; ultimately, it is the conservation status of the then-current range at the time of the listing determination in question that must be evaluated (see *Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005), vacated by No. 06–2049 (10th Cir. May 14, 2007); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 2007 U.S. Dist. LEXIS 16175 (D. Colo. Mar. 7, 2007), vacated by No. 07–1203 (10th Cir. Oct. 22, 2007)). Thus, if a species “is expected to survive [in an area] much smaller than its historical range,” we would undertake an analysis different than that apparently contemplated by the Ninth Circuit. In fact, two different analyses may be required. First, if the species has already been extirpated in some areas, the Services must determine whether the loss of those areas makes the species endangered or threatened in its current range. Second, if the species has not been extirpated from those areas, but is in danger of extirpation there (or likely to become so in the foreseeable future), the Services must determine whether those areas constitute a significant portion of its range, and, if so, list the species in its entirety.

E. Relationship of SPR to the Act’s DPS Authority

The Act’s definition of “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish and wildlife which interbreeds when mature (16 U.S.C. 1532(16)).” Thus, the definition of “species” allows, for vertebrates, consideration of the status of a taxonomic species or subspecies over less than its entire range. The phrase “significant portion of its range” similarly also allows us to consider the status of a species over something less than all its range. Because of the potential overlap between these two statutory provisions, we must explain their relationship.

In this draft policy, the definition of “significant” differs for the purpose of SPR analysis from the definition of “significant” defined in our DPS policy and used for DPS analysis. We expect, based on our experience and knowledge of already listed DPSs, that the differences in the two standards, the specific circumstance described by the definition of “significant portion of its range,” and the high bar it sets will seldom result in situations in which the population within a SPR for a taxonomic species or subspecies might also constitute a DPS. In those rare circumstances, under this draft policy, we would consider the DPS to be the proper entity for listing.

We considered various possible relationships between the SPR language and the Act’s DPS authority. This draft policy includes what we consider to be a reasonable approach. We describe our reasoning below, and we request public comments on it.

1. Definitions of “Significant” for SPR and DPS

Our interpretation of the DPS language in the statute is explained in the Services’ “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act” (DPS policy) (61 FR 4722, February 7, 1996). Both that policy and the statutory SPR language employ the concept of “significance.” The DPS policy requires that for a vertebrate population to meet the Act’s definition of “species,” it must be discrete from other populations and must be significant to the taxon as a whole. We considered using the standard for significance under the DPS policy to define “significant” in the SPR language. If the definition of “significant” were the same as that defined in the DPS policy, the range of a DPS would also always constitute an SPR. We note that the converse, that a SPR would always be a DPS, would not always be true because, unlike a DPS, an SPR is not required to be discrete from other populations.

We would then have to consider what would be protected—only the DPS, or the entire taxon (taxonomic species or subspecies) to which it belongs? The first possibility is that when we determine a DPS is endangered or threatened, we would then list the entire taxonomic species or subspecies as a result of the DPS being significant to the taxon as a whole and constituting a SPR. However, this would render the DPS portion of the definition of “species” meaningless, if as a result of a DPS being significant to the taxon as a whole, we list the entire taxon. We

conclude that this option is not appropriate because Congress intended that we treat DPSs as “species” themselves. The second possibility would be to list the entire taxon when a plant or invertebrate is endangered or threatened in an SPR, but only list the distinct population when a vertebrate species is endangered or threatened in an SPR. However, this approach would render the SPR language meaningless with respect to vertebrates. In addition, this could be viewed as contrary to congressional intent to allow greater regard for vertebrates afforded by the Act’s definition of “species.”

Considering the potential results of using the same standard for significance under the DPS policy to define “significant” in the SPR language leads us to conclude that the two provisions cannot utilize the same definitions for “significant.” We also considered revising the DPS policy to either revise or remove the requirement that a population must be significant to the taxon as a whole to qualify as a DPS. However, given the Services’ history of use of the DPS policy, and the fact that policy has already been through public review and comment and has been considered by many courts, we declined to take that approach. We conclude that this draft policy’s definition of “significant,” which sets a high threshold for the purposes of SPR analysis, would help to promote the consistent application of SPR analysis among vertebrates and plants and invertebrates, while maintaining the flexibility afforded by the DPS authority to apply differing statuses (and thus differing management) across the range of vertebrate species.

2. This Draft Policy’s Definition of “Significant” Creates Little Overlap Between SPR and DPS

Although there are similarities in the definition of “significant” under this draft policy and the definition of “significance” in the DPS policy, there are important differences between the two. The DPS policy requires that for a vertebrate population to meet the Act’s definition of “species,” it must be discrete from other populations and must be significant to the taxon as a whole. The significance criterion under the DPS policy is necessarily broad, and could be met under a wider variety of circumstances. This is appropriately so, as the DPS language, unlike the SPR language, allows a population segment to have a different listing status than the taxon to which it belongs. In fact, because a DPS must also be discrete, it may in fact function somewhat independently of the rest of the range,

and its status may not directly influence that of the remainder of the taxon.

In contrast, under this draft policy a portion of a species’ range would be 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. The definition of “significant” in this draft policy requires a specific set of circumstances that demonstrate a relationship between that portion of the range and the potential future conservation of the species as a whole. The bar for significance under this interpretation of “significant portion of its range” is a higher bar than that established under the DPS policy. This is necessarily so, in part, because the finding that a species is endangered or threatened in an SPR requires listing the entire species.

It should be noted that in general practice, the Services determine what entity(s) meets the Act’s definition of “species” (taxonomic species, subspecies, or distinct population segment of a vertebrate species) prior to analyzing its status as endangered or threatened. This means that typically we would first determine whether we should be analyzing status at the level of taxonomic species, subspecies, or, for vertebrates, DPS. This determination is made based on whether there are any taxonomic distinctions below the level of species, any recognized distinct populations or division in the species’ range, and whether there are differences in management or threats that would indicate it may be appropriate to consider status of entities separately. We would then analyze whether the determined entity(s) is endangered or threatened throughout all or a significant portion of its range. We note that this also applies to analyzing the status of a DPS; a DPS could be listed because it is endangered or threatened in an SPR. In the case where we find a taxonomic species or subspecies of a vertebrate is endangered or threatened in a significant portion of its range, we will generally already have considered whether there are any appropriate DPSs for which we should conduct a status review, so it is unlikely that we would need to ask whether that portion of the species’ range occupied by the DPS is also a SPR.

We conclude, based on our knowledge of and experience with the DPS policy, that because of the differences between this draft SPR policy and the DPS policy, including how “significant” is defined in this draft policy and the higher bar it sets, there will seldom be situations in which a DPS is so important that, without the

portion of the species' range that the DPS occupies, the species would be in danger of extinction such that the portion would qualify as an SPR under this draft policy. However, we recognize that there may be some limited circumstances where the range of a DPS will also comprise a significant portion of the taxon's range. It may not be possible to entirely eliminate some instances of overlap without considerably altering the DPS policy, and we believe that there would be potential overlap under other possible approaches to defining "significant" as well. Given that circumstances may occur where the range of a DPS will also comprise a significant portion of the taxon's range, we must consider what would be protected in those situations in which the range of a DPS also constitutes an SPR.

3. What would be protected in those situations in which the range of a DPS also constitutes an SPR?

In those circumstances in which the range of a DPS also comprises a significant portion of the taxonomic species' or subspecies' range, there are two possible approaches to what should be protected: (1) List and protect only the DPS; or (2) list and protect the entire taxonomic species or subspecies to which it belongs because it is also an SPR. We conclude that the most appropriate policy position is to list and protect only the DPS. We believe this to be a reasonable interpretation, in that it gives meaning to Congress' intent in authoring the DPS language, and it directs conservation efforts to the appropriate listable entity.

We considered listing the entire taxonomic species or subspecies when the range of a DPS also constitutes an SPR. Under this approach, we could still list a DPS when the range of such a taxon within the DPS is not significant as defined by this draft policy, and therefore not an SPR, and we would therefore not make the DPS provision of the Act meaningless. This would create a consistent application of SPR for vertebrates and for plants and invertebrates. We also would still have the ability to provide additional consideration for vertebrates because we could list DPSs for vertebrates in cases in which the portion of the range occupied by the DPS is not an SPR of the taxonomic species or subspecies (an ability we would not have for plants and invertebrates). However, this would in some circumstances remove our flexibility to apply differing statuses across the range of a vertebrate taxon when it is comprised of multiple DPSs with differing statuses. In the case of

species listed under the Act that occur outside the United States, this may unnecessarily restrict international trade, and may run counter to congressional intent that suggests we should apply differing statuses for species across international boundaries if there are differences in management. For example, a species may have a range that includes several countries. One country may be taking actions to manage threats to improve the species' status within its borders, while the remaining countries are not managing the species and are allowing exploitation. In this case, the population that is being well-managed may qualify as a DPS under the Services' DPS policy as a result of differences in management across international boundaries and may in fact be only threatened in that country while it is endangered everywhere else. However, because the DPS composed of the remainder of the species' range where it is endangered constitutes most of the range of the species, it may also be an SPR that would require us to apply the status of endangered to the entire range of the taxon. If we were required to list rangewide based on the SPR status, we would be unable to apply a different status to the population in the country that is proactively managing the taxon. If a status of threatened cannot be applied to the DPS in that country, special regulations that would allow regulated international trade could also not be applied and much needed revenue to fund continued management of the taxon would not be generated.

We believe that Congress intended us to give consideration to differences in status across the range of a species, especially in the case of internationally listed species. Section 4(b)(1)(A) of the Act directs us, when making a status determination, to take into account "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." Legislative history, although not entirely clear on what mechanisms Congress intended the Services to use, also indicates that we should give consideration to differences in status, recognize and encourage other agencies to exercise their management authorities, and apply differing management where appropriate (*see The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. On the*

Environment of the Senate Comm. on Commerce, 92d Cong. 109 (1972) (statement of Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior: "It is our hope that this ability to apply selective protections would provide protection to those animals needing it, encourage the agencies which have management and protective authority to exercise that authority and allow the recognition of such efforts"). We also note that a Senate Committee Report discussed the Secretary's failure to recognize differing status of populations of a species in response to testimony regarding game species listed in foreign countries (S. Rep. No. 97-418(1982)). The DPS authority to apply differing statuses across the range of a vertebrate taxon, along with the use of special regulations for threatened species under section 4(d) of the Act, is one of the few mechanisms available to us to consider and recognize efforts made by States or foreign nations in our application of protections of the Act. This draft policy's definition of "significant," which sets a high threshold for the purposes of SPR analysis, would help to promote the consistent application of SPR analysis among vertebrates and plants and invertebrates, while maintaining the flexibility afforded by the DPS authority to apply differing statuses (and thus differing management) across the range of vertebrate species. Thus, we conclude that this policy honors this intent.

F. Alternatives for Interpreting the Phrase "Significant Portion of Its Range"

In addition to the interpretation proposed in this draft policy, we considered three alternative statutory interpretations of the phrase "significant portion of its range": (1) That the SPR and DPS language comprise a single authority; (2) that the SPR language provides clarification of the endangered and threatened definitional language; and (3) that the SPR language provides an independent basis for listing, and protections of the Act would apply only in the SPR (consistent with the withdrawn M-Opinion).

Under the first alternative interpretation considered, in which SPR and DPS comprise a single authority, the SPR phrase would not provide an independent basis for listing. Instead, the SPR phrase and the DPS language in the definition of "species" would be read together to provide a single authority to list populations. The Services would interpret the SPR phrase to be a descriptive term that places a limitation on the listing of populations

of vertebrate taxa by only allowing listing of vertebrate populations that make up a significant portion of the entire taxon's range. This interpretation is consistent with the stated meaning in DOI's Final Environmental Statement (DOI 1973) that accompanied the original legislative language drafted by the Nixon Administration: "The term 'significant portion' of its range is used in the definition of endangered to provide the Secretary with the authority to protect a population unique to some portion of the country without regard to its taxonomic status, or a population that is now endangered over a large portion of its range even if the population inhabiting that portion of the range is not recognized as a distinct subspecies from a more abundant population occurring [sic] elsewhere." However, it is unclear how that original intended meaning of this phrase can be ascribed to the different statutory framework in which the phrase was placed in the Act as enacted: the SPR language was moved from the operative language to one set of definitions ("endangered species" and "threatened species"), and the precursor to the DPS language was included in another ("species"). Under a literal reading of the current language of the Act, the Services determine whether a group of vertebrates is a DPS, and therefore a "species," independent of the application of the definitions of "endangered species" and "threatened species." Thus, a group of vertebrates need not inhabit an SPR in order to qualify as a DPS; rather, the entirety of a DPS, like any other "species," may be listed if it is endangered throughout all of its range or throughout a significant portion of its range. In addition, it is unclear under this interpretation what meaning the "significant portion of its range" phrase would have with regard to plants, since the distinct population segment language applies only to vertebrates (and the precursor language only applies to fish and wildlife).

Under the second alternative considered, the SPR phrase would not provide an independent basis for listing as envisioned in this draft policy. Instead, the phrase would be interpreted as clarifying the extent to which the Services must show that a species is endangered or threatened throughout its range. The language would allow the Services to list a species if we determine that a species is endangered or threatened in at least a portion of its range that is so significant to the whole that it is currently driving the status of the entire species. In other words, we would not need to demonstrate that

threats occur throughout the range, or know definitively the status of the species everywhere, provided that we could infer its overall status based on knowledge of its status in a significant portion. This interpretation was specifically rejected by the Ninth Circuit in *Defenders (Lizard)*, which held that this interpretation rendered the SPR language superfluous and inconsistent with the plain meaning of the Act (*i.e.*, it does not give separate meaning to all parts of statute) because it ultimately relied on making a determination about the status of the whole species, which could already be done on the basis of the "throughout all * * * of its range" language. The court concluded that our ability to list a species when we do not know definitively the status of the species in every part of its range, but can infer its overall status based on what we do know, does not rely on the SPR language, but rather relies on the best-available-science standard of the Act. (Note that under all alternatives, the Services could list a species when we do not have complete information but can infer the species' overall status. However, the alternatives differ in which statutory language is relied on as the authority to do so. The clarification alternative relies on the SPR phrase, whereas the other alternatives rely on the best-available-science standard of the Act to list a species when we do not have complete information but can infer the species' overall status.)

Under the third alternative considered, the SPR phrase would provide an independent basis for listing, and the protections of the Act would apply only in the SPR. This interpretation (as with the one included in this draft policy) would create additional circumstances in which the Services may list a species. A species could be found to be endangered or threatened throughout all its range, or endangered or threatened in only a significant portion of its range. The SPR phrase would be interpreted as a substantive standard allowing the listing of a species that is endangered or threatened in a significant portion of its range but secure overall. Under this alternative interpretation, protections of the Act would be applied only in the SPR. As explained in *Case Law* above, two courts have concluded this approach violates the plain and unambiguous terms of the Act. Both courts concluded that the terms "endangered species" and "threatened species" must be read consistently with the term "species" as defined in the Act; the SPR language does not provide

authority to redefine "species" or to list or protect less than a "species."

Valid arguments can be made for and against adopting any of the SPR phrase interpretations we considered. In weighing the advantages and disadvantages of each against the other, we determined that the above three alternative interpretations were less acceptable than the interpretation in this draft policy. We found the three alternative interpretations to be less acceptable—and therefore both less desirable and more vulnerable to criticism—primarily due to their inconsistencies with the plain language of the Act, inconsistencies with court decisions on SPR, or both. Our detailed analysis of the SPR phrase interpretations we considered is presented in FWS and NMFS SPR Working Group (2010) and is available at <http://www.regulations.gov>.

G. Alternatives for Defining "Significant"

Under alternative interpretations of the SPR phrase, we must also define what is "significant." There are several options for doing so, each with pros and cons. Depending on which alternative interpretation of the SPR phrase a definition is applied to, there may be additional implications and considerations for applying various definitions of "significant." Although we considered numerous ideas of how to define significance, they can all be placed into three general categories: (1) Biological/conservation importance; (2) values stated in section 2 of the Act; and (3) size. Our rationale for choosing a biological/conservation importance alternative is explained above. The other alternatives are discussed below.

Values of the Act: Values stated in section 2 of the Act could be an alternative way to define significance. Section 2(a)(3) of the Act states that threatened and endangered species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." We could use these values to define whether a portion is significant. One variation on this theme would be to define the U.S. portions of a species' range to be "significant," either automatically or based on a determination that the existence of the species in the United States is particularly significant to the Nation. Thus, a species could be listed as endangered in the United States even if its principal range is outside the United States and the U.S. portion of its range only constitutes the periphery of its range. Another option would be to define "significant" as ecologically

significant, where a portion of a species' range would be "significant" if the species in that portion played an important ecological role (such as pollination), regardless of whether the portion of the range contributed substantially to the viability of the species as whole.

Size alternatives: Size of the portion of range is another suggested approach for defining significance. There are several ways size of a portion can be defined: Percentage of total range, percentage of population(s), percent of habitat within that portion, and so forth. It should be noted that a biological/conservation importance approach may also consider size as a component or method of assessing biological/conservation importance because factors such as size and number of populations, amount of suitable habitat, and so forth, have a bearing on the contribution of an area to the conservation of a species. However, size is one among many factors and is considered in relation to its effect on species' viability.

As we have discussed previously, congressional intent regarding the SPR phrase is unclear, particularly with regard to what would qualify as significant. The one exception is that Congress did indicate that we should have the authority to protect species within the United States even when they are more abundant elsewhere in their ranges. However, it is unclear how Congress intended us to do so, and all possible interpretations of the SPR phrase, in combination with any of the possible approaches for defining "significant," allow us to protect U.S. populations to some extent. The approach to defining "significant" that would give us the most latitude to do so would be one based on values.

We also must consider whether the approaches to defining significance are legally sound. However, there is some inconsistency in the case law. The Ninth Circuit Court stated that the Secretary of the Interior has "a wide degree of discretion in delineating" what portion of a range is "significant." One other court indicated that a determination of significance should be based on size. Despite this inconsistency in case law, none of the approaches is inherently inconsistent with the statutory language of the Act. However, for the values and size approaches, developing defensible methodologies for determining significance may be much more challenging, and the Ninth Circuit Court specifically rejected Plaintiff environmental organization's argument that a specific percentage loss of habitat should automatically qualify a species

for listing: "[T]he percentage of habitat loss that will render a species in danger of extinction or threatened with extinction will necessarily be determined on a case-by-case basis. Furthermore, were a bright line percentage appropriate for determining when listing was necessary, Congress could simply have included that percentage in the text of the [Act]" (258 F.3d at 1144). The court found persuasive the Secretary's argument that a simple quantitative approach to interpreting SPR would not be appropriate: "The Secretary offers a compelling counter-argument to the Defenders' suggested approach: A reading of the phrase 'significant portion of its range,' that adopts a purely quantitative measurement of range and ignores fact-based examination of the significance of the threats posed to part of the species' range to the viability of the species as a whole, does not carry out the purpose of the statute. Such an interpretation would fail to protect species in danger of extinction because it might not allow listing of species where areas of range vital to the species' survival-but not the majority of the range-face significant threats"

Of the three approaches to defining significance, the biological/conservation importance approach may be the most scientifically supportable because the reference point is the significance to the species itself. For the values and size approaches, some thresholds of significance would have to be determined that are unrelated to the importance of the portion to the species. However, particularly with a size approach, a single threshold would likely be arbitrary and not be scientifically supportable because of the wide variation in situations and species biology we encounter. Plus, it could not be applied in a systematic and consistent manner. Multiple thresholds for a variety of situations could be considered, but it is likely that we would not be able to account for all possible situations, and we would need to retain some discretion to depart from standards in appropriate circumstances. Although we could likely develop methods, definitions, and/or thresholds under the values approach, judging whether a species has cultural, aesthetic, educational, historical, or recreational value would likely remain very subjective and thus inordinately subject to legal challenge. An additional concern is that a system incorporating values may favor certain kinds of organisms or taxa over others (such as birds that are of value to recreational

bird-watchers). Alternatively, we could avoid developing thresholds under values and size approaches and instead broadly consider either size or values in assessing significance, but we would risk applying definitions inconsistently.

We also considered whether any of the approaches to defining "significant" are straightforward enough to be applied and implemented consistently. A size approach with simple thresholds would be the easiest to apply. However, determining appropriate analyses and thresholds would likely not be a simple exercise. Similarly, a values approach would require developing new guidance and analytical tools before we could effectively implement such an approach (although, ultimately, the analysis could be developed in such a way as to result in consistent application). The biological/conservation importance approach, while not necessarily a straightforward analysis, would require the least amount of new guidance because much of the consideration of whether portions are biologically significant to the species is inherent in the threats analyses the Services already conduct, and would build upon the Services' experience and existing practice, as similar frameworks already exist in the DPS policy and in the FWS draft SPR guidance implementing the M-Opinion (FWS 2008). Because the reference point for significance is the species itself, there would be no one-size-fits-all approach or threshold that could be seen as arbitrary. However, because each analysis would be case-specific, this approach might be difficult to apply consistently. Nevertheless, we recognize that administering many portions of the Act likewise ultimately rely on a degree of professional judgment, which is to some degree inevitable.

The final consideration is whether the approaches would provide a conservation benefit consistent with the purposes of the Act. Values approaches could potentially result in our applying protections and conservation resources when the portion of the range that is endangered or threatened is not biologically important to the conservation of the species even though it may be significant culturally or otherwise but not contribute to the conservation of the species. In other words, we could be expending resources on portions of the range of species that are biologically unimportant. Size approaches could also have the same result, especially if thresholds are low or if thresholds are not tailored to specific situations and species' life histories. (For example, some wide-ranging species may be viable even if

they lose a substantial amount of their range, or a species may be sparsely distributed over large areas at the periphery of its range that contribute little biologically but core areas that constitute smaller proportions of the range may be of much greater importance to the species' viability). We conclude that a biological/conservation importance approach would result in us applying protections and resources to portions that are biologically important and in need of conservation, consistent with the purposes of the Act.

H. Implementation of the Policy

When we arrive at a final policy, after taking into consideration all comments we receive on this draft policy, we intend to issue detailed internal guidance to assist staff and the public in conducting analyses consistent with that policy. To allow the public to understand better how this draft policy would likely be implemented if finalized in substantially the same form, we provide an overview of how we anticipate the policy would be implemented.

The first step in our analysis of the status of a species would be to determine the status of the species in all of its range. If we determined that the species is in danger of extinction throughout all of its range, we would list the species as an endangered species, and no SPR analysis would be required. If the species was threatened throughout all of its range, we would limit our SPR analysis to the question of whether the species is in danger of extinction in a significant portion of its range; if so, we would list the species as endangered; if not, we would list the species as threatened. If the species was neither endangered nor threatened throughout all of its range, we would determine whether the species was endangered or threatened in a significant portion of its range; if so, we would list the species as endangered or threatened, respectively; if not, we would conclude that listing the species is not warranted.

When we conduct an SPR analysis, we would first identify any portions of the range of the species that warrant further consideration. 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 are not reasonably likely to be significant and endangered or threatened. To identify only those portions that warrant further consideration, we would determine whether there was substantial information indicating that (i) the portions may be significant and (ii) the

species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis would be whether the threats are geographically concentrated in some way. If the threats to the species were affecting it essentially uniformly throughout its range, no portion would be likely to warrant further consideration. Moreover, if any concentration of threats applied only to portions of the range that clearly would not meet the biologically based definition of "significant" (*i.e.*, the loss of that portion clearly would not reasonably be expected to increase the vulnerability to extinction of the entire species to the point that the species would then be in danger of extinction), such portions would not warrant further consideration.

If we were to identify any portions that warrant further consideration, we would then determine their status (*i.e.*, whether in fact the species was endangered or threatened in a significant portion of its range). Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the "significant" question first, or the status question first. Thus, if we determined that a portion of the range is not "significant," we would not need to determine whether the species was endangered or threatened there; if we determined that the species was not endangered or threatened in a portion of its range, we would not need to determine if that portion was "significant."

I. Interpretation and Application of the SPR Language Prior to Finalizing This Policy

While the M–Opinion was in place, the FWS used in its listing determinations the interpretations relating to the SPR language set forth in the M–Opinion. NMFS, on the other hand, has not used those interpretations, but neither has it issued separate guidance. It is our intent to publish a final policy that will provide a uniform standard for interpretation of the SPR language and its role in listing determinations. However, before it can become final the policy must go through public notice-and-comment procedures consistent with the requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553). This notice begins that process.

In the meantime, the Services have an obligation to make numerous determinations in response to petitions to list, reclassify, and delist species, and to meet statutory timeframes. During this interim period, we will not apply

this policy as a binding interpretation of the SPR language. However, during this period, we will consider the interpretations and principles contained in this draft policy as nonbinding guidance in making individual listing determinations. Thus, as nonbinding guidance, we will apply those interpretations and principles only as the circumstances warrant, and we will independently explain and justify any decision made in this interim period in light of the circumstances of the species under consideration. In preparing a final policy, we will consider all comments and information received during the comment period on this draft policy, as well as our experience during the interim experience. Accordingly, we recognize that any interpretation in the final, binding policy may differ from those in this proposal and those applied during this interim period.

III. Draft Policy

Below, we provide the text of our draft policy, which we developed based on the preceding information provided in this document.

Consequences of a species being endangered or threatened in a significant portion of its range: The phrase "significant portion of its range" in the Endangered Species Act's (the Act's) definitions of "endangered species" and "threatened species" provides 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 found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act's protections apply across the species' entire range.

Significant: 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.

Range: The range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination. This range includes those areas used throughout all or part of the species' life cycle, even if they are not used regularly (*e.g.*, seasonal habitats). Lost historical range is relevant to the analysis of the status of the species, but it cannot constitute a significant portion of a species' range.

Reconciling SPR with DPS authority: If the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

IV. Effects of Draft Policy

If made final, this draft policy's interpretation of the "significant portion of its range" language in the Act's definitions of "endangered species" and "threatened species" provides a standard for determining whether a species meets the definitions of "endangered species" or "threatened species." The only direct effect of the policy would be to accept or reject as "significant" portions of the range of a species under consideration for listing, delisting, or reclassification. More uniform application of the Act's definitions of "endangered species" and "threatened species" would allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better judge and concentrate their efforts toward the conservation of biological resources vulnerable to extinction.

Application of the draft policy would result in the Services listing and protecting throughout their ranges species that previously we either would not have listed, or would have listed in only portions of their ranges. However, this result would occur only under a limited set of circumstances. Under most circumstances, we would anticipate that the outcomes of our status determinations with or without the draft policy would be the same. This comparison is true for both the period prior to the M–Opinion, and the period during which FWS implemented the M–Opinion. The primary difference when compared to the M–Opinion is that a species would be listed throughout all of its range. FWS's experience with implementing the M–Opinion (which differs from the draft policy primarily in that under the withdrawn M–Opinion we would list the species only within the SPR rather than the entire species) suggests that listings based on application of this draft policy likely would be relatively uncommon. During the time that the M–Opinion was put into effect between March 2007 and May 2011, FWS had determined that a species should be listed based on its status in a significant portion of its range only five times. In those instances where we would list a species because of its status in a significant portion of its

range, protections would be applied throughout the species' range, rather than just in the portion. This outcome would be a permissible interpretation of the statute, and it reflects the policy views of the Departments of the Interior and Commerce.

Listing a species when it is endangered or threatened in a "significant portion of its range" before it is endangered or threatened throughout all its range may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs throughout the entire range of the species. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover a species that is endangered or threatened throughout all its range.

Once a species is determined to be an endangered species or a threatened species, the provisions of the Act are applied similarly, regardless of whether the species was listed because it is endangered or threatened throughout all its range or only in a significant portion of its range. As such, if the Services determine that a species is endangered or threatened in a significant portion of its range, we will list the species throughout its range, triggering statutory and regulatory requirements under other sections of the Act.

A. Designation of Critical Habitat

If a species is listed because it is endangered or threatened in a significant portion of its range, the Services will designate critical habitat for the species. We will use the same process for designating critical habitat for species regardless of whether they are listed because they are endangered or threatened in a significant portion of their range or because they are endangered or threatened throughout all of their range. In either circumstance, we will designate all areas that meet the definition of "critical habitat" (unless excluded pursuant to section 4(b)(2)) of the Act. "Critical habitat" includes certain "specific areas within the geographical area occupied by *the species* at the time it is listed" and certain "specific areas outside the geographic area occupied by *the species* at the time it is listed" (16 U.S.C. 1532(5)(A)). Thus, critical habitat designations may include areas within the SPR, areas outside the SPR occupied by the species, and areas that are both outside the SPR and outside the area occupied by the species at the time of listing, as appropriate. If a species is

listed, however, as a result of threats in a significant portion of its range, the designation of critical habitat may tend to focus on that portion of its range. For example, with respect to portions of the range of the species not facing relevant threats, the Secretary may be more likely to find that the benefits of excluding an area from designation outweigh the benefits of specifying the area as critical habitat.

B. Section 4(d) of the Act Special Rules

Determining that a species is threatened in a significant portion of its range will result in the threatened status being applied to the entire range of the species. When a species is listed as threatened, section 4(d) of the Act allows us to issue special regulations "necessary and advisable to provide for the conservation" of the species. This provision in effect allows us to tailor regulations to the needs of the species. When a species is listed as threatened because of its status in an SPR, we will consider the development of a 4(d) rule to provide regulatory flexibility and to ensure that we apply the prohibitions of the Act where appropriate.

C. Recovery Planning and Implementation

Regardless of whether a species is listed because it is endangered or threatened throughout all of its range, or because it is endangered or threatened in only a significant portion of its range, the goal of recovery planning and implementation is to bring the species to the point at which it no longer needs the protections of the Act. Recovery plans must, to the maximum extent practicable, include site-specific management actions and measurable, objective criteria for determining the point at which the species no longer meets the definition of an "endangered species" or a "threatened species." See 16 U.S.C. 1533(f)(1)(b). In other words, when any established measurable, objective criteria are met, the species would not be likely to become an endangered species in the foreseeable future either throughout all of its range or throughout a significant portion of its range. As with recovery planning and implementation for species that are endangered or threatened throughout all of their ranges, a variety of actions may be necessary to recover species that are endangered or threatened in an SPR. Recovery actions should focus on removing threats to the species, and are thus likely to be focused on those areas where threats have been identified. However, recovery efforts are not constrained to just the significant portion of the range in which the

species was originally determined to be endangered or threatened, and may include recovery actions outside the SPR, or even outside the current range of the species. For example, reintroducing a species to parts of its historical range outside the SPR may increase the species' redundancy and resiliency such that the SPR no longer meets the draft policy's standard for "significant" (*i.e.*, loss of the species in the SPR would no longer cause the remainder to become endangered).

D. Sections 7, 9, and 10 of the Act

Regardless of whether a species is listed because it is endangered or threatened throughout all of its range, or because it is endangered or threatened in only a significant portion of its range, the provisions of the Act generally apply to the entire species. A Federal agency is required to consult with FWS or NMFS under section 7 of the Act if its actions may affect an endangered or threatened species anywhere throughout its range. Jeopardy analyses would be conducted at the scale of the species as a whole. Where threats vary across the range of a species, we may use various methods to streamline consultation processes in areas where the species are more secure. We note that threats, population trends, and relative importance to recovery commonly vary across the range for many species, especially as recovery efforts progress. The Services routinely account for this variation in our consultations. We expect to apply the same approach for species listed because they are endangered or threatened in only a significant portion of its range. Similarly, analyses for issuing permits and exemptions under section 10 of the Act would apply throughout the species' range, and we would use our expertise to streamline the processes and apply the appropriate level of protection for the areas under consideration. In the same way, even if a species is listed because it is endangered or threatened in a significant portion of its range, the prohibitions under section 9 of the Act would apply throughout the species' range for endangered species, and as established by special rules pursuant to section 4(d) of the Act for species listed as threatened.

V. Public Comments; Request for Information

We intend that the final policy on interpretation of the phrase "significant portion of its range" in the Act's definitions of "endangered species" and "threatened species" will consider information and recommendations from

all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in the **DATES** section above will be considered prior to the approval of a final document. We seek comments and recommendations on:

(1) Consequences of a species being endangered or threatened in a significant portion of its range:

(a) The draft policy interprets the "significant portion of its range" language to provide an independent basis for listing. Is this an appropriate interpretation? Are the other alternative interpretations we considered more appropriate, and why or why not? Are there other alternative interpretations that we should consider?

(b) When a species is listed due to being endangered or threatened throughout an SPR, should the protections of the Act apply throughout the range of the species? If so, how should we apply those protections?

(2) The definition of "significant":

(a) The draft policy includes a definition based on biological/conservation importance. Are alternative ways to define "significant" more appropriate, and why or why not? Would such approaches be workable in terms of their transparency, harmony with all key portions of the Act, and ability to be implemented consistently?

(b) We chose a relatively high threshold for "significant" which requires that loss of the portion would cause the overall species to become endangered ("in danger of extinction"). Is this threshold appropriate? Should it be higher or lower? Should the definition reference both "in danger of extinction" and "likely to become endangered," thus reflecting both the definitions of "endangered species" and "threatened species" as the benchmark for biological significance? Or should it refer only to whether loss of the portion would render the whole "in danger of extinction," as is currently included in the draft policy?

(3) We recognize that our definition of "significant" in the draft policy has a difficult conceptual underpinning both to analyze and to convey. Would it be appropriate to use another measure, such as percentage of range or population, as a rebuttable presumption as to whether a portion meets the definition of "significant," or whether a portion does not meet the definition of "significant"? Doing so could potentially streamline analyses and

allow us to use our resources more effectively, as well as provide some general guidance to the public on how the standard for "significant" would be applied. Would development of such a measure provide a useful tool? What measure would be an appropriate for a rebuttable presumption, and how would it be rebutted?

(4) Range and historical range: What role should lost historical range play in determining whether a species is endangered or threatened?

(5) Reconciling SPR with DPS authority: What is the proper relationship between SPR and DPS?

(6) We recognize that under the draft policy, a species can be threatened throughout all of its range while also being endangered in an SPR. For the reasons discussed in this document, in such situations we would list the entire species as endangered throughout all of its range. However, we recognize that this approach may raise concerns that the Services would be applying a higher level of protection where a lesser level of protection may also be appropriate, with the consequences that the Services would have less flexibility to manage the species and that scarce conservation resources would be diverted to species that might arguably better fit a lesser standard if viewed solely across its range. The Services are particularly interested in public comment on this issue.

Please include sufficient information with your submission (such as references to scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

You may submit your information concerning this draft policy by one of the methods listed in the **ADDRESSES** section. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and supporting documentation used in preparing this document is available for you to review at <http://www.regulations.gov>, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Endangered Species Program (see **FOR FURTHER INFORMATION CONTACT**).

VI. Required Determinations

A. Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this draft policy is significant and has reviewed it under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual economic effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of government;

(b) Whether the rule will create inconsistencies with other Federal agencies' actions;

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) Whether the rule raises novel legal or policy issues.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal 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 that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this policy would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking establishes requirements for NMFS and FWS in listing determinations under the Endangered Species Act. NMFS and FWS are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities are directly affected by this rule.

This draft policy, if made final, would be applied in determining whether a species meets the Act's definitions of "endangered species" or "threatened

species." However, based on agency experience, we predict application of this policy interpretation would affect our determinations in only a limited number of circumstances. This would likely only result in a small number of additional species listed under the Act and application of the Act's protective regulations.

We cannot reasonably predict those species for which we will receive petitions to list, delist, or reclassify, or whether a species' specific circumstances would result in us listing a species based on its status in an SPR. We therefore cannot predict which entities (other than the Services) would be affected by listing a species as endangered or threatened based on its status in an SPR or the extent of those impacts. However, given our experience implementing the Act, we believe few if any entities would be affected.

In addition, section 4(b) of the Act requires that we base decisions to list, delist, or reclassify species "solely on the best scientific and commercial data available." In other words, we cannot consider economic or socioeconomic impacts in our status determinations (48 FR 49244, October 25, 1983). In status determinations that would apply this policy, we would not consider the economic impacts of those listings. However, the Act also requires that we give notice of and seek comment on any proposal to list, delist, or reclassify any species prior to a final decision. Our proposed rules to list, delist, or reclassify species would indicate the types of activities that may be affected by resulting regulatory requirements of the Act. Entities that may be affected may review and comment on this or any other aspect of our proposed rules.

C. Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the "Regulatory Flexibility Act" section above, this draft policy would not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this policy would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the draft policy would not place additional requirements on any city, county, or other local municipalities.

(b) This draft policy would not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This policy would impose no obligations on State, local, or tribal governments.

D. Takings (E.O. 12630)

In accordance with Executive Order 12630, this draft policy would not have significant takings implications. This policy would not pertain to "taking" of private property interests, nor does it directly affect private property. A takings implication assessment is not required because this policy (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This policy would substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

E. Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this draft policy would have significant Federalism effects and have determined that a Federalism assessment is not required. This draft policy pertains only to determinations to list, delist, or reclassify species under section 4 of the Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Civil Justice Reform (E.O. 12988)

This draft policy does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of the Executive Order 12988. This draft policy would clarify how the Services will make determinations to list, delist, and reclassify species under section 4 of the Act.

G. Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951, May 4, 1994), Executive Order 13175, the Department of the Interior Manual

Chapter 512 DM 2, and the Department of Commerce *American Indian and Alaska Native Policy* (March 30, 1995), we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of issuing this draft policy. As noted above, we cannot reasonably predict those species for which we will receive petitions to list, delist, or reclassify, or whether a species' specific circumstances would result in us listing a species based on its status in an SPR. We therefore cannot predict which entities, including federally recognized Indian tribes, would be affected by listing a species as endangered or threatened based on its status in an SPR or the extent of those impacts. Given our experience implementing the Act, we believe few if any entities, including tribes, would be affected.

However, the Act requires that we give notice of and seek comment on any proposal to list, delist, or reclassify any species prior to a final decision. Our proposed rules to list, delist, or reclassify species would indicate the types of activities that may be affected by resulting regulatory requirements of the Act. Any potentially affected federally recognized Indian tribes would be notified of a proposed determination and given the opportunity to review and comment on the proposed rules.

H. Paperwork Reduction Act

This draft policy does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act. This policy would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

I. National Environmental Policy Act

We are analyzing this draft policy in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-6. We will complete our analysis, in compliance with NEPA, before finalizing this proposed policy.

J. Energy Supply, Distribution or Use (E.O. 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations

that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This draft policy, if made final, is not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

K. Clarity of This Policy

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule or policy we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the policy, your comments should be as specific as possible. For example, you should tell us the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov> or upon request from the Endangered Species Program, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this draft policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, VA 22203, and the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 6, 2011.

Daniel M. Ashe,

Director, Fish and Wildlife Service.

Dated: December 6, 2011

Samuel D. Rauch III,

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

[FR Doc. 2011-31782 Filed 12-8-11; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

**[FWS-R9-IA-2011-N257;
FXGO1671090000P5-123-FF09A30000]**

Endangered Species; Receipt of Applications for Permit; Correction

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities. We also invite comment on a previously published application that has been corrected.

DATES: We must receive comments or requests for documents on or before January 9, 2012.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358-2280; or email DMAFR@fws.gov.

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358-2104 (telephone); (703) 358-2280 (fax); DMAFR@fws.gov (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under

ADDRESSES. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email 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.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, “Delivering an Efficient, Effective, and Accountable Government” and “the President’s Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government” (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment before final

action on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: Mountain Gorilla Veterinary Project, Inc., Baltimore, MD; PRT–55564A

The applicant requests a permit to re-export biological samples from Eastern lowland gorillas (*Gorilla berengei*), for the purpose of enhancement of the survival of the species.

Applicant: U.S. Geological Survey, National Wildlife Health Center, Madison, WI; PRT–048370

The applicant requests renewal of a permit to import biological samples from all species of wild, captive-bred, and/or captive-held specimens for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Ricardo Longoria, Laredo TX; PRT–192404

The applicant requests renewal and amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) for barasingha (*Rucervus duvaucelii*), Eld’s deer (*Rucervus eldii*) and Arabian oryx (*Oryx leucoryx*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Virginia Zoological Park, Norfolk, VA; PRT–676511

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include the family Equidae to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Busch Gardens, Tampa, FL; PRT–692283

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include the families Hominidae and Rhinocerotidae and the species Asian elephant (*Elephas maximus*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: New England Aquarium Corp., Boston, MA; PRT–59781A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for jackass penguin (*Spheniscus demersus*) to enhance their propagation

or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Phoenix Herpetological Society, Scottsdale, AZ; PRT–19818A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include the Aruba island rattlesnake (*Crotalus durissus unicolor*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Stephen Chan, El Cajon, CA; PRT–197162

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for radiated tortoise (*Astrochelys radiata*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Jeffrey Hunter, San Francisco, CA; PRT–091931

The applicant requests renewal of their captive-bred wildlife registration under 50 CFR 17.21(g) for radiated tortoise (*Astrochelys radiata*), to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: James Pfarr, Everett, WA; PRT–201582

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for radiated tortoise (*Astrochelys radiata*) to enhance their propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Matson’s Laboratory, Milltown, MT; PRT–096048

The applicant requests renewal and amendment of a permit to import samples such as teeth from wood bison (*Bison bison athabasca*) from government-managed herds such as the Mackenzie Sanctuary herd and the Nahanni population in Canada for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Zoological Society of San Diego, San Diego, CA; PRT–50819A

The applicant requests a permit to export and reimport nonliving museum specimens of endangered and threatened species previously

accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Duke Lemur Center, Durham, NC; PRT-56737A

The applicant requests a permit to import biological specimens collected from silky sifakas (*Propithecus diadema candidus*) in the wild in Madagascar for the purpose of scientific research.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Ronald Bain, New Haven, MO; PRT-59367A.

Applicant: James Moses, Houston, TX; PRT-59496A.

Applicant: Glen Hudson, Weston, FL; PRT-59085A.

Applicant: Paxton Motheral, Fort Worth, TX; PRT-58509A.

Applicant: Lloyd Douglas, Aledo, TX; PRT-59287A.

Applicant: Jill Holstead, Houston, TX; PRT-59495A.

Correction

On October 28, 2011, we published a **Federal Register** notice inviting the public to comment on several applications for permits to conduct certain activities with endangered species (76 FR 66954). We made an error by omitting one animal in Leonard Voyle's application (PRT-57362A), which starts in the first column on page 66955. The omission is for an additional male bontebok (*Damaliscus pygargus pygargus*), for a total of two animals, not one. All the other information we printed was correct. With this notice, we correct that error and reopen the comment period for PRT-57362A. The corrected entry for this application is as follows:

Applicant: Leonard Voyles, Richmond, TX; PRT-57362A

The applicant requests a permit to import the sport-hunted trophy of two male bontebok (*Damaliscus pygargus pygargus*), culled from a captive herd maintained under the management program of the Republic of South Africa,

for the purpose of enhancement of the survival of the species.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2011-31590 Filed 12-8-11; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT930000-12-L1820000-XX0000]

Notice of Administrative Boundary Change for Bureau of Land Management Offices in Montana To Eliminate the County Split of Lewis and Clark County

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The administrative boundaries between the Central Montana District Office, Lewistown Field Office, and the Western Montana District Office, Butte Field Office, are being changed. The administrative boundary change will realign Lewis and Clark County, currently a split county between the two offices, to the Western Montana District Office, Butte Field Office.

DATES: The boundary change is effective October 1, 2011.

FOR FURTHER INFORMATION CONTACT: Gary Benes by telephone at (406) 538-1945 or by email at gbenes@blm.gov; or Richard Hotaling by telephone at (406) 533-7629 or by email at rhotalin@blm.gov; or Scott Haight by telephone at (406) 533-7630 or by email at shaight@blm.gov. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-(800) 877-8339 to contact the above individuals during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The primary purpose of the administrative boundary change is to improve service to the public and coordination efforts with local, Federal, State, and county agencies. The benefits of this change will result in the following improvements:

- Consolidation of resource receipts, workloads (*i.e.*, range, forestry, recreation) into one office location;

- Consolidation of law enforcement coordination between the county sheriff and one BLM office;

- Consolidation of fire response and coordination between the county interagency dispatch and one BLM office; and

- Improved coordination with local and county officials on a number of land resource issues such as lands and realty, rights-of-way, and land use planning.

The boundaries for the Butte Field Office are described as follows:

Butte Field Office

The Bureau of Land Management, Butte Field Office administrative boundary now encompasses all of Broadwater, Deer Lodge, Gallatin, Jefferson, Lewis and Clark, Park, Silver Bow and the northern portion of Beaverhead Counties, in the state of Montana.

Authority: BLM Manual 1203 Delegation of Authority Sec 1202 and Sec 1201 relates to functions of BLM. The delegation manual shows the various delegations of functions to BLM officials, *et al.*, which includes "Approve changes in District and Field Office boundaries." (See the table of delegations in the manual, specifically subject code 1202). This authority is retained by the Director, with concurrence by the "Office of the Assistant Secretary" (see footnote 3 in the 1203 Manual).

Jamie E. Connell,
State Director.

[FR Doc. 2011-31651 Filed 12-8-11; 8:45 am]

BILLING CODE 4310-DN-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO230.11100000.PH0000]

Notice of Intent To Prepare Environmental Impact Statements and Supplemental Environmental Impact Statements To Incorporate Greater Sage-Grouse Conservation Measures Into Land Use Plans and Land Management Plans

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), the Federal Land Policy and Management Act of 1976, as amended (FLPMA), and the Resources Planning Act of 1974, as amended by the National Forest Management Act 1976 (NFMA), the Bureau of Land Management (BLM) and the Forest Service (FS) intend to prepare Environmental Impact Statements (EIS)

and Supplemental EISs, and by this notice are announcing the beginning of the scoping process to solicit public comments and identify issues. The BLM is the lead agency on these EISs and Supplemental EISs and the FS is participating as a cooperating agency.

These EISs/Supplemental EISs will be coordinated under two regions: An Eastern Region and a Western Region. The Eastern Region includes BLM land use plans in the States of Colorado, Wyoming, North Dakota, South Dakota, and portions of Utah and Montana. The Western Region includes BLM land use plans in California, Idaho, Nevada, Oregon, and portions of Utah and Montana. For each of these regions, the FS will include those areas that were identified by the FWS as high priority areas for greater sage-grouse within the NFS units listed below.

DATES: This notice initiates the public scoping process for the EISs/Supplemental EISs. Comments on issues may be submitted in writing until February 7, 2012. The date(s) and location(s) of all scoping meetings will be announced at least 15 days in advance through local media, newspapers and the BLM Web site for the Eastern Region at <http://www.blm.gov/wo/st/en/prog/more/sagegrouse/eastern.html>, and for the Western Region at <http://www.blm.gov/wo/st/en/prog/more/sagegrouse/western.html>. In order to be included in the Draft EISs/Supplemental EISs, all scoping comments must be received prior to the close of the scoping period or 15 days after the last public meeting, whichever is later. Comments that are specific to a particular area or land use plan should be identified as such. We will provide additional opportunities for public participation upon publication of the Draft EISs/Supplemental EISs.

ADDRESSES: You may submit comments related to the greater sage-grouse planning effort by any of the following methods:

- Eastern Region
 - Web site: <http://www.blm.gov/wo/st/en/prog/more/sagegrouse/eastern.html>
 - Email: sageeast@blm.gov
 - Fax: (307) 775-6042
 - Mail: Eastern Region Project Manager, BLM Wyoming State Office, 5353 Yellowstone, Cheyenne, Wyoming 82009
- Western Region
 - Web site: <http://www.blm.gov/wo/st/en/prog/more/sagegrouse/western.html>
 - Email: sagewest@blm.gov
 - Fax: (775) 861-6747

- Mail: Western Region Project Manager, BLM Nevada State Office, 1340 Financial Blvd., Reno, Nevada 89502

Documents pertinent to the Eastern Region will be coordinated through the BLM Wyoming State Office. Documents pertinent to the Western Region will be coordinated through the BLM Nevada State Office.

Though BLM and NFS lands in Utah are distributed between the Western and Eastern Regions, all such lands will be addressed in one EIS, or through ongoing plan revision processes. All comments applicable to the Utah EIS should be sent to the Western Region.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Chuck Otto, Eastern Region Project Manager, telephone (307) 775-6062; address 5353 Yellowstone Road, Cheyenne, Wyoming 82009; email cotto@blm.gov, or: Brian Amme, Western Region Project Manager, telephone (775) 861-6645; address 1340 Financial Boulevard, Reno, Nevada 89520; email bamme@blm.gov. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-(800) 877-8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: In April 2010, the U.S. Fish and Wildlife Service (FWS) published its listing decision for the greater sage-grouse indicating that listing was "Warranted but Precluded" due to higher listing priorities under the Endangered Species Act. The inadequacy of regulatory mechanisms to conserve the greater sage-grouse and its habitat was identified as a significant threat in the FWS finding on the petition to list the greater sage-grouse as a threatened or endangered species. The FWS has identified conservation measures to be included in the respective agencies' land use plans as the principal regulatory mechanisms to assure adequate conservation of the greater sage-grouse and its habitat on public lands. For the BLM, these land use plans are Resource Management Plans (RMP). For the FS, these are Land and Resource Management Plans (LMP). In view of the identified threats to the greater sage-grouse, and the FWS timeline for making a listing decision on this species, the BLM and FS propose to incorporate consistent objectives and conservation measures for the

protection of greater sage-grouse and its habitat into relevant RMPs and LMPs by September 2014 in order to avoid a potential listing under the Endangered Species Act. These conservation measures would be incorporated into RMPs and LMPs through the plan amendment and revision processes of the respective agencies. The BLM and FS expect to prepare EISs to analyze proposed amendments to some land use plans that are not currently undergoing amendment or revision. For plans already undergoing amendment or revision, the BLM and FS will consider incorporating conservation measures either through the ongoing amendment or revision processes, or through supplemental environmental analyses as appropriate.

The BLM and FS intend to evaluate the adequacy of sage-grouse conservation measures in RMPs and selected LMPs, and consider conservation measures, as appropriate, in proposed RMP and selected LMP amendments and/or revisions throughout the range of the greater sage-grouse (with the exception of the bi-state population in California and Nevada and the Washington State distinct population segment, which will be addressed through other planning efforts).

The BLM currently expects to evaluate sage-grouse conservation measures in 68 planning areas, and the FS expects to evaluate sage-grouse conservation measures in 9 LMPs. The plans applicable to these planning areas are listed below.

BLM Wyoming has already begun undertaking a programmatic EIS specific to the greater sage-grouse. This programmatic EIS will analyze amendments to all of the State's RMPs not currently being amended or revised to address needed changes to the management and conservation of greater sage-grouse habitats. The ongoing RMP revisions in Wyoming will evaluate conservation measures through existing planning processes.

Below is a list of RMPs and LMPs that the BLM and FS intend to evaluate. Some RMPs/LMPs are already undergoing either revision or amendment. In cases in which an ongoing plan revision or amendment may not be completed by September 2014, the underlying completed RMP is also listed, as it may be amended. FS LMPs are denoted below in parentheses.

Within the Eastern Region, the potentially affected BLM RMPs and FS LMPs include:

- Colorado
 - Colorado River Valley RMP

- revision
 - Grand Junction RMP revision (and existing 1987 Grand Junction RMP)
 - Kremmling RMP revision
 - Little Snake RMP (2011)
 - White River RMP Oil and Gas amendment
 - Montana/Dakotas
 - Billings RMP revision (and existing 1984 Billings RMP)
 - Headwaters RMP (1984)
 - HiLine RMP revision (and existing 1988 West HiLine RMP)
 - Judith, Valley, and Phillips RMP (1992)
 - Miles City RMP revision (and existing 1985 Powder River and 1995 Big Dry RMPs)
 - North Dakota RMP (1988)
 - South Dakota RMP revision (and existing 1986 South Dakota RMP)
 - Upper Missouri River Breaks NM RMP (2008)
 - Utah
 - Park City Management Framework Plan (MFP) (1975)
 - Price RMP (2008)
 - Randolph MFP (1980)
 - Salt Lake District Isolated Tracts Planning Analysis (1985)
 - Vernal RMP (2008)
 - Uinta National Forest Revised Forest Plan (2003) (FS)
 - Wyoming (please note that BLM Wyoming has already issued a Notice of Intent to begin an EIS that will amend all completed plans to address needed changes in the management and conservation of greater sage-grouse habitat)
 - Bighorn Basin RMP revision
 - Buffalo RMP revision (and existing 1985 Buffalo RMP)
 - Casper RMP (2007)
 - Kemmerer RMP (2010)
 - Lander RMP revision
 - Newcastle RMP (2000)
 - Pinedale RMP (2008)
 - Rawlins RMP (2008)
 - Rock Springs RMP revision (and existing 1997 Green River RMP)
 - Thunder Basin National Grassland LMP (not included in BLM Wyoming Notice of Intent above) (FS)
- Within the Western Region, the potentially affected RMPs and LMPs include:
- California
 - Alturas RMP (2008)
 - Eagle Lake RMP (2008)
 - Surprise RMP (2008)
 - Idaho
 - Birds of Prey NCA RMP (2008)
 - Bruneau RMP revision (and existing 1983 Bruneau RMP)
 - Challis RMP (1999)
 - Craters of the Moon NM RMP (2006)
 - Four Rivers RMP revision (and existing 1988 Cascade and 1983 Kuna RMPs)
 - Jarbidge RMP revision
 - Lemhi RMP (1987)
 - Owyhee RMP (1999)
 - Pocatello RMP revision
 - Shoshone-Burley RMP revision (and existing 1980 Bennett Hills/Timmerman Hills, 1985 Cassia, 1975 Magic, 1985 Monument, 1981 Sun Valley, and 1982 Twin Falls MFPs/RMPs)
 - Upper Snake RMP revision (and existing 1983 Big Lost, 1985 Medicine Lodge, 1981 Big Desert, and 1981 Little Lost-Birch Creek MFPs/RMPs)
 - Curlew National Grassland Management Plan (2002) (FS)
 - Caribou National Forest Revised Forest Plan (2003) (FS)
 - Sawtooth National Forest Revised Forest Plan (2003) (FS)
- Montana
 - Butte RMP (2009)
 - Dillon RMP (2006)
 - Nevada
 - Battle Mountain RMP revision (and existing 1997 Tonopah and 1986 Shoshone-Eureka RMPs)
 - Black Rock Desert NCA RMP (2004)
 - Carson City RMP revision (and existing 2001 Carson City RMP)
 - Elko RMP (1987)
 - Ely RMP (2008)
 - Wells RMP (1985)
 - Winnemucca RMP revision
 - Humboldt National Forest Land and Resource Management Plan (1986) (FS)
 - Toiyabe National Forest Land and Resource Management Plan (1986) (FS)
 - Oregon
 - Andrews RMP (2005)
 - Baker RMP revision (and existing 1989 Baker RMP)
 - Brothers-Lapine RMP (1989)
 - John Day RMP revision
 - Lakeview RMP amendment (and existing 2003 Lakeview RMP)
 - Southeastern Oregon RMP amendment (and existing 2003 Southeastern Oregon RMP)
 - Steens RMP (2005)
 - Three Rivers RMP (1992)
 - Two Rivers RMP (1989)
 - Upper Deschutes RMP (2005)
 - Utah
 - Box Elder RMP (1986)
 - Cedar City RMP revision (and existing 1983 Pinyon and 1986 Cedar-Beaver-Garfield-Antimony RMPs)
 - Grand Staircase-Escalante NM RMP (1999)

- House Range RMP (1987)
- Kanab RMP (2008)
- Pony Express RMP (1990)
- Richfield RMP (2008)
- Warm Springs RMP (1986)
- Dixie National Forest Land and Resource Management Plan (1986) (FS)
- Fishlake National Forest Land and Resource Management Plan (1986) (FS)

The purpose of the public scoping process is to determine relevant issues relating to the conservation of the greater sage-grouse and its habitat that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EISs/Supplemental EISs.

At present, the BLM has identified the following preliminary issues:

- Greater Sage-grouse Habitat Management
- Fluid Minerals
- Coal Mining
- Hard Rock Mining
- Mineral Materials
- Rights-of-Way (including transmission)
- Renewable Energy Development
- Fire
- Invasive Species
- Grazing
- Off Highway Vehicle Management and Recreation

Preliminary planning criteria include:

- The BLM and FS will utilize the Western Association of Fish and Wildlife Agencies (WAFWA) *Conservation Assessment of Greater Sage-grouse and Sagebrush Habitats* (Connelly, *et al.* 2004), and any other appropriate resources, to identify greater sage-grouse habitat requirements and best management practices.
 - The approved RMP amendments/revisions will be consistent with the BLM's National Sage-grouse Conservation Strategy.
 - The approved RMP amendments/revisions will comply with FLPMA, NEPA, and Council on Environmental Quality regulations at 40 CFR parts 1500–1508 and Department of the Interior regulations at 43 CFR part 46 and 43 CFR part 1600; the BLM *H-1601-1 Land Use Planning Handbook*, “Appendix C: Program-Specific and Resource-Specific Decision Guidance Requirements” for affected resource programs; the 2008 BLM NEPA Handbook (H-1790-1), and all other applicable BLM policies and guidance.
 - The approved LMP amendments/revisions will comply with NFMA, NEPA, Council on Environmental Quality regulations at 40 CFR parts 1500–1508, Regulations of the Secretary

of Agriculture at 36 CFR part 219 and FSM 1920 and FSH 1909.12.

- The RMP and LMP amendments/revisions will be limited to making land use planning decisions specific to the conservation of greater sage-grouse habitats.

- The BLM and FS will consider allocative and/or prescriptive standards to conserve greater sage-grouse habitat, as well as objectives and management actions to restore, enhance, and improve greater sage-grouse habitat.

- The RMP and LMP amendments/revisions will recognize valid existing rights.

- Lands addressed in the RMP and LMP amendments/revisions will be public lands (including surface-estate split estate lands) managed by the BLM, and National Forest System lands, respectively, in greater sage-grouse habitats. Any decisions in the RMP and LMP amendments/revisions will apply only to Federal lands administered by either the BLM or the FS.

- The BLM and FS will use a collaborative and multi-jurisdictional approach, where appropriate, to determine the desired future condition of public lands and National Forest System lands for the conservation of greater sage-grouse and their habitats.

- As described by law and policy, the BLM and FS will strive to ensure that conservation measures are as consistent as possible with other planning jurisdictions within the planning area boundaries.

- The BLM and FS will consider a range of reasonable alternatives, including appropriate management prescriptions that focus on the relative values of resources while contributing to the conservation of the greater sage-grouse and sage-grouse habitat.

- The BLM and FS will address socioeconomic impacts of the alternatives. Socio-economic analysis will use an accepted input-output quantitative model such as IMPLAN or RIMSII, and/or JEDI for renewable energy analysis.

- The BLM and FS will endeavor to use current scientific information, research, technologies, and results of inventory, monitoring, and coordination to determine appropriate local and regional management strategies that will enhance or restore greater sage-grouse habitats.

- Management of greater sage-grouse habitat that intersects with Wilderness Study Areas (WSAs) on Public lands administered by the BLM will be guided by the *Interim Management Policy for Lands Under Wilderness Review (IMP)*. Land use allocations made for WSAs must be consistent with the IMP and

with other laws, regulations, and policies related to WSA management.

- For BLM-administered lands, all activities and uses within greater sage-grouse habitats will follow existing land health standards. Standards and guidelines (S&G) for livestock grazing and other programs that have developed S&Gs will be applicable to all alternatives for BLM lands.

- The BLM and FS will consult with Indian tribes to identify sites, areas, and objects important to their cultural and religious heritage within greater sage-grouse habitats.

- The BLM and FS will coordinate and communicate with State, local, and tribal governments to ensure that the BLM and FS consider provisions of pertinent plans, seek to resolve inconsistencies between State, local, and tribal plans, and provide ample opportunities for state, local, and tribal governments to comment on the development of amendments or revisions.

- The BLM and FS will develop vegetation management objectives, including objectives for managing noxious weeds and invasive species (including identification of desired future condition for specific areas), within greater sage-grouse habitat.

- The RMP and LMP amendments/revisions will be based on the principles of Adaptive Management.

- Reasonable Foreseeable Development Scenarios and planning for Fluid Minerals will follow the BLM Handbook H-1624-1 and current fluid mineral (oil and gas, coal-bed methane, oil shale) and geothermal resources. For NFS lands, the FS will use applicable and relevant policy and procedures.

- The RMP and LMP amendments/revisions will be developed using an interdisciplinary approach to prepare reasonable foreseeable development scenarios, identify alternatives, and analyze resource impacts, including cumulative impacts to natural and cultural resources and the social and economic environment.

- The most current approved BLM and FS corporate spatial data will be supported by current metadata and will be used to ascertain greater sage-grouse habitat extent and quality. Data will be consistent with the principles of the Information Quality Act of 2000.

- State Game and Fish agencies' greater sage-grouse data and expertise will be utilized to the fullest extent practicable in making management determinations on Federal lands.

The BLM and FS will utilize and coordinate the NEPA commenting process to help fulfill the public

involvement process under Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), if applicable, as provided for in 36 CFR 800.2(d)(3).

Native American tribal consultations will be conducted in accordance with policy, and tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, and local agencies, along with other stakeholders that may be interested or affected by the BLM's or FS's decision on this proposal are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency. The public is also invited to nominate or recommend areas on public lands for greater sage-grouse and their habitat to be considered as Areas of Critical Environmental Concern as a part of this planning process (BLM Manual 1613.3.31). Parties interested in leasing and development of Federal coal in the planning area should provide coal resource data for their area(s) of interest. Specifically, information is requested on the location, quality, and quantity of Federal coal with development potential, and on surface resource values related to the 20 coal unsuitability criteria described in 43 CFR part 3461. This information will be used for any necessary updating of coal screening determinations (43 CFR 3420.1-4) in the Decision Area and in the environmental analysis.

Before including your address, phone number, email 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.

Authority: 40 CFR 1501.7, 43 CFR 1610.2.

Edwin Roberson,

Assistant Director, Renewable Resources and Planning.

[FR Doc. 2011-31652 Filed 12-8-11; 8:45 am]

BILLING CODE 4310-84-P

DEPARTMENT OF THE INTERIOR**National Park Service**

[2253–665]

Notice of Inventory Completion: U.S. Department of the Interior, National Park Service, Organ Pipe Cactus National Monument, Ajo, AZ and Arizona State Museum, Tucson, AZ**AGENCY:** National Park Service, Interior.**ACTION:** Notice

SUMMARY: Organ Pipe Cactus National Monument has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian tribes, and has determined that there is a cultural affiliation between the human remains and associated funerary objects and present-day Indian tribes.

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects may contact Organ Pipe Cactus National Monument.

Repatriation of the human remains and associated funerary objects to the Indian tribes stated below may occur if no additional claimants come forward.

DATES: Representatives of any Indian tribe that believes it has a cultural affiliation with the human remains and associated funerary objects should contact Organ Pipe Cactus National Monument at the address below by January 9, 2012.

ADDRESSES: Lee Baiza, Superintendent, Organ Pipe Cactus National Monument, 10 Organ Pipe Drive, Ajo, AZ 85321, telephone (520) 387–6849 ext. 7500.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of Organ Pipe Cactus National Monument, Ajo, AZ and in the physical custody of the Arizona State Museum, Tucson, AZ. The human remains and associated funerary objects were removed from site AZ Y:16:002 (ASM) in Pima County, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the Superintendent, Organ Pipe Cactus National Monument.

Consultation

A detailed assessment of the human remains was made by Organ Pipe Cactus

National Monument and Arizona State Museum professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Quechan Tribe of the Fort Yuma Indian Reservation, California and Arizona; and Tohono O'odham Nation of Arizona. The Cocopah Tribe of Arizona; Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California; Fort Mojave Indian Tribe of Arizona, California, and Nevada; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico were also contacted for consultation purposes.

History and Description of the Remains

Between 1951 and 1954, human remains representing, at minimum, one individual were removed from site AZ Y:16:002 (ASM) in Pima County, AZ. The remains were removed during archeological fieldwork under the direction of Paul H. Ezell in a cooperative project between Arizona State Museum and the National Park Service. Project collections were stored at the NPS Southwestern National Monuments Headquarters, also known as the Southwest Archaeological Center, in Globe, AZ, for analysis and report preparation. The professional report was never completed. It is unclear at what point the cremated remains came to be in collections storage at the Arizona State Museum. No known individuals were identified. The 38 associated funerary objects are 2 faunal bone fragments and 36 fragments of charcoal.

Based upon the archeological context, including the presence of Tanque Verde Red-on-Brown ceramics, the remains have been determined to be Native American dating to A.D. 1150–1450, commonly known to the archeological community as the Classic Hohokam period.

A relationship of shared group identity can reasonably be traced between members of the Hohokam culture and the four southern O'odham tribes of Arizona. The O'odham people comprise four Federally recognized Indian tribes (the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona) and one Indian Group that is not

Federally recognized, the Hia C-ed O'odham. A Hia C-ed O'odham association with lands lying directly to the west of the Ajo Mountains, including Organ Pipe Cactus National Monument, is documented throughout the historic period and into the 20th century.

O'odham oral histories describe the end time of the Hohokam, when O'odham armies gathered and marched on the Great House communities (e.g., Casa Grande, Pueblo Grande) and cast out the Hohokam societies there. The armies then occupied the conquered lands, intermarrying with the remnants of the Hohokam and ultimately becoming the O'odham people. Other evidence of the O'odham-Hohokam connection includes similar settlement patterns, irrigation systems, residence styles, and a possible relationship between modern O'odham kickball games and formal Hohokam ball courts.

A relationship of shared group identity can also reasonably be traced between members of the Hohokam culture and the Hopi Tribe of Arizona. Hopi history is based, in large part, on clan migration narratives. The Hopi consider all of Arizona to be within traditional Hopi lands, i.e., areas in and through which Hopi clans are believed to have migrated in the past. Hopi oral history and the anthropological record show that some clans originated in the Salt-Gila region and were descended from the Hohokam. After the fall of the Great House communities, Hohokam refugees were absorbed into the Hopi culture.

A relationship of shared group identity can also reasonably be traced between members of the Hohokam culture and the Zuni Tribe of the Zuni Reservation, New Mexico. Zuni oral history tells of ancestral migrations and settling throughout this region in their search for the Middle Place of the World (present day Pueblo of Zuni). Elders have identified features in the area, including shrines and petroglyphs, as Zuni. Zuni ancestors left many markers of their passing including trails, habitation sites, campsites, burials, sacred shrines, and rock art.

Determinations Made by Organ Pipe Cactus National Monument

Officials of Organ Pipe Cactus National Monument have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 38 objects described above are reasonably believed to have been placed

with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

Additional Requestors and Disposition

Representatives of any Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Lee Baiza, Superintendent, Organ Pipe Cactus National Monument, 10 Organ Pipe Drive, Ajo, AZ 85321, telephone (520) 387-6849 ext. 7500 before January 9, 2012. Repatriation of the human remains and associated funerary objects to the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico may proceed after that date if no additional claimants come forward.

Organ Pipe Cactus National Monument is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Cocopah Tribe of Arizona; Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California; Fort Mojave Indian Tribe of Arizona, California, and Nevada; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Quechan Tribe of the Fort Yuma Indian Reservation, California and Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: December 5, 2011.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. 2011-31614 Filed 12-8-11; 8:45 am]

BILLING CODE 4310-50-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-860 (Second Review)]

Tin- and Chromium-Coated Steel Sheet From Japan; Scheduling of a Full Five-Year Review Concerning the Antidumping Duty Order

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty order on tin- and chromium-coated steel sheet from Japan would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* December 5, 2011.

FOR FURTHER INFORMATION CONTACT:

Karen Taylor (202) 708-4101, Office of Industries, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background.—On September 6, 2011, the Commission determined that responses to its notice of institution of the subject five-year review were such that a full review pursuant to section 751(c)(5) of the Act should proceed (76 FR 58536, September 21, 2011). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the review and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this review available to authorized applicants under the APO issued in the review, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. § 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the review will be placed in the nonpublic record on March 22, 2012, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on April 11, 2012, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before April 3, 2012. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on April 5, 2012, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules.

Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is March 30, 2012. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is April 19, 2012; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before April 19, 2012. On May 8, 2012, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before May 10, 2012, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. See 76 Fed. Reg. 61937 (October 6, 2011) and the newly revised Commission's Handbook on E-Filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a

document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: December 6, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011-31642 Filed 12-8-11; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[DN 2863]

Certain Blu-Ray Disc Players; 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 Blu-Ray Disc Players*, DN 2863; 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 Walker Digital, LLC on December 5, 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 blu-ray disc players. The complaint names D&M Holdings, Inc. of Japan; D&M Holdings US, Inc. of Mahwah, NJ; Denon Electronics (USA) LLC of Mahwah, NJ; Funai Electric Co., Ltd. of Japan; Funai Corporation, Inc. of Rutherford, NJ; Haier Group Corporation of China; Haier America Trading, LLC of New York, NY; Harman International Industries, Inc. of Stamford, CT; Inkel Corporation of South Korea; LG Electronics, Inc. of South Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, NJ; Marantz America LLC of Mahwah, NJ; Onkyo Sound & Vision Corporation of Japan; Onkyo USA Corporation of Upper Saddle River, NJ; Orion America, Inc. of Princeton, IN; Orion Electric Co. of Ltd., Japan; Panasonic Corporation of Japan; Panasonic Corporation of North America of Secaucus, NJ; P&F USA, Inc. of Alpharetta, GA; Philips Electronics North America Corp. of Andover, MA; Pioneer Corporation of Japan; Pioneer Electronics (USA) Inc. of Long Beach, CA; Samsung Electronics Co., Ltd. of South Korea; Samsung Electronics America, Inc. of Ridgefield Park, NJ; Sharp Corporation of Japan; Sharp Electronics Corporation of Mahwah, NJ; Sherwood America, Inc. of La Mirada, CA; Sony Corporation of Japan; Sony Computer Entertainment, Inc. of Japan; Sony Corporation of America, New York, NY; Sony Electronics, Inc., San Diego, CA; Sony Computer Entertainment of Foster City, CA; Toshiba Corporation of Japan; Toshiba America Information Systems, Inc. of Irvine, CA; VIZIO, Inc. of Irvine, CA; Yamaha Corporation of Japan; Yamaha Corporation of America, Buena Park of CA; and Yamaha Electronics Corporation, USA of Buena Park, CA, as respondents.

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. 2863") 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: December 6, 2011.

James R. Holbein,
Secretary to the Commission.

[FR Doc. 2011-31643 Filed 12-8-11; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731 TA 340-E and 340-H (Third Review)]

Solid Urea From Russia and Ukraine

Determination

On the basis of the record¹ 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 solid urea from Russia and Ukraine 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 December 1, 2010 (75 FR 74746) and determined on March 7, 2011 that it would conduct full reviews (76 FR 15339, March 21, 2011). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on April 28, 2011 (76 FR 23835). The hearing was held in Washington, DC, on October 4, 2011, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on December 5, 2011. The views of the Commission are contained in USITC Publication 4279 (December 2011), entitled *Solid Urea from Russia and Ukraine: Investigation Nos. 731-TA-340-E and 340-H (Third Review)*.

By order of the Commission.

Issued: December 5, 2011.

James R. Holbein,
Secretary to the Commission.

[FR Doc. 2011-31596 Filed 12-8-11; 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 dissenting.

DEPARTMENT OF JUSTICE

[AAG/A Order No. 001/2011]

Privacy Act of 1974; Computer Matching Agreement

AGENCY: Department of Justice.

ACTION: Notice—computer matching between the Department of Justice and the Internal Revenue Service, Department of Treasury.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100-503), Office of Management and Budget (OMB) Guidelines on the Conduct of Matching Programs 54 FR 25818 (June 19, 1989), OMB Bulletin 89-22, "Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public," and OMB Circular No. A-130, Revised November 28, 2000, "Management of Federal Information Resources", the Department of Justice is issuing a public notice of its intent to conduct a computer matching program with the Internal Revenue Service, Department of the Treasury. Under this matching program, entitled Taxpayer Address Request, the IRS will provide information relating to taxpayers' mailing addresses to the DOJ for purposes of enabling DOJ to locate debtors to initiate litigation and/or enforce the collection of debts owed by the taxpayers to the United States.

DATES: Effective Date: The matching program will become effective 40 days after a copy of the agreement, as approved by the Data Integrity Board of each agency, is sent to Congress and the Office of Management and Budget, or 30 days after publication of this notice in the **Federal Register**, whichever is later. The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months, if the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

Reporting: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100-503), Office of Management and Budget (OMB) Guidelines on the Conduct of Matching Programs 54 FR 25818 (June 19, 1989), OMB Bulletin 89-22, "Instructions on Reporting Computer Matching Programs to the Office of Management and Budget (OMB), Congress and the Public," and OMB Circular No. A-130, Revised November 28, 2000, "Management of Federal Information Resources", copies

of this notice and report are being provided to the Committee on Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget.

Authority: This matching program is being conducted under the authority of the Internal Revenue Code (IRC) 6103(m)(2). This provides for disclosure, upon written request, of a taxpayer's mailing address for use by officers, employees, or agents of a Federal agency for the purpose of locating such taxpayer to collect or compromise a Federal claim against the taxpayer in accordance with sections 3711, 3717, and 3718 of title 31 of the United States Code, statutory provisions which authorize DOJ to collect debts on behalf of the United States through litigation.

Objectives To Be Met by the Matching Program: The purpose of this program is to provide DOJ with the most current addresses of taxpayers to notify debtors of legal actions that may be taken by DOJ and the rights afforded them in the litigation to enforce collection of debts owed to the United States.

Records To Be Matched: DOJ will provide records from the Debt Collection Management System, JUSTICE/JMD-006, last published in its entirety at 58 FR 60058-60060 (November 12, 1993), and from the Debt Collection Enforcement System, JUSTICE/USA-015, last published in its entirety at 71 FR 42118-42122 (July 25, 2006). These systems of records contain information on persons who owe debts to the United States and whose debts have been referred to the DOJ for litigation and/or enforced collection. DOJ records will be matched against records contained in the Privacy Act System of Records: Customer Account Data Engine (CADE) Individual Master File (IMF), Treasury/IRS 24.030, last published at 73 FR 13304 (March 12, 2008). This system of records, among other information, contains the taxpayer's name, Social Security Number (SSN), and most recent address known by IRS.

Categories of Records/Individuals Involved: DOJ will submit the nine-digit Social Security Number (SSN) and four character Name Control (the first four letters of the surname) of each individual whose current address is requested. IRS will provide an address for each taxpayer whose SSN and Name Control matches the record submitted by DOJ or a code explaining that no match was found on the IMF.

Notice Procedures: IRS provides direct notice to taxpayers in the

instructions to Forms 1040, 1040A, and 1040EZ, and constructive notice in the **Federal Register** system of records notice, that information provided on U.S. Individual Income Tax Returns may be given to other Federal agencies, as provided by law. For the records involved in this match, both IRS and DOJ have provided constructive notice to records subjects through the publication, in the **Federal Register**, of system of record notices that contain routine uses permitting disclosures for this matching program.

Address for Receipt of Public Comments or Inquiries: Interested persons are invited to submit written comments regarding this notice to Holley B. O'Brien, Director, Debt Collection Management Staff, Justice Management Division, 145 N St. NE., Rm 5E.101, Washington, DC 20530.

Lee Lofthus,
Assistant Attorney General for Administration.

[FR Doc. 2011-31673 Filed 12-8-11; 8:45 am]

BILLING CODE 4410-NW-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA-343F]

Controlled Substances: Final Adjusted Aggregate Production Quotas for 2011

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice.

SUMMARY: This notice establishes final adjusted 2011 aggregate production quotas for controlled substances in Schedules I and II of the Controlled Substances Act (CSA).

FOR FURTHER INFORMATION CONTACT: John W. Partridge, Chief, Liaison and Policy Section, Drug Enforcement Administration, 8701 Morrisette Drive, Springfield, VA 22152, Telephone: (202) 307-4564.

SUPPLEMENTARY INFORMATION:

Background

Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in Schedules I and II. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100. In accordance with 21 U.S.C. 826 and 21 CFR 1303.11, DEA published in the **Federal Register** on December 20, 2010, notice of the

established 2011 aggregate production quotas for controlled substances in Schedules I and II (75 FR 79404). That notice stated that the Administrator would adjust, as needed, the established aggregate production quotas in 2011 as provided for in 21 CFR 1303.13. The 2011 proposed adjusted aggregate production quotas were subsequently published in the **Federal Register** on September 14, 2011, (76 FR 56810) in consideration of the outlined criteria. All interested persons were invited to comment on or object to the proposed adjusted aggregate production quotas on or before October 14, 2011.

The September 14, 2011, proposed adjusted aggregate production quotas also included proposed aggregate production quotas for five newly scheduled substances. On March 1, 2011, the DEA Administrator published a final order (76 FR 11075) which temporarily placed five synthetic cannabinoids in Schedule I: 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200); 1-Butyl-3-(1-naphthoyl)indole (JWH-073); 1-Pentyl-3-(1-naphthoyl)indole (JWH-018); 5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol; and 5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol. That final order stated that quotas for the five substances would be "established based on registrations granted and quota applications received pursuant to part 1303 of Title 21 of the Code of Federal Regulations." 76 FR 11077. Aggregate production quotas for these newly scheduled substances had not been previously established and were initially proposed in the above referenced notice published in the **Federal Register** on September 14, 2011 (76 FR 56810). All interested persons were invited to comment on or object to the proposed aggregate production quotas on or before October 14, 2011.

Analysis for Final Adjusted 2011 Aggregate Production Quotas

Consideration has been given to the criteria outlined in the September 14, 2011, notice of proposed adjusted aggregate production quotas in accordance with 21 CFR 1303.13. In addition, six companies, four DEA registered manufacturers and two non-registrants, submitted timely comments regarding a total of 22 Schedule I and II controlled substances. Comments received proposed that the aggregate production quotas for 4-anilino-N-phenethyl-4-piperidine (ANPP), alfentanil, amphetamine (for sale), diphenoxylate, fentanyl, gamma hydroxybutyric acid, hydrocodone, meperidine, methadone, methadone

intermediate, methylphenidate, morphine (for conversion), morphine (for sale), noroxymorphone (for conversion), noroxymorphone (for sale), oxycodone (for sale), oxymorphone (for conversion), oxymorphone (for sale), pentobarbital, secobarbital, sufentanil, and thebaine were insufficient to provide for the estimated medical, scientific, research, and industrial needs of the United States, for export requirements, and for the establishment and maintenance of reserve stocks. DEA has taken into consideration the above comments along with the relevant 2010 year-end inventories, initial 2011 manufacturing quotas, 2011 export requirements, actual and projected 2011 sales, research and product

development requirements, and additional applications received.

Based on all of the above, the Administrator has determined that the proposed adjusted 2011 aggregate production quotas for alfentanil, diphenoxylate, gamma hydroxybutyric acid, meperidine, and pentobarbital required additional consideration and hereby further adjusts the 2011 aggregate production quotas for those substances.

Regarding 4-anilino-N-phenethyl-4-piperidine (ANPP), amphetamine (for sale), fentanyl, hydrocodone, methadone, methadone intermediate, methylphenidate, morphine (for conversion), morphine (for sale), noroxymorphone (for conversion), noroxymorphone (for sale), oxycodone

(for sale), oxymorphone (for conversion), oxymorphone (for sale), secobarbital, sufentanil, and thebaine, the Administrator hereby determines that the proposed adjusted 2011 aggregate production quotas for these substances as published on September 14, 2011, at 76 FR 56810 are sufficient to meet the current 2011 estimated medical, scientific, research, and industrial needs of the United States and to provide for adequate inventories.

Pursuant to the above, the Administrator hereby establishes the 2011 final aggregate production quotas for Schedule I and II controlled substances, including the five newly scheduled substances previously referenced, expressed in grams of anhydrous acid or base, as follows:

Basic class—Schedule I	Final adjusted 2011 quotas
1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200)	45 g
1-Butyl-3-(1-naphthoyl)indole (JWH-073)	45 g
1-Methyl-4-phenyl-4-propionoxypiperidine	2 g
1-Pentyl-3-(1-naphthoyl)indole (JWH-018)	45 g
2,5-Dimethoxyamphetamine	2 g
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2 g
2,5-Dimethoxy-4-n-propylthiophenethylamine	2 g
3-Methylfentanyl	2 g
3-Methylthiofentanyl	2 g
3,4-Methylenedioxyamphetamine (MDA)	22 g
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	15 g
3,4-Methylenedioxymethamphetamine (MDMA)	22 g
3,4,5-Trimethoxyamphetamine	2 g
4-Bromo-2,5-dimethoxyamphetamine (DOB)	2 g
4-Bromo-2,5-dimethoxyphenethylamine (2-CB)	2 g
4-Methoxyamphetamine	77 g
4-Methylaminorex	2 g
4-Methyl-2,5-dimethoxyamphetamine (DOM)	2 g
5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol	68 g
5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol	53 g
5-Methoxy-3,4-methylenedioxyamphetamine	2 g
5-Methoxy-N,N-diisopropyltryptamine	2 g
Acetyl-alpha-methylfentanyl	2 g
Acetyldihydrocodeine	2 g
Acetylmethadol	2 g
Allylprodine	2 g
Alphacetylmethadol	2 g
Alpha-ethyltryptamine	2 g
Alphameprodine	2 g
Alphamethadol	2 g
Alpha-methylfentanyl	2 g
Alpha-methylthiofentanyl	2 g
Alpha-methyltryptamine (AMT)	2 g
Aminorex	2 g
Benzylmorphine	2 g
Betacetylmethadol	2 g
Beta-hydroxy-3-methylfentanyl	2 g
Beta-hydroxyfentanyl	2 g
Betameprodine	2 g
Betamethadol	2 g
Betaprodine	2 g
Bufotenine	3 g
Cathinone	4 g
Codeine-N-oxide	602 g
Diethyltryptamine	2 g
Difenoxin	50 g
Dihydromorphine	3,608,000 g
Dimethyltryptamine	7 g
Gamma-hydroxybutyric acid	5,772,000 g
Heroin	20 g

Basic class—Schedule I	Final adjusted 2011 quotas
Hydromorfinol	2 g
Hydroxypethidine	2 g
Ibogaine	5 g
Lysergic acid diethylamide (LSD)	16 g
Marihuana	21,000 g
Mescaline	5 g
Methaqualone	10 g
Methcathinone	4 g
Methyldihydromorphine	2 g
Morphine-N-oxide	605 g
N-Benzylpiperazine	2 g
N,N-Dimethylamphetamine	2 g
N-Ethylamphetamine	2 g
N-Hydroxy-3,4-methylenedioxyamphetamine	2 g
Noracymethadol	2 g
Norlevorphanol	52 g
Normethadone	2 g
Normorphine	18 g
Para-fluorofentanyl	2 g
Phenomorphan	2 g
Pholcodine	2 g
Psilocybin	2 g
Psilocyn	2 g
Tetrahydrocannabinols	393,000 g
Thiofentanyl	2 g
Tilidine	10 g
Trimeperidine	2 g

Basic class—Schedule II	Final adjusted 2011 quotas
1-Phenylcyclohexylamine	2 g
1-Piperidinocyclohexanecarbonitrile	2 g
4-Anilino-N-phenethyl-4-piperidine (ANPP)	1,800,000 g
Alfentanil	12,800 g
Alphaprodine	2 g
Amobarbital	40,007 g
Amphetamine (for conversion)	8,500,000 g
Amphetamine (for sale)	25,300,000 g
Cocaine	216,000 g
Codeine (for conversion)	65,000,000 g
Codeine (for sale)	39,605,000 g
Dextropropoxyphene	7 g
Dihydrocodeine	255,000 g
Diphenoxylate	730,000 g
Ecgonine	83,000 g
Ethylmorphine	2 g
Fentanyl	1,428,000 g
Glutethimide	2 g
Hydrocodone (for sale)	59,000,000 g
Hydromorphone	3,455,000 g
Isomethadone	2 g
Levo-alphaacetylmethadol (LAAM)	3 g
Levomethorphan	2 g
Levorphanol	3,600 g
Lisdexamfetamine	10,400,000 g
Meperidine	5,500,000 g
Meperidine Intermediate-A	3 g
Meperidine Intermediate-B	7 g
Meperidine Intermediate-C	3 g
Metazocine	5 g
Methadone (for sale)	20,000,000 g
Methadone Intermediate	26,000,000 g
Methamphetamine	3,130,000 g
Methylphenidate	56,000,000 g
Morphine (for conversion)	70,000,000 g
Morphine (for sale)	39,000,000 g
Nabilone	10,502 g
Noroxymorphone (for conversion)	7,200,000 g
Noroxymorphone (for sale)	401,000 g
Opium (powder)	63,000 g
Opium (tincture)	1,000,000 g
Oripavine	8,000,000 g

Basic class—Schedule II	Final adjusted 2011 quotas
Oxycodone (for conversion)	5,600,000 g
Oxycodone (for sale)	98,000,000 g
Oxymorphone (for conversion)	12,800,000 g
Oxymorphone (for sale)	3,070,000 g
Pentobarbital	34,000,000 g
Phenazocine	5 g
Phencyclidine	24 g
Phenmetrazine	2 g
Phenylacetone	8,000,000 g
Racemethorphan	2 g
Remifentanyl	2,500 g
Secobarbital	336,002 g
Sufentanil	5,000 g
Tapentadol	403,000 g
Thebaine	116,000,000 g

Aggregate production quotas for all other Schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 remain at zero.

Dated: December 1, 2011.

Michele M. Leonhart,
Administrator.

[FR Doc. 2011-31621 Filed 12-8-11; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA 350F]

Final Adjusted Assessment of Annual Needs for the List I Chemicals: Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2011

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice.

SUMMARY: This notice establishes the Final Adjusted 2011 assessment of annual needs for the List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

DATES: *Effective Date:* December 9, 2011.

FOR FURTHER INFORMATION CONTACT: John W. Partridge, Chief, Liaison and Policy Section, Drug Enforcement Administration (DEA), Springfield, Virginia 22152, *Telephone:* (202) 307-4564.

SUPPLEMENTARY INFORMATION: The 2011 assessment of annual needs represents those quantities of ephedrine, pseudoephedrine, and phenylpropanolamine which may be manufactured domestically and imported into the United States in 2011 to provide adequate supplies of each chemical for the estimated medical, scientific, research, and industrial needs of the United States, lawful export

requirements, and the establishment and maintenance of reserve stocks of such chemicals. Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires that the Attorney General establish an assessment of annual needs for ephedrine, pseudoephedrine, and phenylpropanolamine. This responsibility has been delegated to the Administrator of the DEA by 28 CFR 0.100.

On September 14, 2011, a notice entitled "Proposed Adjustment of the Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2011" was published in the **Federal Register** (76 FR 56807). That notice proposed to adjust the 2011 assessment of annual needs for ephedrine (for sale), ephedrine (for conversion), pseudoephedrine (for sale), phenylpropanolamine (for sale) and phenylpropanolamine (for conversion). All interested persons were invited to comment on or object to the proposed assessments on or before October 14, 2011.

Comments Received

DEA did not receive any comments to the proposed adjustment of the assessment of annual needs for ephedrine (for sale), ephedrine (for conversion), pseudoephedrine (for sale), phenylpropanolamine (for sale) and phenylpropanolamine (for conversion).

Conclusion

In determining the adjusted 2011 assessments, DEA used the calculation methodology previously described in the 2010 and 2011 assessment of annual needs (74 FR 60294 and 75 FR 79407 respectively). DEA considered changes in demand, changes in the national rate of net disposal, and changes in the rate of net disposal by the registrants holding individual manufacturing or

import quotas for the chemical; whether any increased demand or changes in the national and/or individual rates of net disposal are temporary, short term, or long term; whether any increased demand could be met through existing inventories, increased individual manufacturing quotas, or increased importation without increasing the assessment of annual needs; whether any decreased demand would result in excessive inventory accumulation by all persons registered to handle the particular chemical; and other factors affecting the medical, scientific, research, industrial, and importation needs in the United States, lawful export requirements, and reserve stocks, as found relevant.

Other factors that DEA considered include trends as derived from information provided in applications for import, manufacturing, and procurement quotas and in import and export declarations. The inventory, acquisition (purchases), and disposition (sales) data as provided by DEA registered manufacturers and importers reflects the most current information available to DEA at the time of publication of this Notice. The underlying data used to determine the final 2011 assessment of annual needs is the same as that used in determining the proposed 2011 assessment of annual needs, as published on September 14, 2011, at 76 FR 56807.

In accordance with 21 U.S.C. 826(a) and 21 CFR 1315.13, the Administrator hereby orders that the 2011 assessment of annual needs for ephedrine, pseudoephedrine, and phenylpropanolamine, expressed in kilograms of anhydrous acid or base, is adjusted and established as follows:

List I chemical	Final 2011 assessment of annual needs
Ephedrine (for sale)	4,200 kg.
Phenylpropanolamine (for sale)	5,300 kg.
Pseudoephedrine (for sale)	299,000 kg.
Phenylpropanolamine (for conversion).	29,500 kg.
Ephedrine (for conversion)	18,600 kg.

Dated: December 1, 2011.

Michele M. Leonhart,
Administrator.

[FR Doc. 2011-31619 Filed 12-8-11; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Coke Oven Emissions

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "Coke Oven Emissions," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before January 9, 2012.

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 email 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, Occupational Safety and Health Administration (OSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* (202) 395-6929/*Fax:* (202) 395-6881 (these are not toll-free numbers), *email:* 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 email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: The purpose of Coke Oven Emissions Standard and its information collection requirements, codified at 29 CFR 1910.1029, are to provide protection for workers from the adverse health effects associated with occupational exposure to coke oven emissions. Employers must monitor worker exposure, reduce worker exposure to within permissible exposure limits, and provide workers with medical examinations and training.

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 1218-0128. The current OMB approval is scheduled to expire on December 31, 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. For additional information, see the related notice published in the **Federal Register** on August 22, 2011 (76 FR 52350).

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 1218-0128. 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: Occupational Safety and Health Administration (OSHA).

Title of Collection: Coke Oven Emissions.

OMB Control Number: 1218-0128.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 19.

Total Estimated Number of Responses: 42,413.

Total Estimated Annual Burden Hours: 54,241.

Total Estimated Annual Other Costs Burden: \$839,680.

Dated: December 5, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011-31640 Filed 12-8-11; 8:45 am]

BILLING CODE 4510-26-P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10 a.m., Wednesday, December 14, 2011.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314-3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel. Closed pursuant to Exemption (2).
2. Action under Section 205 of the Federal Credit Union Act. Closed pursuant to Exemption (6).
3. Member Business Loan Waiver Appeal. Closed pursuant to Exemptions (4), (6) and (8).
4. Consideration of Supervisory Activities (6). Closed pursuant to some or all of the following: exemptions (8), (9)(i)(B), and 9(ii).

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: (703) 518-6304.

Mary Rupp,

Board Secretary.

[FR Doc. 2011-31806 Filed 12-7-11; 4:15 pm]

BILLING CODE 7535-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–018 and 52–019; NRC–2008–0170, Docket Nos. 52–022 and 52–023; NRC–2008–0231, Docket Nos. 52–029 and 52–030; NRC–2008–0558, Docket Nos. 52–040 and 52–041; NRC–2009–0337]

Notice of Availability of Combined License Applications

ACTION: Combined license applications; receipt.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is giving notice once each week for four consecutive weeks of combined license (COL) applications from Progress Energy Florida, Inc., Duke Energy Carolinas, LLC, Progress Energy Carolinas, Inc., and Florida Power & Light Company.

ADDRESSES: You can access publicly available documents related to this action 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 email to pdr.resource@nrc.gov. The ADAMS accession numbers for the initial application cover letters are as follows: ML073510494 for William States Lee III Nuclear Station Units 1 and 2, ML080580078 for Shearon Harris Nuclear Power Plant Units 2 and 3; ML082260277 for Levy Nuclear Plant Units 1 and 2; and ML091830589 for Turkey Point Units 6 and 7.

- *Federal Rulemaking Web site:* Public comments and supporting materials related to this action can be found at <http://www.regulations.gov> by searching on Docket ID NRC–2008–0170 (William States Lee III Nuclear Station Units 1 and 2), NRC–2008–0231 (Shearon Harris Nuclear Power Plant Units 2 and 3), NRC–2008–0558 (Levy Nuclear Plant Units 1 and 2), and NRC–2009–0337 (Turkey Point Units 6 and 7). Address questions about NRC dockets to

Carol Gallagher, telephone: (301) 492–3668; email: Carol.Gallagher@nrc.gov.

The applications are also available at <http://www.nrc.gov/reactors/new-reactors/col.html>.

FOR FURTHER INFORMATION CONTACT:

Donald Habib, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–1035, email: Donald.Habib@nrc.gov.

SUPPLEMENTARY INFORMATION: The following parties have filed applications for COLs with the NRC, pursuant to Section 103 of the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 CFR) part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants:”

1. On December 12, 2007, Duke Energy Carolinas, LLC, submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as William States Lee III Nuclear Station Units 1 and 2 in Cherokee County, South Carolina.

2. On February 18, 2008, Progress Energy Carolinas, Inc., submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as Shearon Harris Nuclear Power Plant Units 2 and 3 in Wake County, North Carolina.

3. On July 28, 2008, Progress Energy Florida, Inc., submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as Levy Nuclear Plant Units 1 and 2 in Levy County, Florida.

4. On June 30, 2009, Florida Power & Light Company submitted an application for COLs for two AP1000 advanced passive pressurized water reactors designated as Turkey Point Units 6 and 7 in Miami-Dade County, Florida.

These four applications are currently under review by the NRC staff.

An applicant may seek a COL in accordance with Subpart C of 10 CFR part 52. The information submitted by the applicant includes certain administrative information, such as financial qualifications submitted pursuant to 10 CFR 52.77, as well as technical information submitted pursuant to 10 CFR 52.79. These notices are being provided in accordance with the requirements in 10 CFR 50.43(a)(3).

Dated at Rockville, Maryland, this 5th day of December, 2011.

For the Nuclear Regulatory Commission.

Jeffrey Cruz,

Chief, AP1000 Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2011–31521 Filed 12–8–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0283; License No. NPF–63; Docket No. 50–400]

In the Matter of Carolina Power & Light Company, North Carolina Eastern Municipal Power Agency Shearon Harris Nuclear Power Plant, Unit 1; Order Approving Indirect Transfer of Control of License

I

Carolina Power & Light Company (CP&L, the licensee) and North Carolina Eastern Municipal Power Agency are the owners of Shearon Harris Nuclear Power Plant (Harris), Unit 1. With respect to their ownership, they are coholders of Renewed Facility Operating License No. NPF–63. The Harris facility consists of a single unit Westinghouse three-loop pressurized water reactor located in Wake and Chatham Counties, North Carolina. The facility operating license authorizes CP&L to possess, use, and operate the Harris facility.

II

By application dated March 30, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11110A031), as supplemented by letter dated September 2, 2011 (ADAMS Accession No. ML11255A129) (collectively hereinafter referred to as the application), the licensee requested, on its own behalf, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and Section 50.80 of Title 10 of the Code of Federal Regulations (10 CFR), that the Nuclear Regulatory Commission (NRC, the Commission) consent to the proposed indirect transfer of control of facility operating license to for Harris, Unit 1, to the extent held by CP&L. The proposed indirect transfer of control of the Harris license results from the planned corporate merger between Progress Energy, Inc. (Progress Energy) and Duke Energy Corporation (Duke Energy). Progress Energy is CP&L's ultimate parent corporation. As part of the transaction, Progress Energy will merge with Diamond Acquisition Corporation, a wholly owned subsidiary of Duke Energy. Progress Energy will be the surviving entity and will become a wholly owned subsidiary of Duke Energy. Progress Energy will become an intermediate parent corporation of CP&L.

The ownership interest in Harris held by CP&L is 83.83 percent and that held by North Carolina Eastern Municipal Power Agency is 16.17 percent. CP&L is

the sole operator of Harris. The proposed indirect transfer of control of the Brunswick operating license will not result in any change in the role of the CP&L as the licensed operator and owner of the licensed facilities and will not result in any changes to its financial qualifications, decommissioning funding assurance, or technical qualifications. CP&L will retain the requisite qualifications to own and operate the licensed facility. North Carolina Eastern Municipal Power Agency is not involved in the proposed transaction and will continue to own 16.17 percent of Harris facility.

Approval of the indirect transfer of control of the facility operating license was requested by CP&L. A notice entitled, "Notice of Consideration of Approval of Application for Indirect License Transfers Resulting from the Proposed Merger Between Progress Energy, Inc. and Duke Energy Corporation, and Opportunity for Hearing," was published in the **Federal Register** on August 30, 2011 (76 FR 53967). No comments or hearing requests were received.

Pursuant to 10 CFR 50.80(a), no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the NRC shall give its consent in writing. Upon review of the information in the application and other information before the Commission, and relying on the representations in the application, the NRC staff has determined that the proposed indirect transfer of control of the Harris license to the extent held by CP&L, to the extent affected by the planned corporate merger between Progress Energy and Duke Energy Corporation, will not affect the qualifications of CP&L as holder of the Harris license and is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the NRC, pursuant thereto. The findings set forth above are supported by a safety evaluation dated December 2, 2011.

III

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended (42 U.S.C. Sections 2201(b), 2201(i), 2201(o), and 2234 respectively); and 10 CFR 50.80, *it is hereby ordered* that the application regarding the indirect license transfer related to the proposed merger is approved.

It is further ordered that after receipt of all required regulatory approvals of the proposed indirect transfer action, CP&L shall inform the Director of the Office of Nuclear Reactor Regulation in

writing of the date of the closing of the corporate merger of Progress Energy and Duke Energy. Should the indirect transfer of control of the licenses not be completed by December 2, 2012, this Order shall become null and void, provided, however, upon written application and good cause shown, such date may be extended by order of the Commission.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated March 30, 2011, as supplemented by letter dated September 2, 2011, and the Safety Evaluation dated December 2, 2011, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR reference staff by telephone at 1-(800) 397-4209, or (301) 415-4737, or by email to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, this 2nd day of December 2011.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011-31635 Filed 12-8-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2011-0282; License Nos. DPR-23 and SNM-2502; Docket Nos. 50-261 and 72-3]

In the Matter of Carolina Power & Light Company, H.B. Robinson Steam Electric Plant, Unit No. 2, H. B. Robinson Steam Electric Plant, Unit 2, Independent Spent Fuel Storage Installation; Order Approving Indirect Transfer of Control of Licenses

I.

Carolina Power & Light Company (CP&L, the licensee) is the owner of the H.B. Robinson Steam Electric Plant (Robinson), Unit No. 2, Renewed Facility Operating License No. DPR-23, and the Robinson Unit No. 2 Independent Spent Fuel Storage Installation (ISFSI), Renewed Materials License No. SNM-2502. The Robinson facility consists of a single unit

Westinghouse three-loop pressurized water reactor and an ISFSI located in Darlington County, South Carolina. The facility operating license and materials license authorize CP&L to possess, use, and operate the Robinson facility.

II.

By application dated March 30, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11110A031), as supplemented by letter dated September 2, 2011 (ADAMS Accession No. ML11255A129) (collectively hereinafter referred to as the application), the licensee requested, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and Sections 50.80 and 72.50 of Title 10 of the Code of Federal Regulations (10 CFR), that the Nuclear Regulatory Commission (NRC or the Commission) consent to the proposed indirect transfer of control of the facility operating license and materials license for Robinson. The proposed indirect transfer of control of the licenses results from the planned corporate merger between Progress Energy, Inc. (Progress Energy) and Duke Energy Corporation (Duke Energy). Progress Energy is CP&L's ultimate parent corporation. As part of the transaction, Progress Energy will merge with Diamond Acquisition Corporation, a wholly owned subsidiary of Duke Energy. Progress Energy will be the surviving entity and will become a wholly owned subsidiary of Duke Energy. Progress Energy will become an intermediate parent corporation of CP&L.

CP&L holds 100 percent ownership and is the sole operator of the Robinson facility. The proposed indirect transfer of control of the Robinson licenses will not result in any change in the role of the CP&L as the licensed operator and owner of the Robinson facility and will not result in any changes to its financial qualifications, decommissioning funding assurance, or technical qualifications. CP&L will retain the requisite qualifications to own and operate the licensed facility.

Approval of the indirect transfer of control of the facility operating license and the material license for Robinson was requested by CP&L. A notice entitled, "Notice of Consideration of Approval of Application for Indirect License Transfers Resulting from the Proposed Merger Between Progress Energy, Inc. and Duke Energy Corporation, and Opportunity for Hearing," was published in the **Federal Register** on August 31, 2011 (76 FR 54261). No comments or hearing requests were received.

Pursuant to 10 CFR 50.80(a), no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the NRC shall give its consent in writing. Also, pursuant to 10 CFR 72.50(a), no license or any part included in a license issued under part [72] for an ISFSI shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing. Upon review of the information in the application and other information before the Commission, and relying on the representations in the application, the NRC staff has determined that the proposed indirect transfer of control of the Robinson licenses held by CP&L, to the extent affected by the proposed corporate merger between Progress Energy and Duke Energy Corporation, will not affect the qualifications of CP&L as holder of the Robinson licenses and is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the NRC, pursuant thereto. The findings set forth above are supported by a safety evaluation dated December 2, 2011.

III.

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended (42 USC Sections 2201(b), 2201(i), 2201(o), and 2234, respectively); and Sections 50.80 and 72.50 of 10 CFR, *it is hereby ordered* that the application regarding the proposed indirect license transfers related to the proposed merger is approved.

It is further ordered that after receipt of all required regulatory approvals associated with the proposed indirect transfer action, CP&L shall inform the Director of the Office of Nuclear Reactor Regulation in writing of the date of the closing of the corporate merger of Progress Energy and Duke Energy. Should the indirect transfer of control of the licenses not be completed by December 2, 2012, this Order shall become null and void, provided, however, upon written application and good cause shown, such date may be extended by order of the Commission.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated March 30, 2011, as supplemented by letter dated September 2, 2011, and the Safety Evaluation dated December 2, 2011, which are available for public inspection at the Commission's Public Document Room (PDR), located at One

White Flint North, Public File Area 01 F21, 11555 Rockville Pike, Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR reference staff by telephone at 1-(800) 397-4209, or (301) 415-4737, or by email to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, this 2nd day of December 2011.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Daniel H. Dorman,

Acting Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2011-31636 Filed 12-8-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2011-0281; License No. DPR-72; Docket No. 50-302]

In the Matter of Florida Power Corporation, et al., Crystal River Unit 3 Nuclear Generating Plant; Order Approving Indirect Transfer of Control of License

I.

Florida Power Corporation (FPC, the licensee) and nine other entities are the owners of Crystal River Unit 3 Nuclear Generating Plant (Crystal River), Facility Operating License No. DPR-72. The ownership interest in Crystal River is held by ten owners in the following percentages:

	Percent
Florida Power Corporation	91.78
City of Alachua, Florida	0.08
City of Bushnell, Florida	0.04
City of Gainesville, Florida	1.41
Kissimmee Utility Authority	0.68
City of Leesburg, Florida	0.82
Utilities Commission of the City of New Smyrna Beach	0.56
City of Ocala, Florida	1.33
Orlando Utilities Commission	1.60
Seminole Electric Cooperative, Inc.	1.70

With respect to their ownership, they are co-holders of the Crystal River facility. The Crystal River facility consists of a single unit, Babcock and Wilcox two-loop pressurized water reactor located in Citrus County,

Florida. The operating license authorized FPC to possess, use and operate the Crystal River facility.

II.

By application dated March 30, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11110A031), as supplemented by letter dated September 2, 2011 (ADAMS Accession No. ML11255A129) (collectively hereinafter referred to as the application), the licensee requested, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and Section 50.80 of Title 10 of the Code of Federal Regulations (10 CFR), that the Nuclear Regulatory Commission (NRC, the Commission) consent to the proposed indirect transfer of control of the facility operating license for Crystal River, to the extent held by FPC. The proposed indirect transfer of control of the license results from the planned corporate merger between Progress Energy, Inc. (Progress Energy) and Duke Energy Corporation (Duke Energy). Progress Energy is FPC's ultimate parent corporation. As part of the transaction, Progress Energy will merge with Diamond Acquisition Corporation, a wholly owned subsidiary of Duke Energy. Progress Energy will be the surviving entity and will become a wholly owned subsidiary of Duke Energy. Progress Energy will become an intermediate parent corporation of FPC.

FPC is the sole operator of Crystal River. The proposed indirect transfer of control of the Crystal River license will not result in any change in the role of FPC as the licensed operator and owner of the licensed facilities and will not result in any changes to its financial qualifications, decommissioning funding assurance, or technical qualifications. FPC will retain the requisite qualifications to own and operate the licensed facility. The other nine owners are not involved in the proposed transaction and will continue to own the same percentages of ownership in Crystal River as before the transaction.

Approval of the indirect transfer of the facility operating license was requested by FPC. A notice entitled, "A Notice of Consideration of Approval of Application for Indirect License Transfers Resulting from the Proposed Merger Between Progress Energy, Inc. and Duke Energy Corporation, and Opportunity for Hearing," was published in the **Federal Register** on August 30, 2011 (76 FR 53972). No comments or hearing requests were received.

Pursuant to 10 CFR 50.80(a), no license, or any right thereunder, shall be

transferred, directly or indirectly, through transfer of control of the license, unless the U.S. Nuclear Regulatory Commission (NRC) shall give its consent in writing. Upon review of the information in the licensee's application, and other information before the Commission, and relying on the representations in the application, the NRC staff has determined that the proposed indirect transfer of control of the Crystal River license to the extent held by FPC, to the extent affected by the proposed corporate merger between Progress Energy and Duke Energy, will not affect the qualifications of FPC as holder of the Crystal River facility operating license, and is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the NRC, pursuant thereto. The findings set forth above are supported by a safety evaluation dated December 2, 2011.

III.

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended (42 U.S.C. Sections 2201(b), 2201(i), 2201(o), and 2234, respectively); and 10 CFR 50.80, *it is hereby ordered* that the application regarding the proposed indirect license transfer related to the proposed merger is approved.

It is further ordered that after receipt of all required regulatory approvals associated with the proposed indirect transfer action, FPC shall inform the Director of the Office of Nuclear Reactor Regulation in writing of the date of the closing of the corporate merger of Progress Energy and Duke Energy. Should the indirect transfer of control of the licenses not be completed by December 2, 2012, this Order shall become null and void, provided, however, upon written application and good cause shown, such date may be extended by order of the Commission.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated March 30, 2011, as supplemented by letter dated September 2, 2011, and the Safety Evaluation dated December 2, 2011, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike, Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should

contact the NRC PDR reference staff by telephone at 1-(800) 397-4209, or (301) 415-4737, or by email to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, this 2nd day of December 2011.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011-31638 Filed 12-8-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2011-0284; License Nos. DPR-71 and DPR-62; Docket Nos. 50-325 and 50-324]

In the Matter of Carolina Power & Light Company North Carolina Eastern, Municipal Power Agency, Brunswick Steam Electric Plant, Units 1 and 2; Order Approving Indirect Transfer of Control of Licenses

I

Carolina Power & Light Company (CP&L, the licensee) and North Carolina Eastern Municipal Power Agency are the owners of Brunswick Steam Electric Plant (Brunswick), Units 1 and 2, including Brunswick Independent Spent Fuel Storage Installation (ISFSI). With respect to their ownership, they are coholders of Renewed Facility Operating License Nos. DPR-71 and DPR-62. The Brunswick facility consists of two General Electric boiling water reactors and an ISFSI located in Brunswick County, North Carolina. The facility operating licenses authorize CP&L to possess, use, and operate the Brunswick facility.

II

By application dated March 30, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11110A031), as supplemented by letter dated September 2, 2011 (ADAMS Accession No. ML11255A129) (collectively hereinafter referred to as the application), the licensee requested, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and Section 50.80 of Title 10 of the Code of Federal Regulations (10 CFR), that the Nuclear Regulatory Commission (NRC, the Commission) consent to the proposed indirect transfer of control of the facility operating licenses for Brunswick, to the extent held by CP&L. The proposed indirect transfer of control of the licenses results from the proposed corporate merger between Progress Energy, Inc. (Progress

Energy) and Duke Energy Corporation (Duke Energy). Progress Energy is CP&L's ultimate parent corporation. As part of the transaction, Progress Energy will merge with Diamond Acquisition Corporation, a wholly owned subsidiary of Duke Energy. Progress Energy will be the surviving entity and will become a wholly owned subsidiary of Duke Energy. Progress Energy will become an intermediate parent corporation of CP&L.

The ownership interest in Brunswick held by CP&L is 81.67 percent and that held by North Carolina Eastern Municipal Power Agency is 18.33 percent. CP&L is the sole operator of Brunswick. The proposed indirect transfer of control of the Brunswick operating licenses will not result in any change in the role of the CP&L as the licensed operator and owner of the Brunswick facility and will not result in any changes to its financial qualifications, decommissioning funding assurance, or technical qualifications. CP&L will retain the requisite qualifications to own and operate the licensed facility. North Carolina Eastern Municipal Power Agency is not involved in the proposed transaction and will continue to own 18.33 percent of the Brunswick facility.

Approval of the indirect transfer of control of the facility operating licenses was requested by CP&L. A notice entitled, "Notice of Consideration of Approval of Application for Indirect License Transfers Resulting from the Proposed Merger Between Progress Energy, Inc., and Duke Energy Corporation, and Opportunity for Hearing," was published in the **Federal Register** on August 30, 2011 (76 FR 53970). No comments or hearing requests were received.

Pursuant to 10 CFR 50.80(a), no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the NRC shall give its consent in writing. Upon review of the information in the application, and other information before the Commission, and relying on the representations in the application, the NRC staff has determined that the proposed indirect transfer of control of the Brunswick licenses to the extent held by CP&L, to the extent affected by the proposed corporate merger between Progress Energy and Duke Energy Corporation, will not affect the qualifications of CP&L as holder of the Brunswick licenses, and is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the NRC, pursuant thereto. The findings set forth above are

supported by a safety evaluation dated December 2, 2011.

III

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2201(b), 2201(i), 2201(o), and 2234, respectively); and 10 CFR 50.80, *it is hereby ordered* that the application regarding the indirect license transfers related to the proposed merger is approved.

It is further ordered that after receipt of all required regulatory approvals associated with the proposed indirect transfer action, CP&L shall inform the Director of the Office of Nuclear Reactor Regulation in writing of the date of the closing of the corporate merger of Progress Energy and Duke Energy. Should the indirect transfer of control of the licenses not be completed by December 2, 2012, this Order shall become null and void, provided, however, upon written application and good cause shown, such date may be extended by order of the Commission.

This Order is effective upon issuance.

For further details with respect to this Order, see the initial application dated March 30, 2011, as supplemented by letter dated September 2, 2011, and the Safety Evaluation dated December 2, 2011, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike, Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR reference staff by telephone at 1-(800) 397-4209, or (301) 415-4737, or by email to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, this 2nd day of December 2011.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011-31628 Filed 12-8-11; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2011-0091]

Office of New Reactors; Notice of Availability of the Final Staff Guidance Section 1.0, Revision 2 on Introduction and Interfaces

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of Availability.

SUMMARY: The NRC is issuing its final Revision 2 to NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition," Section 1.0, Revision 2 on "Introduction and Interfaces" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML112730393).

The NRC staff issues revisions to SRP sections to facilitate timely implementation of the current staff guidance and to facilitate reviews to amendments to licenses for operating reactors or for activities associated with review of applications for early site permits and combined licenses for the Office of New Reactors. The NRC will incorporate similar post-COL commitment guidance developed specifically for COL applicants and included in ISG-015 in the next revision of RG 1.206, "Combined License Applications for Nuclear Power Plants (LWR Edition)," and related guidance documents.

Disposition: On April 14, 2011, the NRC staff issued the proposed Revision 2 on SRP Section 1.0 on "Introduction and Interfaces," ADAMS Accession No. ML110110573. There were no comments received on the proposed revision. Therefore, the guidance is issued as final without changes to the proposed notification.

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

ADDRESSES: The NRC maintains ADAMS, which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room

reference staff at 1-(800) 397-4209, (301) 415-4737, or by email at pdr.resource@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Amy E. Cabbage, Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC, 20555-0001; telephone at (301) 415-2875 or email at amy.cabbage@nrc.gov.

SUPPLEMENTARY INFORMATION: The NRC posts its issued staff guidance on the NRC external Web page (<http://www.nrc.gov/reading-rm/doc-collections/isg/>).

Dated at Rockville, Maryland, this 1st day of December 2011.

For the Nuclear Regulatory Commission.

Amy E. Cabbage,

Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.

[FR Doc. 2011-31639 Filed 12-8-11; 8:45 am]

BILLING CODE 7590-01-P

POSTAL REGULATORY COMMISSION

[Docket No. A2012-78; Order No. 1021]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Avalon, Texas post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES:

December 5, 2011: Administrative record due (from Postal Service);
December 27, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene.

See the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (<http://www.prc.gov>) or by directly accessing the Commission's Filing Online system at <https://www.prc.gov/prc-pages/filing-online/login.aspx>. Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789-6820 (case-related information) or DocketAdmins@prc.gov (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on November 18, 2011, the Commission received a petition for review of the Postal Service's determination to close the Avalon post office in Avalon, Texas. The petition for review was filed by Dr. David Del Bosque (Petitioner) and is postmarked November 8, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012-78 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than December 23, 2011.

Categories of issues apparently raised. Petitioner contends that (1) the Postal Service failed to consider the effect of the closing on the community (see 39 U.S.C. 404(d)(2)(A)(i)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record is within 15 days after the date in which the petition for review was filed with the Commission. See 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service is also within 15 days after the

date in which the petition for review was filed with the Commission.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at <http://www.prc.gov>. Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789-6873 or via electronic mail at prc-webmaster@prc.gov.

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at prc-dockets@prc.gov or via telephone at (202) 789-6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, <http://www.prc.gov>, unless a waiver is obtained. See 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, <http://www.prc.gov>, or by contacting the Commission's docket section at prc-dockets@prc.gov or via telephone at (202) 789-6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. See 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before December 27, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, <http://www.prc.gov>, unless a waiver is obtained for hardcopy filing. See 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. See 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. See 39 CFR 3001.21.

It is ordered:

1. The procedural schedule listed below is hereby adopted.
2. Pursuant to 39 U.S.C. 505, Brent W. Peckham is designated officer of the Commission (Public Representative) to represent the interests of the general public.
3. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register**.

By the Commission.
Shoshana M. Grove,
Secretary.

PROCEDURAL SCHEDULE

November 18, 2011	Filing of Appeal.
December 5, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
December 5, 2011	Deadline for the Postal Service to file any responsive pleading.
December 27, 2011	Deadline for notices to intervene (see 39 CFR 3001.111(b)).
December 23, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (see 39 CFR 3001.115(a) and (b)).
January 12, 2012	Deadline for answering brief in support of the Postal Service (see 39 CFR 3001.115(c)).
January 27, 2012	Deadline for reply briefs in response to answering briefs (see 39 CFR 3001.115(d)).
February 3, 2012	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (see 39 CFR 3001.116).
March 7, 2012	Expiration of the Commission's 120-day decisional schedule (see 39 U.S.C. 404(d)(5)).

[FR Doc. 2011-31655 Filed 12-8-11; 8:45 am]
BILLING CODE 7710-FW-P

POSTAL REGULATORY COMMISSION

[Docket No. A2012-77; Order No. 1020]

Post Office Closing

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Niagara, North Dakota post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service,

petitioners, and others to take appropriate action.

DATES: December 5, 2011:

Administrative record due (from Postal Service); December 27, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. See the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (<http://www.prc.gov>) or by directly accessing the Commission's Filing Online system at <https://www.prc.gov/prc-pages/filing-online/login.aspx>. Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at (202) 789-6820 (case-related information) or DocketAdmins@prc.gov (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), the Commission received three petitions for review of the Postal Service's determination to close the Niagara post office in Niagara, North Dakota. The first petition for review received November 18, 2011, was filed by the Citizens Against the Closure of the Niagara Post Office. The second petition for review received November 29, 2011, was filed by Sandra K. Behm. The third petition for review received November 29, 2011, was filed by Tim Krueger. The earliest postmark date is November 10, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012-77 to consider Petitioners' appeal. If Petitioners would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than December 23, 2011.

Categories of issues apparently raised. Petitioners contend that (1) The Postal

Service failed to consider the effect of the closing on the community (see 39 U.S.C. 404(d)(2)(A)(i)); and (2) the Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (see 39 U.S.C. 404(d)(2)(A)(iii)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record is within 15 days after the date in which the petition for review was filed with the Commission. See 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service is also within 15 days after the date in which the petition for review was filed with the Commission.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at <http://www.prc.gov>. Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789-6873 or via electronic mail at prc-webmaster@prc.gov.

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at prc-dockets@prc.gov or via telephone at (202) 789-6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, <http://www.prc.gov>, unless a waiver is obtained. See 39 CFR 3001.9(a) and

3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, <http://www.prc.gov>, or by contacting the Commission's docket section at prc-dockets@prc.gov or via telephone at (202) 789-6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. See 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before December 27, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, <http://www.prc.gov>, unless a waiver is obtained for hardcopy filing. See 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. See 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. See 39 CFR 3001.21.

It is ordered:

1. The procedural schedule listed below is hereby adopted.

2. Pursuant to 39 U.S.C. 505, Getachew Mekonnen is designated officer of the Commission (Public Representative) to represent the interests of the general public.

3. The Secretary shall arrange for publication of this notice and order and Procedural Schedule in the **Federal Register**.

By the Commission.

Shoshana M. Grove,
Secretary.

PROCEDURAL SCHEDULE

November 18, 2011	Filing of Appeal.
December 5, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
December 5, 2011	Deadline for the Postal Service to file any responsive pleading.
December 27, 2011	Deadline for notices to intervene (see 39 CFR 3001.111(b)).
December 23, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (see 39 CFR 3001.115(a) and (b)).
January 12, 2012	Deadline for answering brief in support of the Postal Service (see 39 CFR 3001.115(c)).
January 27, 2012	Deadline for reply briefs in response to answering briefs (see 39 CFR 3001.115(d)).

PROCEDURAL SCHEDULE—Continued

February 3, 2012	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (<i>see</i> 39 CFR 3001.116).
March 9, 2012	Expiration of the Commission's 120-day decisional schedule (<i>see</i> 39 U.S.C. 404(d)(5)).

[FR Doc. 2011-31626 Filed 12-8-11; 8:45 am]

BILLING CODE 7710-FW-P

POSTAL REGULATORY COMMISSION

[Docket No. A2012-75; Order No. 1019]

Post Office Closing**AGENCY:** Postal Regulatory Commission.**ACTION:** Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Geuda Springs, Kansas post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES:

December 1, 2011: Administrative record due (from Postal Service);
December 27, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene.

See the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (<http://www.prc.gov>) or by directly accessing the Commission's Filing Online system at <https://www.prc.gov/prc-pages/filing-online/login.aspx>. Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT:

Stephen L. Sharfman, General Counsel, at (202) 789-6820 (case-related information) or DocketAdmins@prc.gov (electronic filing assistance).

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 39 U.S.C. 404(d), the Commission received six petitions for review of the Postal Service's determination to close the Geuda Springs post office in Geuda Springs, Kansas. The first petition for review received November 16, 2011, was filed by Paula Hills. The second petition for review received November 22, 2011, was filed by Billilee A. Paton. The third petition for review received

November 22, 2011, was filed by Terry and Nancy Oursler. The fourth petition for review received November 22, 2011, was filed by Linda Estrada. The fifth petition for review received November 29, 2011, was filed by Patricia A. Blubaugh. The sixth petition for review received November 30, 2011, was filed by Shannon Wendt. The earliest postmark date is November 9, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012-75 to consider Petitioners' appeal. If Petitioners would like to further explain their position with supplemental information or facts, Petitioners may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than December 21, 2011.

Categories of issues apparently raised. Petitioners contend that (1) The Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)); (2) the Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); (3) the Postal Service failed to adequately consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)); and (4) there are factual errors contained in the Final Determination.

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the applicable administrative record is within 15 days after the date in which the petition for review was filed with the Commission. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service is also within 15 days after the date in which the petition for review was filed with the Commission.

Availability; Web site posting. The Commission has posted the appeal and supporting material on its Web site at <http://www.prc.gov>. Additional filings in this case and participant's submissions also will be posted on the Web site, if provided in electronic format or amenable to conversion, and

not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at (202) 789-6873 or via electronic mail at prc-webmaster@prc.gov.

The appeal and all related documents are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at prc-dockets@prc.gov or via telephone at (202) 789-6846.

Filing of documents. All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, <http://www.prc.gov>, unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site, <http://www.prc.gov>, or by contacting the Commission's docket section at prc-dockets@prc.gov or via telephone at (202) 789-6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before December 27, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, <http://www.prc.gov>, unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

Further procedures. By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by Commission rules,

if any motions are filed, responses are due 7 days after any such motion is filed. See 39 CFR 3001.21.

It is ordered:

1. The procedural schedule listed below is hereby adopted.

2. Pursuant to 39 U.S.C. 505, Derrick Dennis is designated officer of the Commission (Public Representative) to represent the interests of the general public.

3. The Secretary shall arrange for publication of this notice and order and

Procedural Schedule in the **Federal Register**.

By the Commission,
Shoshana M. Grove,
Secretary.

PROCEDURAL SCHEDULE

November 16, 2011	Filing of Appeal.
December 1, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
December 1, 2011	Deadline for the Postal Service to file any responsive pleading.
December 27, 2011	Deadline for notices to intervene (see 39 CFR 3001.111(b)).
December 21, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (see 39 CFR 3001.115(a) and (b)).
January 10, 2012	Deadline for answering brief in support of the Postal Service (see 39 CFR 3001.115(c)).
January 25, 2012	Deadline for reply briefs in response to answering briefs (see 39 CFR 3001.115(d)).
February 1, 2012	Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (see 39 CFR 3001.116).
March 8, 2012	Expiration of the Commission's 120-day decisional schedule (see 39 U.S.C. 404(d)(5)).

[FR Doc. 2011-31612 Filed 12-8-11; 8:45 am]

BILLING CODE 7710-FW-P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available

From: Securities and Exchange Commission, Office of Investor Education Advocacy, Washington, DC 20549-0213.

Extension:

Form N-17f-2, SEC File No. 270-317, OMB Control No. 3235-0360.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form N-17f-2 (17 CFR 274.220) under the Investment Company Act is entitled "Certificate of Accounting of Securities and Similar Investments in the Custody of Management Investment Companies." Form N-17f-2 is the cover sheet for the accountant examination certificates filed under rule 17f-2 (17 CFR 270.17f-2) by registered management investment companies (funds") maintaining custody of securities or other investments. Form N-17f-2 facilitates the filing of the accountant's examination certificates prepared under rule 17f-2. The use of the form allows the certificates to be filed electronically, and increases the accessibility of the examination certificates to both the Commission's examination staff and interested

investors by ensuring that the certificates are filed under the proper Commission file number and the correct name of a fund.

Commission staff estimates that on an annual basis it takes: (i) On average 1.25 hours of fund accounting personnel at a total cost of \$206.25 to prepare each Form N-17f-2;¹ and (ii) .75 hours of clerical time at a total cost of \$49.50 to file the Form N-17f-2 with the Commission.² Approximately 243 funds currently file Form N-17f-2 with the Commission. Commission staff estimates that on average each fund files Form N-17f-2 four times annually for a total annual hourly burden per fund of approximately 8 hours at a total cost of \$1,023.00. The total annual hour burden for Form N-17f-2 is therefore estimated to be approximately 1944 hours. Based on the total annual costs per fund listed above, the total cost of Form N-17f-2's collection of information requirements is estimated to be approximately \$248,589.³

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by Form N-17f-2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. An agency may not conduct or sponsor,

¹ This estimate is based on the following calculation: 1.25 × \$165 (fund senior accountant's hourly rate) = \$206.25.

² This estimate is based on the following calculation: .75 × \$66 (secretary hourly rate) = \$48.75.

³ This estimate is based on the following calculation: 243 funds × \$1,023.00 (total annual cost per fund) = \$248,589.

and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, <http://www.reginfo.gov>. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: Shagufta_Ahmed@omb.eop.gov; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: PRA_Mailbox@sec.gov. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 5, 2011.

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31608 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available

From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549-0213.

Extension: Rule 19a-1; SEC File No. 270-240; OMB Control No. 3235-0216.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995

(44 U.S.C. 3501–3520), the Securities and Exchange Commission (the “Commission”) has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Section 19(a) (15 U.S.C. 80a–19(a)) of the Investment Company Act of 1940 (the “Act”)¹ makes it unlawful for any registered investment company to pay any dividend or similar distribution from any source other than the company’s net income, unless the payment is accompanied by a written statement to the company’s shareholders which adequately discloses the sources of the payment. Section 19(a) authorizes the Commission to prescribe the form of such statement by rule.

Rule 19a–1 (17 CFR 270.19a–1) under the Act, entitled “Written Statement to Accompany Dividend Payments by Management Companies,” sets forth specific requirements for the information that must be included in statements made pursuant to section 19(a) by or on behalf of management companies.² The rule requires that the statement indicate what portions of distribution payments are made from net income, net profits from the sale of a security or other property (“capital gains”) and paid-in capital. When any part of the payment is made from capital gains, rule 19a–1 also requires that the statement disclose certain other information relating to the appreciation or depreciation of portfolio securities. If an estimated portion is subsequently determined to be significantly inaccurate, a correction must be made on a statement made pursuant to section 19(a) or in the first report to shareholders following the discovery of the inaccuracy.

The purpose of rule 19a–1 is to afford fund shareholders adequate disclosure of the sources from which distribution payments are made. The rule is intended to prevent shareholders from confusing income dividends with distributions made from capital sources. Absent rule 19a–1, shareholders might receive a false impression of fund gains.

Based on a review of filings made with the Commission, the staff estimates that approximately 9200 series of registered investment companies that are management companies may be subject to rule 19a–1 each year,³ and

that each portfolio on average mails two statements per year to meet the requirements of the rule.⁴ The staff further estimates that the time needed to make the determinations required by the rule and to prepare the statement required under the rule is approximately 1 hour per statement. The total annual burden for all portfolios therefore is estimated to be approximately 18,400 burden hours.

The staff estimates that approximately one-third of the total annual burden (6,133 hours) would be incurred by a paralegal with an average hourly wage rate of approximately \$168 per hour,⁵ and approximately two-thirds of the annual burden (12,267 hours) would be incurred by a compliance clerk with an average hourly wage rate of \$67 per hour.⁶ The staff therefore estimates that the aggregate annual cost of complying with the paperwork requirements of the rule is approximately \$1,852,233 ((6,133 hours × \$168) + (12,267 hours × \$67)).

To comply with state law, many investment companies already must distinguish the different sources from which a shareholder distribution is paid and disclose that information to shareholders. Thus, many investment companies would be required to distinguish the sources of shareholder dividends whether or not the Commission required them to do so under rule 19a–1.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Compliance with the collection of information required by rule 19a–1 is mandatory for management companies that make statements to shareholders pursuant to section 19(a) of the Act. An agency may

of management investment company portfolios that make distributions for which compliance with rule 19a–1 is required depends on a wide range of factors and can vary greatly across years. Therefore, the calculation of estimated burden hours is based on the total number of management investment company portfolios, each of which may be subject to rule 19a–1.

⁴ A few portfolios make monthly distributions from sources other than net income, so the rule requires them to send out a statement 12 times a year. Other portfolios never make such distributions.

⁵ Hourly rates are derived from the Securities Industry and Financial Markets Association (“SIFMA”), Management and Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

⁶ Hourly rates are derived from SIFMA’s Office Salaries in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, <http://www.reginfo.gov>. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: Shagufta_Ahmed@omb.eop.gov; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: PRA_Mailbox@sec.gov. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 5, 2011.

Kevin M. O’Neill,
Deputy Secretary.

[FR Doc. 2011–31607 Filed 12–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65893; File No. SR–NYSEAmex–2011–92]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Specifying in Its Rules an Existing Policy Related to the Application of NYSE Amex Options Rule 935NY

December 5, 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 November 23, 2011, NYSE Amex LLC (the “Exchange” or “NYSE Amex”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b–4(f)(6) thereunder.⁴ The Commission is publishing this notice to solicit

¹ 15 U.S.C. 80a.

² Section 4(3) of the Act (15 U.S.C. 80a–4(3)) defines “management company” as “any investment company other than a face amount certificate company or a unit investment trust.”

³ This estimate is based on statistics compiled by Commission staff as of May 31, 2011. The number

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).

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 specify in its rules an existing policy related to the application of NYSE Amex Options Rule 935NY. The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, the Commission's Public Reference Room, and at <http://www.sec.gov>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to specify in its rules an existing policy related to the application of NYSE Amex Options Rule 935NY.

NYSE Amex Options Rule 935NY provides, in part, that Users⁵ may not execute as principal orders they represent as agent unless agency orders are first exposed on the Exchange for at least one second. This requirement gives other market participants an opportunity to participate in the execution of orders before the entering User executes them. The Exchange recognizes, however, that because the Exchange does not identify the User that entered an order to the NYSE Amex System, orders from the same ATP Holder may inadvertently execute against each other as a result of being entered by different persons and/or systems at the same ATP Holder. Therefore, when enforcing NYSE Amex Options Rule 935NY, the Exchange does not consider the inadvertent interaction of orders from the same ATP Holder

⁵ The term "User" means any ATP Holder that is authorized to obtain access to the NYSE Amex System pursuant to NYSE Amex Options Rule 902.1NY. See NYSE Amex Options Rule 900.2NY(87).

within one second to be a violation of the exposure requirement.

When investigating potential violations of NYSE Amex Options Rule 935NY, the Exchange takes into consideration whether orders that executed against each other within one second in the NYSE Amex System were entered by persons, business units and/or systems at the same ATP Holder that did not have knowledge of the order in the NYSE Amex System.⁶ Commonly, ATP Holders are able to demonstrate that orders were entered by individuals or systems that did not have the ability to know of the preexisting order in the NYSE Amex System due to information barriers in place at the time the orders were entered.

The Exchange proposes to codify this policy in Commentary .07 to NYSE Amex Options Rule 935NY. Proposed Commentary .07 would specify that ATP Holders may demonstrate that orders were entered without knowledge of a preexisting order in the NYSE Amex System represented by the same ATP Holder by providing evidence that effective information barriers between the persons, business units and/or systems entering the orders on the Exchange were in existence at the time the orders were entered. Commentary .07 would require that such information barriers be fully documented and provided to the Exchange upon request.⁷

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In

⁶ The Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the Exchange and pursuant to a Regulatory Services Agreement ("RSA"), conducts routine surveillance to identify instances when an order in the NYSE Amex System is executed against an order entered by the same ATP Holder within one second.

⁷ Information barrier documentation is reviewed by FINRA on the Exchange's behalf to evaluate whether an ATP Holder has implemented processes that are reasonably designed to prevent the flow of pre-trade order information given the particular structure of the ATP Holder. Additionally, information barriers are reviewed as part of the Exchange's examination program, which is also administered by FINRA pursuant to the RSA.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

particular, the Exchange believes that codifying the Exchange's policy that appropriate information barriers may be used to demonstrate that the execution of two orders within one second was inadvertent because the orders were entered without knowledge of each other, would clarify the intent and application of NYSE Amex Options Rule 935NY for ATP Holders.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(7) of the Act,¹⁰ which requires the rules of an exchange to provide a fair procedure for the disciplining of members and persons associated with members. In particular, by specifying that the information barriers must be fully documented for the purpose of demonstrating that orders were entered without knowledge that there was a pre-existing unexecuted agency or proprietary order on the Exchange, ATP Holders would be better prepared to properly respond to requests for information by the Exchange in the course of a regulatory investigation. Moreover, while ATP Holders are generally required to provide information to the Exchange as requested, specifying that ATP Holders must provide written documentation regarding information barriers within the context of NYSE Amex Options Rule 935NY would require that all ATP Holders adhere to the same standard for demonstrating compliance with NYSE Amex Options Rule 935NY.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has

¹⁰ 15 U.S.C. 78f(b)(7).

become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEAmex-2011-92 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2011-92. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public

Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAmex-2011-92 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011-31633 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65878; File No. SR-NASDAQ-2011-165]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify NASDAQ's Transaction Execution Fee and Credit Schedule in Rule 7018

December 2, 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 November 30, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange is proposing to modify NASDAQ's transaction execution fee and credit schedule in Rule 7018. NASDAQ proposes to implement the proposed rule change on December 1, 2011. The text of the proposed rule change is available on the Exchange's Web site at <http://>

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

nasdaq.cchwallstreet.com/Filings, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III [sic] below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is amending its fee and credit schedule for transaction executions in Rule 7018(a).³ First, NASDAQ is expanding the criteria under which a member may qualify for its highest liquidity provider credit tier (\$0.00295 per share executed for displayed quotes/orders and \$0.0015 per share executed for non-displayed quotes/orders). Currently, a member qualifies for this rebate tier if either (i) the shares of liquidity provided in all securities through one of its Market Participant Identifiers ("MPIDs") represent more than 0.90% of the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities ("Consolidated Volume")⁴ during the month; or (ii) the member provides shares of liquidity in all securities during the month representing more than 1.0% of Consolidated Volume during the month through one or more of its NASDAQ Market Center MPIDs, and the member has an average daily volume during the month of more than 200,000 contracts of liquidity accessed or provided through one or more of its Nasdaq Options Market MPIDs. Under the proposed change, a member may also qualify for this rebate tier if (i) it is a registered market maker, through a single MPID, in

³ Rule 7018(a) applies to executions at \$1 or more per share.

⁴ In addition to the substantive changes that it is proposing, NASDAQ is also (i) adopting the defined term "Consolidated Volume" and introducing it where appropriate throughout Rule 7018, and (ii) making minor clarifying edits to the text of Rule 7018(a)(3).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

at least 7,000 securities, (ii) the shares of liquidity provided in all securities through one of its MPIDs represent more than 0.75% of Consolidated Volume, and (iii) the shares of liquidity provided in all securities through one or more of its MPIDs represent more than 0.90% of Consolidated Volume. The proposal is designed to incentivize members to act as market makers in a large number of stocks and provide significant liquidity through NASDAQ, with the majority of the provided liquidity focused through a single MPID (likely the MPID through which the member is registered as a market maker). By providing financial incentives to market makers, NASDAQ hopes to improve its market quality for all market participants.

Second, NASDAQ is introducing a liquidity provider rebate tier for members that provide an average daily volume of 3 million shares or more of liquidity through quotes/orders that are not displayed. Although NASDAQ believes that transparent markets should be encouraged wherever possible, it allows members to provide non-displayed liquidity to offer an alternative to trading venues that are entirely dark. For members qualifying for this tier, the rebate for non-displayed quotes/orders will be \$0.0015 per share executed, and the rebate for displayed quotes/orders will be \$0.0020 per share executed (unless the member qualifies for a higher rebate due to other characteristics of its trading volume).⁵

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁶ in general, and with Section 6(b)(4) of the Act,⁷ 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. All similarly situated members are subject to the same fee structure, and access to

NASDAQ is offered on fair and non-discriminatory terms.

The proposed rebate tier for members that make markets in significant numbers of stocks is reasonable because it will result in a fee reduction for members that qualify for the tier, but will not increase the costs borne by other members or limit the availability of other, pre-existing rebate tiers. Moreover, the proposed program is consistent with an equitable allocation of fees because it allocates a higher rebate to members that make significant contributions to NASDAQ market quality by making markets in a large number of stocks and that contribute to price discovery by providing high volumes of liquidity. NASDAQ believes that the program may encourage market makers to become active in more stocks and provide more liquidity, thereby benefitting other market participants that may be able to trade larger volumes of stocks without affecting the price of those stocks.

The addition of a new, volume-based pricing tier for provision of non-displayed liquidity will provide members with an additional means to obtain a favorable rate of \$0.0015 per share executed for non-displayed liquidity, in addition to the volume-based tiers already in effect. By offering a rebate tier focused on non-displayed liquidity, NASDAQ hopes to attract more liquidity to its market that might otherwise be traded in “dark pool” alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. NASDAQ believes that the tier is reasonable because it will provide a fee reduction for members that qualify for the tier, but will not increase the costs borne by other members or limit the availability of other, pre-existing rebate tiers. Moreover, the proposed tier is consistent with an equitable allocation of fees because it is designed to reward members that contribute to market quality by providing liquidity. Although the rebate in question is focused on non-displayed liquidity, NASDAQ believes that the incentive may nevertheless contribute to its market quality by attracting orders that might otherwise be posted in dark pools. Although non-displayed orders contribute less to price discovery than displayed orders, they nevertheless provide liquidity to support the execution of incoming orders. Accordingly, NASDAQ believes that the proposal is a reasonable and equitable means of attracting further liquidity to the market, which has the potential to benefit all market participants.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. NASDAQ believes that the proposed rule change reflects this competitive environment because it will increase the conditions under which higher liquidity provider rebates may be paid to active market participants, without altering any of the market’s existing rebate tiers.

B. Self-Regulatory Organization’s Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, members may readily opt to disfavor NASDAQ’s execution services if they believe that alternatives offer them better value. For this reason and the reasons discussed in connection with the statutory basis for the proposed rule change, NASDAQ does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.⁸ 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

⁵ The \$0.0015 per share rebate for non-displayed quotes/orders is the same as the rebate for non-displayed quotes/orders offered to members qualifying for certain more favorable rebate tiers, and higher than the base rebate for non-displayed quotes/orders of \$0.0010 per share executed. The rebate of \$0.0020 per share executed for displayed quotes/orders is the same as the base rebate for displayed quotes/orders. In limited circumstances, a member qualifying for the new tier might also qualify for a tier that has a more favorable rebate for displayed quotes/orders but a less favorable rebate for non-displayed quotes/orders. In that case, the member qualifying for both tiers would receive the higher rebate for both types of quotes/orders.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78s(b)(3)(a)(ii).

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 email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2011-165 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-2011-165. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2011-165, and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011-31631 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65890; File No. SR-FINRA-2011-070]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Amend FINRA Rule 4512 (Customer Account Information)

December 5, 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 December 2, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule as described in Items I and II below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

FINRA proposes to amend FINRA Rule 4512 (Customer Account Information) to except institutional accounts from the requirements of FINRA Rule 4512(a)(1)(C).

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, as set forth in sections A, B and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 27, 2011, the SEC approved FINRA's proposal to adopt rules governing books and records³ for the consolidated FINRA rulebook.⁴ In April 2011, FINRA issued *Regulatory Notice* 11-19, which announced SEC approval of the new rules and an implementation date of December 5, 2011. Following SEC approval of the rules and publication of the *Regulatory Notice*, several firms requested guidance regarding the application of FINRA Rule 4512(a)(1)(C) to institutional accounts.

Servicing Institutional Accounts

FINRA Rule 4512 requires firms to maintain certain information relating to customer accounts, and it is based on existing requirements in NASD Rule 3110(c) (Customer Account Information) with several changes, as described in *Regulatory Notice* 11-19. Among other changes, FINRA Rule 4512(a)(1)(C) requires firms to maintain the name of the associated person, if any, responsible for the account, rather than requiring firms to maintain the signature of the registered representative introducing the account.⁵ Where a member designates multiple individuals as being responsible for an account, the firm is required to maintain each of their names and a record indicating the scope of their responsibilities with respect to the account.⁶ For purposes of

³ See Securities Exchange Act Release No. 63784 (January 27, 2011), 76 FR 5850 (February 2, 2011) (Order Approving Proposed Rule Change; File No. SR-FINRA-2010-052).

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 also SEA Rule 17a-3(a)(17).

⁶ This provision was added in response to a comment from the Securities Industry and Financial Markets Association ("SIFMA") during the rulemaking process. See Securities Exchange Act Release No. 63181 (October 26, 2010), 75 FR 67155 (November 1, 2010) (Notice of Filing of Proposed Rule Change; File No. SR-FINRA-2010-

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

the rule, it is the member's obligation to determine whether a particular individual is responsible for the account based on the scope of the individual's activities with respect to that account.

Following discussions with industry representatives, FINRA has determined that the application of FINRA Rule 4512(a)(1)(C) to institutional accounts⁷ raises significant operational issues in light of the manner in which institutional business is conducted.

FINRA understands that numerous sales and trading associated persons often interact with institutional accounts, depending on such factors as the scope of the relationship with the institutional account and the products involved, and that, for purposes of institutional accounts, compliance with the recordkeeping requirements of FINRA Rule 4512(a)(1)(C) would cause significant operational challenges. Accordingly, FINRA proposes to amend the rule to except institutional accounts from the recordkeeping requirements of FINRA Rule 4512(a)(1)(C). Additionally, FINRA proposes to add Supplementary Material .05 (Supervision of Accounts) to FINRA Rule 4512 to clarify that nothing in paragraph (a)(1)(C) of the rule obviates a member's obligation to supervise an account that it services, including determining the associated persons responsible for the account and ensuring that such persons are appropriately qualified and registered, and to comply with the requirements of Rule 2090 ("Know Your Customer") (which becomes effective on July 9, 2012). Moreover, the Supplementary Material states that, with respect to a member's obligation to supervise an account, it is incumbent upon the member to design appropriate mechanisms to determine the associated persons responsible for the account, ensure that such persons are appropriately qualified and registered, and have the ability to provide such information to FINRA or SEC staff upon request.

FINRA has requested the Commission to find good cause pursuant to Section

052). Specifically, SIFMA had commented that the original proposal in *Regulatory Notice* 08–25 (May 2008) to maintain the name of a single individual as responsible for an account is not practical in all cases, such as an institutional account, where multiple individuals cover the account.

⁷ As defined in FINRA Rule 4512(c), the term "institutional account" means the account of: (1) A bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

19(b)(2) of the Act⁸ for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register** so that FINRA can implement the proposed rule change on December 5, 2011, which coincides with the implementation date for the amendments to the FINRA books and records rules.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁹ 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 that the proposed rule change will further these purposes by providing greater clarity to members regarding the application of FINRA Rule 4512(a)(1)(C), which, in turn, will assist them in their compliance efforts. The clarification regarding FINRA Rule 4512(a)(1)(C) would except institutional accounts from the recordkeeping requirements of the provision, while new Supplementary Material .05 (Supervision of Accounts) emphasizes a member's obligation to supervise all accounts that it services, including determining the associated persons responsible for the account and ensuring that such persons are appropriately qualified and registered, and to comply with the requirements of Rule 2090 (which becomes effective on July 9, 2012). The Supplementary Material also states that, with respect to a member's obligation to supervise an account, it is incumbent upon the member to design appropriate mechanisms to determine the associated persons responsible for the account, ensure that such persons are appropriately qualified and registered, and have the ability to provide such information to FINRA or SEC staff upon request.

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. 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 email to rule-comments@sec.gov. Please include File No. SR-FINRA-2011-070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-FINRA-2011-070. This file number should be included on the subject line if email 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-2011-070 and

⁸ 15 U.S.C. 78s(b)(2).

⁹ 15 U.S.C. 78o-3(b)(6).

should be submitted on or before December 30, 2011.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, FINRA requested that the Commission approve the proposal on accelerated basis so that the proposed rule change is approved in time to coincide with the implementation date for the amendments to the FINRA books and records rules. After careful consideration, 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 association.¹⁰

The Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ 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. The Commission believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act because it will clarify to members that FINRA Rule 4512(a)(1)(C) does not apply to institutional accounts, which, in turn, will assist them in their compliance efforts. The proposal also includes new .05 of the Supplementary Material to FINRA Rule 4512, which emphasizes a member's obligation to supervise all accounts that it services, including determining the associated persons responsible for the account and ensuring that such persons are appropriately qualified and registered, and that members servicing institutional accounts continue to have the obligation to comply with the requirements of Rule 2090 when that rule becomes effective on July 9, 2012. The new provision within the Supplementary Material also states that, with respect to a member's obligation to supervise an account, it is incumbent upon the member to design appropriate mechanisms to determine the associated persons responsible for the account, ensure that such persons are appropriately qualified and registered, and have the ability to provide such information to FINRA or SEC staff upon request. The Commission believes that the provisions included in .05 of the Supplementary Material will serve to prevent fraudulent

¹⁰ In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78o-3(b)(6).

and manipulative acts and practices relating to institutional accounts and protect institutional investors and the public interest by effectively reminding members of their supervisory and Know Your Customer obligations for institutional accounts.

The Commission also finds good cause pursuant to Section 19(b)(2) of the Act¹² for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register**. FINRA Rule 4512, which provides for member recordkeeping obligations relating to customer account information, becomes effective on December 5, 2011. The instant proposed rule change clarifies the inapplicability of FINRA Rule 4512(a)(1)(C) to institutional accounts while advising firms of other relevant obligations related to the supervision of institutional accounts and the obligations related to complying with FINRA Rule 2090. Accelerating approval of the instant proposed rule change will enable FINRA to have the proposed rule change's effectiveness coincide with the effectiveness of FINRA's revised books and records rules, including FINRA Rule 4512, on December 5, 2011.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-FINRA-2011-070) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31632 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65886; File No. SR-CME-2011-16]

Self-Regulatory Organizations; Chicago Mercantile Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Revise Rules Relating to Its Cleared Only OTC FX Swap Offering

December 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

¹² 15 U.S.C. 78s(b)(2).

¹³ *Id.*

¹⁴ 17 CFR 200.30-3(a)(12).

(“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 25, 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 and Order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

CME proposes to amend rules related to existing cleared-only foreign exchange (“FX”) currency derivatives products. The proposed rule changes make revisions to rules that were the subject of a recent filing, SR-CME-2011-12.³ The changes correct inadvertent rule language that was included in SR-CME-2011-12.

The text of the proposed rule change is available at the CME's Web site at <http://www.cmegroup.com>, at the principal office of CME, and at the Commission's Public Reference Room.

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

In late September, 2011, CME submitted proposed rule changes in filing SR-CME-2011-12 to establish rules to expand its cleared-only, foreign currency (“FX”) swaps offering to support the introduction of (1) twenty-six new foreign FX currency derivatives for over-the-counter (“OTC”) cash settlement; and (2) eleven new FX non-deliverable forward transaction

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Commission staff notes that SR-CME-2011-12 was previously approved pursuant to delegated authority on October 26, 2011. See Securities Exchange Act Release No. 65637, 76 FR 67512 (Nov. 1, 2011).

currency pairs for traditional, OTC cash settlement.

CME wishes to amend two aspects of the rules package that was adopted in connection with SR-CME-2011-12. The changes address Chapter 271H and in Chapter 273H and are intended to correct inadvertent rule language that was initially included in the changes brought in by SR-CME-2011-12. The first change involves Rule 271H.01.C, which deals with minimum price increments for the Cleared OTC U.S. Dollar/Korean Won contract; the change is intended to correct an erroneous reference to 0.0001 in the rule by specifying the correct increment of 0.01. The second rule change involves in Rule 273H.02.A, a rule that addresses cash settlement of the Cleared OTC U.S. Dollar/Colombian Peso contract; the change is intended to remove a paragraph that references a method of determining settlement prices that is not currently available.

CME believes the proposed changes are consistent with the requirements of the Exchange Act including Section 17A of the Exchange Act because they involve clearing of swaps and thus relate solely to CME's swaps clearing activities pursuant to its registration as a derivatives clearing organization under the Commodity Exchange Act ("CEA") and do not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service. 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 a range of FX OTC swap products.

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. 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 email to rule-comments@sec.gov. Please include File No. SR-CME-2011-16 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-2011-16. This file number should be included on the subject line if email 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-2011-16 and should be submitted on or before December 30, 2011.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

In its filing, CME requested that the Commission approve this request on an accelerated basis for good cause shown. CME has articulated three reasons for granting this request on an accelerated

basis. One, the products covered by this filing, and CME's operations as a derivatives clearing organization for such products, are regulated by the CFTC under the CEA. Two, the proposed rule changes relate solely to FX swap clearing and therefore relate solely to its swaps clearing activities and do not significantly relate to CME's functions as a clearing agency for security-based swaps. Three, not approving this request on an accelerated basis will have a significant impact on the swap clearing business of CME as a designated clearing organization.

Section 19(b) of the Act⁴ directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. The Commission finds that the proposed rule change is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act,⁵ and the rules and regulations thereunder applicable to CME. Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act which requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of derivative agreements, contracts, and transactions because it should allow CME to enhance its services in clearing FX swaps, thereby promoting the prompt and accurate clearance and settlement of derivative agreements, contracts, and transactions.⁶

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁷ for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register** because: (i) The proposed rule change does not significantly affect any securities clearing operations of the clearing agency (whether in existence or contemplated by its rules) or any related rights or obligations of the clearing agency or persons using such service; (ii) CME has indicated that not providing accelerated approval would have a significant impact on the swap clearing business of CME as a designated clearing organization; and (iii) the activity relating to the non-security clearing operations of the

⁴ 15 U.S.C. 78s(b).

⁵ 15 U.S.C. 78q-1. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78q-1(b)(3)(F).

⁷ 15 U.S.C. 78s(b)(2).

clearing agency for which the clearing agency is seeking approval is subject to regulation by another regulator.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-CME-2011-16) is approved on an accelerated basis.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁸

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31641 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65884; File No. SR-SCCP-2011-03]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Order Approving Proposed Rule Change With Respect to an Amendment to the By-Laws of The NASDAQ OMX Group, Inc.

December 5, 2011.

I. Introduction

On October 11, 2011, Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-SCCP-2011-03 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder. The proposed rule change was published for comment in the **Federal Register** on October 28, 2011.³ The Commission received no comment letters regarding the proposal. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The rule change will permit an amendment to the by-laws of SCCP's parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). NASDAQ OMX is seeking to amend provisions of its by-laws pertaining to the composition of committees of the NASDAQ OMX Board of Directors.

First, NASDAQ OMX is amending the compositional requirements of its Audit Committee in Section 4.13(g) to provide that the committee shall include three or more directors. Currently, the provision provides that the Audit Committee shall be composed of either four or five directors. Second, NASDAQ OMX is proposing to amend the compositional requirements of the Nominating & Governance Committee in Section 4.13(h) to replace a requirement that the committee comprise four or five members with a requirement to include two or more members. Third, NASDAQ OMX proposes to delete a paragraph of the by-laws (Section 4.13(k)) that pertains to the qualifications of committee members who are not directors. Finally, NASDAQ OMX is correcting a typographical error in the numbering of the provisions of Section 4.13(h) of the by-laws.

III. Discussion

Section 19(b)(2)(B) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.⁴ In particular, Section 17A(b)(3)(A)⁵ of the Act requires, among other things, that the clearing agency be so organized and have the capacity to facilitate the prompt and accurate clearance and settlement of securities transactions, to safeguard the securities and funds which are in the custody or control of such clearing agency or for which it is responsible, and to comply with the provisions of the Act and the rules and regulations thereunder.

The proposed change would allow the NASDAQ OMX Board of Directors ("Board") to determine the size of its Audit Committee, so long as the Audit Committee includes at least three directors, as well as the size of its Nominating & Governance Committee, so long as the Nominating & Governance Committee includes at least two directors. The proposal is intended to provide greater flexibility to the NASDAQ OMX Board to determine the appropriate size for these committees. The proposal does not change any other compositional requirements of either the Audit Committee or the Nominating & Governance Committee, including independence requirements. Moreover, the Commission notes that the proposal does not alter the application of Section

10A of the Exchange Act⁶ and Rule 10A-3 thereunder⁷ to the NASDAQ OMX Audit Committee.

The proposal also deletes an obsolete section from, and corrects a typographical error in, the NASDAQ OMX by-laws, which are clarifying revisions. For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act. The proposal also deletes an obsolete section from, and corrects a typographical error in, the NASDAQ OMX by-laws, which are clarifying revisions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2)⁸ of the Act, that the proposed rule change (File No. SR-SCCP-2011-03) be, and hereby is, approved.⁹

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31600 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65887; File No. SR-NYSEAmex-2011-91]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Amex Equities Rule 72 Priority of Bids and Offers and Allocation of Executions

December 5, 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 November 21, 2011, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission ("Commission") the

⁶ 15 U.S.C. 78j-1.

⁷ 17 CFR 240.10A-3.

⁸ 15 U.S.C. 78s(b)(2).

⁹ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 34-65614 (October 24, 2011), 76 FR 67009 (October 28, 2011). In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change. The text of these statements is incorporated into the discussion of the proposed rule change in Section II below.

⁴ 15 U.S.C. 78s(b)(2)(B).

⁵ 15 U.S.C. 78q-1(b)(3)(A).

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 Act³ 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 amend NYSE Amex Equities Rule 72 (Priority of Bids and Offers and Allocation of Executions). The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the Commission’s Public Reference Room, and at <http://www.sec.gov>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Amex Equities Rule 72 (Priority of Bids and Offers and Allocation of Executions).⁵

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ The provisions of NYSE Amex Equities Rule 72 are in effect during a pilot (“New Market Model Pilot”) that is set to end on January 31, 2012. The Exchange adopted the New Market Model Pilot pursuant to its merger with the New York Stock Exchange LLC (“NYSE”). See Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10). See also Securities Exchange Act Release Nos. 60758 (October 1, 2009), 74 FR 51639 (October 7, 2009) (SR-NYSEAmex-2009-65) (extending Pilot to November 30, 2009); 61030 (November 19, 2009), 74 FR 62365 (November 27, 2009) (SR-NYSEAmex-2009-83) (extending Pilot to March 30, 2010); 61725 (March 17, 2010), 75 FR 14223 (March 24, 2010) (SR-NYSEAmex-2010-28) (extending Pilot to September 30, 2010); 62820 (September 1, 2010), 75 FR 54935 (September 9, 2010) (SR-NYSEAmex-2010-86) (extending Pilot to January 31, 2011);

As provided under NYSE Amex Equities Rule 72(a)(ii), a bid or offer is considered the “setting interest” when it is established as the only displayable bid or offer made at a particular price and is the only displayable interest when such price is or becomes the Exchange best bid or offer (“BBO”). Setting interest is entitled to priority for allocation of executions at that price, as provided for under NYSE Amex Equities Rule 72. In this regard, and as currently provided for under NYSE Amex Equities Rule 72(a)(ii)(G), if non-pegging interest is the setting interest, it retains its priority even if joined at that price by a pegging e-Quote.⁶ If, however, at the time non-pegging interest becomes the Exchange BBO, an e-Quote is pegging to such non-pegging interest, all such interest is considered to be entered simultaneously and, therefore, no interest is considered the setting interest.

Since implementing this rule as part of the New Market Model Pilot, the Exchange has determined that NYSE Amex Equities Rule 72(a)(ii) may currently disincentivize aggressive displayed quoting by permitting pegging e-Quotes to eliminate the priority to which a non-pegging e-Quote might otherwise be entitled. Specifically, because pegging interest is not displayed until it joins non-pegging interest, the participant entering the non-pegging interest is unaware that one or more pegging e-Quotes at that price may exist. Because the goal of the setting interest, and related priority given to such interest, is to create an incentive for participants to display aggressive prices, a participant may be reluctant to enter such displayed interest if a non-displayed pegging e-Quote could impede such displayed interest from receiving priority. The Exchange therefore proposes to amend NYSE Amex Equities Rule 72(a)(ii)(G) to reflect that non-pegging interest that becomes the Exchange BBO will be considered the setting interest even if an e-Quote is pegging to such non-pegging interest.⁷ In this regard, the Exchange believes that this proposed change would enhance the New Market Model’s positive impact on the Exchange’s

63615 (December 29, 2010), 76 FR 611 (January 5, 2011) (SR-NYSEAmex-2010-123) (extending Pilot to August 1, 2011); and 64773 (June 29, 2011), 76 FR 39453 (July 6, 2011) (SR-NYSEAmex-2011-43) (extending Pilot to January 31, 2012).

⁶ See Rule 70.26—Pegging for d-Quotes and e-Quotes.

⁷ Non-pegging interest that is the setting interest will continue to retain its priority even if joined at that price by a pegging e-Quote. See *id.*

market, on the Exchange’s members, and on investors generally.

Because of the related technology changes that this proposed rule change would require, the Exchange proposes to announce the initial implementation date and related roll-out schedule, if applicable, via Trader Update.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),⁸ in general, and furthers the objectives of Section 6(b)(5),⁹ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 Exchange believes that the proposed rule change meets these requirements because it would permit non-pegging interest that sets a new BBO to be considered the setting interest and therefore retain priority, as provided for under NYSE Amex Equities Rule 72, over a pegging e-Quote that reacts and pegs to such non-pegging interest. Accordingly, the proposal is designed to incentivize and reward aggressive displayed quoting by market participants, which contributes to the market quality of the Exchange. In this regard, the Exchange believes that this proposed change would enhance the New Market Model’s positive impact on the Exchange’s market, on the Exchange’s members, and on investors generally.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹

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 email to rule-comments@sec.gov. Please include File Number SR-NYSEAmex-2011-91 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2011-91. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAmex-2011-91 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31602 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65889; File No. SR-NYSE-2011-60]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 72 Priority of Bids and Offers and Allocation of Executions

December 5, 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 November 21, 2011, New York Stock Exchange LLC (the "Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule

change pursuant to Section 19(b)(3)(A)(iii) of the Act³ 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 amend NYSE Rule 72 (Priority of Bids and Offers and Allocation of Executions). The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the Commission's Public Reference Room, and at <http://www.sec.gov>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 72 (Priority of Bids and Offers and Allocation of Executions).⁵

As provided under Rule 72(a)(ii), a bid or offer is considered the "setting interest" when it is established as the only displayable bid or offer made at a particular price and is the only

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ The provisions of Rule 72 are in effect during a pilot ("New Market Model Pilot") that is set to end on January 31, 2012. See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46). See also Securities Exchange Act Release Nos. 60756 (October 1, 2009), 74 FR 51628 (October 7, 2009) (SR-NYSE-2009-100) (extending Pilot to November 30, 2009); 61031 (November 19, 2009), 74 FR 62368 (November 27, 2009) (SR-NYSE-2009-113) (extending Pilot to March 30, 2010); 61724 (March 17, 2010), 75 FR 14221 (March 24, 2010) (SR-NYSE-2010-25) (extending Pilot to September 30, 2010); 62819 (September 1, 2010), 75 FR 54937 (September 9, 2010) (SR-NYSE-2010-61) (extending Pilot to January 31, 2011); 63616 (December 29, 2010), 76 FR 612 (January 5, 2011) (SR-NYSE-2010-86) (extending Pilot to August 1, 2011); and 64761 (June 28, 2011), 76 FR 39147 (July 5, 2011) (SR-NYSE-2011-29) (extending Pilot to January 31, 2012).

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

displayable interest when such price is or becomes the Exchange best bid or offer ("BBO"). Setting interest is entitled to priority for allocation of executions at that price, as provided for under NYSE Rule 72. In this regard, and as currently provided for under NYSE Rule 72(a)(ii)(G), if non-pegging interest is the setting interest, it retains its priority even if joined at that price by a pegging e-Quote.⁶ If, however, at the time non-pegging interest becomes the Exchange BBO, an e-Quote is pegging to such non-pegging interest, all such interest is considered to be entered simultaneously and, therefore, no interest is considered the setting interest.

Since implementing this rule as part of the New Market Model Pilot, the Exchange has determined that Rule 72(a)(ii) may currently disincentivize aggressive displayed quoting by permitting pegging e-Quotes to eliminate the priority to which a non-pegging e-Quote might otherwise be entitled. Specifically, because pegging interest is not displayed until it joins non-pegging interest, the participant entering the non-pegging interest is unaware that one or more pegging e-Quotes at that price may exist. Because the goal of the setting interest, and related priority given to such interest, is to create an incentive for participants to display aggressive prices, a participant may be reluctant to enter such displayed interest if a non-displayed pegging e-Quote could impede such displayed interest from receiving priority. The Exchange therefore proposes to amend NYSE Rule 72(a)(ii)(G) to reflect that non-pegging interest that becomes the Exchange BBO will be considered the setting interest even if an e-Quote is pegging to such non-pegging interest.⁷ In this regard, the Exchange believes that this proposed change would enhance the New Market Model's positive impact on the Exchange's market, on the Exchange's members, and on investors generally.

Because of the related technology changes that this proposed rule change would require, the Exchange proposes to announce the initial implementation date and related roll-out schedule, if applicable, via Trader Update.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),⁸ in general, and furthers the

⁶ See Rule 70.26—Pegging for d-Quotes and e-Quotes.

⁷ Non-pegging interest that is the setting interest will continue to retain its priority even if joined at that price by a pegging e-Quote. See *id.*

⁸ 15 U.S.C. 78f(b).

objectives of Section 6(b)(5),⁹ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 Exchange believes that the proposed rule change meets these requirements because it would permit non-pegging interest that sets a new BBO to be considered the setting interest and therefore retain priority, as provided for under NYSE Rule 72, over a pegging e-Quote that reacts and pegs to such non-pegging interest. Accordingly, the proposal is designed to incentivize and reward aggressive displayed quoting by market participants, which contributes to the market quality of the Exchange. In this regard, the Exchange believes that this proposed change would enhance the New Market Model's positive impact on the Exchange's market, on the Exchange's members, and on investors generally.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the

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 email to rule-comments@sec.gov. Please include File Number SR-NYSE-2011-60 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2011-60. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2011–60 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011–31604 Filed 12–8–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65895; File No. SR–FINRA–2011–052]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change To Adopt NASD Rule 2320 (Best Execution and Interpositioning) and Interpretive Material (“IM”) 2320 as FINRA Rule 5310 in the Consolidated Rulebook

December 5, 2011.

I. Introduction

On October 4, 2011, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) 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 to adopt NASD Rule 2320 (Best Execution and Interpositioning) and Interpretive Material (“IM”) 2320 (Interpretive Guidance with Respect to Best Execution Requirements) as a FINRA rule in the consolidated FINRA rulebook with four notable changes. The proposed rule change was published for comment in the **Federal Register** on October 21, 2011. ³ The Commission received one comment letter on the proposal. ⁴ FINRA filed a response to

this comment on December 1, 2011. ⁵ This order approves the proposed rule change.

II. Description of the Proposal

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”), ⁶ FINRA is proposing to adopt NASD Rule 2320 (Best Execution and Interpositioning) and IM–2320 (Interpretive Guidance with Respect to Best Execution Requirements) as a FINRA rule in the consolidated FINRA rulebook with four notable changes. ⁷ Specifically, the proposed rule change would combine and renumber NASD Rule 2320 and IM–2320 as FINRA Rule 5310 in the Consolidated FINRA Rulebook.

Current NASD Rule 2320 and IM–2320

NASD Rule 2320 currently requires a member, in any transaction for or with a customer or a customer of another broker-dealer, to use “reasonable diligence” to ascertain the best market for a security and to buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. The rule identifies five factors that are among those to be considered in determining whether the member has used reasonable diligence. ⁸ The rule also includes provisions related to interpositioning (i.e., interjecting a third party between the member and the best available market), the use of a broker’s broker, ⁹ the staffing of order rooms, and

⁵ See Letter from Brant K. Brown, Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated December 1, 2011 (“FINRA Response to Comment”).

⁶ 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).

⁷ As part of adopting the NASD rule as a FINRA rule, FINRA has also proposed various technical and conforming changes.

⁸ These five factors are: (1) The character of the market for the security; (2) the size and type of transaction; (3) the number of markets checked; (4) the accessibility of the quotation; and (5) the terms and conditions of the order as communicated to the member.

⁹ The proposed rule change moves part of the provision concerning the use of a broker’s broker from paragraph (b) of the rule to Supplementary Material .05.

the application of the best execution requirements to other parties.

In addition to these provisions, NASD Rule 2320(f) (commonly referred to as the “Three Quote Rule”) generally requires members that execute transactions in non-exchange-listed securities on behalf of customers to contact a minimum of three dealers (or all dealers if three or fewer) and obtain quotations from those dealers subject to certain exclusions. ¹⁰ The Three Quote Rule establishes a minimum standard, and compliance with the Three Quote Rule, in and of itself, does not mean that a member has met its best execution obligations under NASD Rule 2320. ¹¹

IM–2320 was adopted in 2006 to codify interpretive guidance that FINRA staff had provided involving compliance with NASD Rule 2320. ¹² Specifically, IM–2320 addresses issues involving the term “market” for purposes of the rule as well as the application of the rule to debt securities and to broker-dealers that are executing a customer’s order against the broker-dealer’s quote.

Proposed Adoption and Changes to NASD Rule 2320 and IM–2320 as FINRA Rule 2310

FINRA is proposing to adopt NASD Rule 2320 (Best Execution and Interpositioning) and IM–2320 (Interpretive Guidance with Respect to Best Execution Requirements) as FINRA rule 5310 in the Consolidated FINRA Rulebook with four notable changes, discussed in turn.

(1) Three Quote Rule

Although the original concerns the Three Quote Rule was designed to address are still valid, FINRA represents that the current requirements in the Three Quote Rule, even with the various exclusions, are overly prescriptive and can often result in unnecessary delay in the execution of a customer’s order or impose requirements that do not benefit the customer. ¹³ Accordingly, rather than maintain the Three Quote Rule and the various exclusions in their current format, the proposed rule change replaces the Three Quote Rule with Supplementary Material emphasizing a member’s best execution obligations

¹⁰ The Three Quote Rule does not apply, for example, when two or more priced quotations for a non-exchange-listed security are displayed in an inter-dealer quotation system that permits quotation updates on a real-time basis. Also excluded from the Three Quote Rule are certain transactions in non-exchange-listed securities of foreign issuers that are part of the FTSE All-World Index.

¹¹ See NASD *Notice to Members* 00–78 (November 2000).

¹² See Securities Exchange Act Release No. 54339 (August 21, 2006), 71 FR 50959 (August 28, 2006).

¹³ See Notice at 65550.

¹² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ Securities Exchange Act Release No. 65579 (October 17, 2011), 76 FR 65549 (“Notice”).

⁴ See Letter to Elizabeth M. Murphy, Secretary, Commission, from David T. Bellaire, Esq., General Counsel and Director of Government Affairs, Financial Services Institute, dated November 14, 2011 (“FSI Letter”).

when handling an order involving any security, equity or debt, for which there is limited pricing information available.¹⁴

NASD Rule 3110(b) (Books and Records) generally requires members to indicate on the customer order ticket how they complied with the Three Quote Rule, if applicable. FINRA is proposing to replace this provision with a more general documentation requirement in the Supplementary Material to proposed FINRA Rule 5310. Under that provision, members would be required to retain records sufficient to demonstrate that they had handled orders covered by the rule in accordance with their policies and procedures.

(2) Regular and Rigorous Review of Execution Quality

The proposed rule change includes Supplementary Material to proposed FINRA Rule 5310 codifying a member's obligations when it undertakes a regular and rigorous review of execution quality likely to be obtained from different market centers. These longstanding obligations are set forth and explained in various SEC releases and NASD *Notices to Members*.¹⁵ The proposed rule change codifies this guidance as Supplementary Material and does not alter existing requirements regarding regular and rigorous review.

(3) Orders for Foreign Securities for With No U.S. Market

While the determination as to whether a member has satisfied its best execution obligations must take into account the market for a security, NASD Rule 2320, as currently drafted, does not specifically distinguish between orders

for domestic securities and orders for foreign securities, even if there is no U.S. market for the security. The proposed rule change includes new Supplementary Material concerning members' best execution obligations when handling orders for foreign securities, and in particular foreign securities with no U.S. trading activity.

The new Supplementary Material recognizes that markets for different securities can vary dramatically and that the standard of "reasonable diligence" must be assessed by examining specific factors, including "the character of the market for the security" and the "accessibility of the quotation." Accordingly, the determination as to whether a member has satisfied its best execution obligations necessarily involves a "facts and circumstances" analysis.¹⁶

(4) Customer Instructions Regarding the Routing of Orders

When placing an order with a member, customers may specifically instruct the member to route the order to a particular market for execution.¹⁷ The proposed rule change includes Supplementary Material to proposed FINRA Rule 5310 addressing situations where the customer has, on an unsolicited basis, specifically instructed the member to route its order to a particular market.¹⁸ Under those circumstances, the member would not be required to make a best execution determination beyond that specific instruction; however, the Supplementary Material mandates that members process the customer's order promptly and in accordance with the

terms of the order. The Supplementary Material also makes clear that where a customer has directed the member to route an order to another specific broker-dealer that is also a FINRA member, the exception would not apply to the receiving broker-dealer to which the order was directed.¹⁹

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 90 days following publication of the *Regulatory Notice* announcing Commission approval.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,²⁰ which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.²¹ The Commission believes that the proposed rule change clarifies the existing best execution requirements, and that these changes enhance investor protection and promote just and equitable principles of trade. The Commission also believes that codifying members' obligations regarding directed orders, regular and rigorous review, and orders involving foreign securities will bring clarification to these areas and ensure that all members are aware of their obligations.

One commenter²² urged that FINRA provide additional guidance regarding the manner in which a member firm may comply with its best execution obligations with respect to orders for foreign securities with no U.S. market. Specifically, the FSI Letter requests that FINRA amend the Supplementary Material to provide that member firms draft and maintain written policies and procedures regarding foreign securities with no U.S. market that contain certain additional specific elements.²³

¹⁹ For example, if a customer of Member Firm A directs Member Firm A to route an order to Member Firm B, Member Firm B would continue to have best execution obligations to that customer order received from Member Firm A.

²⁰ 15 U.S.C. 78o-3(b)(6).

²¹ 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).

²² See FSI Letter, *supra* note 4, at 3.

²³ The commenter specifically requested that the Supplementary Material provide that written policies and procedures regarding foreign securities

¹⁴ See proposed Supplementary Material .06. NASD Rule 2320(f)(2), which is a subparagraph within the Three Quote Rule, generally requires members that display priced quotations on a real-time basis for a non-exchange-listed security in two or more quotation mediums that permit quotation updates on a real-time basis to display the same priced quotation in each medium except for certain customer limit orders displayed on an electronic communications network. Paragraph (f)(4) of the rule includes definitions of terms used in paragraph (f)(2). At this time, FINRA is proposing to move paragraph (f)(2) into the FINRA Rule 6400 Series (Quoting and Trading in OTC Equity Securities) as FINRA Rule 6438. FINRA is also proposing to replace the term "non-exchange-listed security" with the term "OTC Equity Security" to conform the rule language to other FINRA rules addressing non-NMS stocks. The terms "OTC Equity Security" and "quotation medium" are defined in FINRA Rule 6420. Because the provisions relate to the quotation of OTC Equity Securities, FINRA believes that they should be relocated into the FINRA rule series concerning quoting and trading OTC Equity Securities rather than remain part of the Best Execution Rule.

¹⁵ See, e.g., Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996); NASD *Notice to Members* 01-22 (April 2001).

¹⁶ The new Supplementary Material notes that even though a foreign security may not trade in the U.S., members still have an obligation to seek best execution for customer orders involving the security. Consequently, a member that handles customer orders for foreign securities that do not trade in the U.S. must have specific written policies and procedures in place regarding its handling of customer orders for these securities that are reasonably designed to obtain the most favorable terms available for the customer, taking into account differences that may exist between U.S. markets and foreign markets. The Supplementary Material further notes that a member's best execution obligations also must evolve as changes occur in the market that may give rise to improved executions, including opportunities to trade at more advantageous prices. Members must therefore regularly review their policies and procedures to assess the quality of executions received and update or revise the policies and procedures as necessary.

¹⁷ When the order is for an NMS security, these orders are often referred to as "directed orders." See 17 CFR 242.600(b)(19).

¹⁸ See proposed Supplementary Material .08. FINRA also has proposed technical amendments to paragraph (e) of the rule to clarify that a member's best execution obligations extend to all customer orders and to avoid the potential misimpression that the paragraph limits the scope of the rule's requirements.

In its response to the comment, FINRA notes that the Supplementary Material as currently drafted already provides that written policies and procedures regarding orders in foreign securities with no U.S. market be “reasonably designed to obtain the most favorable terms available for the customer” and also requires that members “regularly review these policies and procedures to assess the quality of executions received and update or revise the policies and procedures as necessary.”²⁴ FINRA contends that the commenter’s request for a requirement to provide reasonable notice to customers of a member’s policies and procedures regarding foreign securities with no U.S. market would inappropriately differentiate among a member’s best execution policies and procedures by specifically requiring notification in the context of foreign securities and would be irrelevant to those retail customers that do not trade in foreign securities with no U.S. market.²⁵ FINRA also argues that a requirement requiring periodic review for compliance with the policies at issue is redundant since, under existing FINRA rules, a member is already responsible for reviewing the conduct of its associated persons for compliance with both its policies and procedures and applicable laws and rules in all aspects of its business.²⁶ The Commission believes that the proposed rule, and FINRA’s response, respond to the concerns raised by the commenter.

With respect to the proposed deletion of the Three Quote Rule, FINRA has represented that replacing the Three Quote Rule with the proposed Supplementary Material will improve the handling of customer orders involving securities with limited quotation or pricing information by decreasing the likelihood that execution of these orders will be unnecessarily delayed while still ensuring that members recognize that their best execution obligations apply to these orders.²⁷ The Commission believes that this proposed change will help promote just and equitable principles of trade

with no U.S. market: (1) Are reasonably designed to obtain favorable terms; (2) provide reasonable notice to customers of the policies and procedures; (3) require periodic review for compliance with policies; and (4) require periodic review of the policies themselves to ensure that they meet the requirements of the rule. *See id.*

²⁴ See FINRA Response to Comment, *supra* note 5, at 2, 3 (citing Supplementary Material .07 to FINRA Rule 5310).

²⁵ *See id.* at 2.

²⁶ *See id.* at 3 (citing NASD Rule 3010(b)(1)).

²⁷ *See* Notice at 65551.

and will protect investors and the public interest.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-FINRA-2011-052) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Kevin M. O’Neill,

Deputy Secretary.

[FR Doc. 2011-31606 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65894; File No. SR-NYSEArca-2011-89]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Specifying in Its Rules an Existing Policy Related to the Application of NYSE Arca Options Rule 6.47A

December 5, 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 November 23, 2011, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ 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 specify in its rules an existing policy related to the application of NYSE Arca Options Rule 6.47A. The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

Commission’s Public Reference Room, and at <http://www.sec.gov>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to specify in its rules an existing policy related to the application of NYSE Arca Options Rule 6.47A.

NYSE Arca Options Rule 6.47A provides, in part, that Users⁵ may not execute as principal orders they represent as agent unless agency orders are first exposed on the Exchange for at least one second. This requirement gives other market participants an opportunity to participate in the execution of orders before the entering User executes them. The Exchange recognizes, however, that because the Exchange does not identify the User that entered an order to the NYSE Arca system, orders from the same OTP Holder or OTP Firm may inadvertently execute against each other as a result of being entered by different persons and/or systems at the same OTP Holder or OTP Firm. Therefore, when enforcing NYSE Arca Options Rule 6.47A, the Exchange does not consider the inadvertent interaction of orders from the same OTP Holder or OTP Firm within one second to be a violation of the exposure requirement.

When investigating potential violations of NYSE Arca Options Rule 6.47A, the Exchange takes into consideration whether orders that executed against each other within one second in the NYSE Arca system were entered by persons, business units and/or systems at the same OTP Holder or OTP Firm that did not have knowledge

⁵ The term “User” means any OTP Holder, OTP Firm or Sponsored Participant that is authorized to obtain access to the NYSE Arca system pursuant to NYSE Arca Options Rule 6.2A. *See* NYSE Arca Options 6.1A(a)(19).

of the order in the NYSE Arca system.⁶ Commonly, OTP Holders and OTP Firms are able to demonstrate that orders were entered by individuals or systems that did not have the ability to know of the preexisting order in the NYSE Arca system due to information barriers in place at the time the orders were entered.

The Exchange proposes to codify this policy in Commentary .05 to NYSE Arca Options Rule 6.47A. Proposed Commentary .05 would specify that OTP Holders and OTP Firms may demonstrate that orders were entered without knowledge of a preexisting order in the NYSE Arca system represented by the same OTP Holder or OTP Firm by providing evidence that effective information barriers between the persons, business units and/or systems entering the orders on the Exchange were in existence at the time the orders were entered. Commentary .05 would require that such information barriers be fully documented and provided to the Exchange upon request.⁷

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the Exchange believes that codifying the Exchange's policy that appropriate information barriers may be used to demonstrate that the execution of two orders within one second was inadvertent because the orders were entered without knowledge of each other, would clarify the intent and

application of NYSE Arca Options Rule 6.47A for OTP Holders and OTP Firms.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(7) of the Act,¹⁰ which requires the rules of an exchange to provide a fair procedure for the disciplining of members and persons associated with members. In particular, by specifying that the information barriers must be fully documented for the purpose of demonstrating that orders were entered without knowledge that there was a pre-existing unexecuted agency or proprietary order on the Exchange, OTP Holders and OTP Firms would be better prepared to properly respond to requests for information by the Exchange in the course of a regulatory investigation. Moreover, while OTP Holders and OTP Firms are generally required to provide information to the Exchange as requested, specifying that OTP Holders and OTP Firms must provide written documentation regarding information barriers within the context of NYSE Arca Options Rule 6.47A would require that all OTP Holders and OTP Firms adhere to the same standard for demonstrating compliance with NYSE Arca Options Rule 6.47A.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

¹⁰ 15 U.S.C. 78f(b)(7).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the

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 email to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2011-89 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2011-89. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

⁶ The Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the Exchange and pursuant to a Regulatory Services Agreement ("RSA"), conducts routine surveillance to identify instances when an order in the NYSE Arca system is executed against an order entered by the same OTP Holder or OTP Firm within one second.

⁷ Information barrier documentation is reviewed by FINRA on the Exchange's behalf to evaluate whether an OTP Holder or OTP Firm has implemented processes that are reasonably designed to prevent the flow of pre-trade order information given the particular structure of the OTP Holder or OTP Firm. Additionally, information barriers are reviewed as part of the Exchange's examination program, which is also administered by FINRA pursuant to the RSA.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2011-89 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011-31605 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65888; File No. SR-Phlx-2011-160]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Firm Related Equity Option Cap

December 5, 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 November 22, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section II of the Fee Schedule entitled "Equity Options Fees" to apply the Firm Related Equity Option Cap to certain proprietary orders of affiliated member organizations.

While fee changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on December 1, 2011.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to apply the Firm Related Equity Option Cap to proprietary orders of certain affiliates of member organizations. Currently, Firms are subject to a maximum fee of \$75,000 ("Firm Related Equity Option Cap"). Firm equity option transaction fees and QCC Transaction Fees³, in the aggregate, for one billing month will not exceed the Firm Related Equity Option Cap per member organization when such members are trading in their own proprietary account.⁴ The Firm equity options transaction fees⁵ will be waived for members executing facilitation orders⁶ pursuant to Exchange Rule 1064

³ QCC Transaction Fees apply to QCC Orders as defined in Exchange Rule 1080(o) and 1064(e). For QCC Orders as defined in Exchange Rule 1080(o), and Floor QCC Orders, as defined in 1064(e), a Service Fee of \$0.05 per side will apply once a Firm has reached the Firm Related Equity Option Cap. This \$0.05 Service Fee will apply to every contract side after a Firm has reached the Firm Related Equity Option Cap.

⁴ Once Firms reach the Firm Related Equity Option Cap by incurring qualifying fees, they will not incur additional transaction fees beyond the \$75,000 Firm Related Equity Option Cap for that month as long as those transactions occurred in their own proprietary account. Member organizations must notify the Exchange in writing of all accounts in which the member is not trading in its own proprietary account. The Exchange will not make adjustments to billing invoices where transactions are commingled in accounts which are not subject to the Firm Related Equity Option Cap.

⁵ See Section II of the Exchange's Fee Schedule for equity option transaction fees.

⁶ A facilitation occurs when a floor broker holds an options order for a public customer and a contra-side order for the same option series and, after providing an opportunity for all persons in the trading crowd to participate in the transaction, executes both orders as a facilitation cross. See

when such members are trading in their own proprietary account.⁷

The Exchange proposes to apply the Firm Related Equity Option Cap to proprietary orders effected for the purpose of hedging the proprietary over-the-counter trading of an affiliate of a member organization that qualifies for the Firm Related Equity Option Cap ("Qualifying Member Organization"). A Qualifying Member Organization would be a 100% wholly-owned affiliate or subsidiary of a member organization that is not a Phlx member organization and is registered as a United States or foreign broker-dealer. In other words, a Qualifying Member Organization must be either a wholly-owned subsidiary of a Phlx member organization or a wholly-owned subsidiary of the parent company of a Phlx member organization. These orders must clear in the customer range at The Options Clearing Corporation and be subject to the fees assessed to Broker-Dealers in order for the trade to be eligible for the Firm Related Equity Option Cap. The Exchange would aggregate the Qualifying Member Organization's fees in Multiply-Listed options⁸ on the Exchange with the transaction fees of affiliated member organizations in Multiply-Listed options on the Exchange for purposes of determining whether the Qualifying Member Organization has reached the Firm Related Equity Option Cap.

A member organization would be required to certify the affiliate status of any Qualifying Member Organization whose trading activity it seeks to aggregate and to certify that the trades identified as eligible for the Firm Related Equity Option Cap were made for the purposes of hedging proprietary over-the-counter trading of the member organization or its affiliates. The member organization would be required to inform the Exchange immediately of any event that causes an entity to cease to be an affiliate. In addition, member organizations must notify the Exchange in writing of the account(s) designated for purposes of hedging the proprietary over-the-counter trading of the Qualifying Member Organization or its affiliates.⁹

Exchange Rule 1064 entitled "Crossing, Facilitation and Solicited Orders."

⁷ The waiver would not apply to orders where a member is acting as agent on behalf of a non-member.

⁸ Multiply Listed Securities include those symbols which are subject to rebates and fees in Section I, Rebates and Fees For Adding and Removing Liquidity in Select Symbols, and Section II, Equity Options Fees.

⁹ The Exchange assesses a \$50 Account Fee for each account beyond the number of permits billed to the member organization.

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The Exchange would require member organizations to segregate other orders from that of its affiliates for those orders to be eligible for the Firm Related Equity Option Cap by placing such orders in a separate house account. If the member organization does not segregate the transactions into the specified house account which was designated by the member organization for the purpose of affiliated eligible transactions, the Exchange will not make any adjustments to the billing invoice to account for those transactions not placed in the specified account and those transactions will not be subject to the Firm Related Equity Option Cap. The Exchange believes that this practice would not create an undue burden on its member organizations and would ensure a more efficient billing process.

The Exchange also proposes to rename the "Firm Related Equity Option Cap" as the "Monthly Firm Fee Cap" to more accurately describe the cap. The Exchange also proposes to amend a reference to "members and member organizations" in Section II of the Fee Schedule as only "member organizations" for clarity.

While fee changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on December 1, 2011.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(4) of the Act¹¹ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

Specifically, the Exchange believes the proposed rule change is reasonable because it would allow aggregation of the trading activity of a member organization and its Qualifying Member Organization for purposes of the Firm Related Equity Option Cap only in very narrow circumstances, namely, where the Qualifying Member Organization is an affiliate, as defined herein, and the trading activity of the Qualifying Member Organization, which would be included in the calculation of the Firm Related Equity Option Cap, is limited to proprietary orders of the Qualifying Member Organization effected for purposes of hedging the proprietary over-the-counter trading of the member organization or its affiliates. Furthermore, other exchanges have rules that permit the aggregation of the trading activity of affiliated entities for

the purposes of calculating and assessing certain fees.¹² The Exchange believes that it is reasonable to require member organizations to segregate these transactions in a separate account to create an effective way to account and bill for these transactions.

The Exchange believes that its proposal is equitable and not unfairly discriminatory because any member organization may request that the Exchange aggregate its trading activity with the trading activity of a Qualifying Member Organization for purposes of calculating the Firm Related Equity Option Cap. The Exchange believes that it is equitable and not unfairly discriminatory to require member organizations to segregate these transactions in a separate account as this requirement would apply to all member organizations.

The Exchange also believes that the amendments to rename the Firm Related Equity Option Cap and change a reference from "members and member organizations" to "member organizations" are reasonable, equitable and not unfairly discriminatory because these amendments will more accurately describe the cap and the member that is being billed.

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.

¹² See the Chicago Board Options Exchange, Incorporated ("CBOE") Fees Schedule (CBOE's application of its Fee Cap and Scale to order to certain non-Trading Permit Holder affiliates of a clearing trading permit holder). See also NASDAQ Stock Market LLC's ("NASDAQ") Rule 7027 (a NASDAQ pricing rule which allows affiliated members to aggregate their activity under certain provision of NASDAQ's fee schedule that make fees dependent upon the volume of their activity). See also the Chicago Stock Exchange, Inc. ("CHX") Fee Schedule at Section P entitled "Aggregation of Activity of Affiliated Participants" (CHX allows a participant to request the aggregation of its activity with the activity of its affiliates). See also the International Securities Exchange, LLC's ("ISE") Fee Schedule at footnote 2 (ISE permits Non-ISE Market-Maker transaction fees that are part of the originating or contra side of a crossing transaction to be included in the calculation of the monthly fee cap).

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.¹³ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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 email to rule-comments@sec.gov. Please include File No. SR-Phlx-2011-160 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-Phlx-2011-160. This file number should be included on the subject line if email 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

¹³ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4).

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-Phlx-2011-160 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31603 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65885; File No. SR-BSECC-2011-03]

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Order Approving Proposed Rule Change With Respect to an Amendment to the By-Laws of The NASDAQ OMX Group, Inc.

December 5, 2011.

I. Introduction

On October 11, 2011, Boston Stock Exchange Clearing Corporation ("BSECC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-BSECC-2011-03 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder. The proposed rule change was published for comment in the **Federal Register** on October 28, 2011.³ The Commission received no comment letters regarding the proposal. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The rule change will permit an amendment to the by-laws of BSECC's parent corporation, The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). NASDAQ OMX is seeking to amend provisions of its by-laws pertaining to the composition of committees of the NASDAQ OMX Board of Directors. First, NASDAQ OMX is amending the compositional requirements of its Audit Committee in Section 4.13(g) to provide that the committee shall include three or more directors. Currently, the provision provides that the Audit Committee shall be composed of either four or five directors. Second, NASDAQ OMX is proposing to amend the compositional requirements of the Nominating & Governance Committee in Section 4.13(h) to replace a requirement that the committee comprise four or five members with a requirement to include two or more members. Third, NASDAQ OMX proposes to delete a paragraph of the by-laws (Section 4.13(k)) that pertains to the qualifications of committee members who are not directors. Finally, NASDAQ OMX is correcting a typographical error in the numbering of the provisions of Section 4.13(h) of the by-laws.

III. Discussion

Section 19(b)(2)(B) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.⁴ In particular, Section 17A(b)(3)(A)⁵ of the Act requires, among other things, that the clearing agency be so organized and have the capacity to facilitate the prompt and accurate clearance and settlement of securities transactions, to safeguard the securities and funds which are in the custody or control of such clearing agency or for which it is responsible, and to comply with the provisions of the Act and the rules and regulations thereunder.

The proposed change would allow the NASDAQ OMX Board of Directors ("Board") to determine the size of its Audit Committee, so long as the Audit Committee includes at least three directors, as well as the size of its Nominating & Governance Committee, so long as the Nominating & Governance Committee includes at least two directors. The proposal is intended to provide greater flexibility to the NASDAQ OMX Board to determine the

appropriate size for these committees. The proposal does not change any other compositional requirements of either the Audit Committee or the Nominating & Governance Committee, including independence requirements. Moreover, the Commission notes that the proposal does not alter the application of Section 10A of the Exchange Act⁶ and Rule 10A-3 thereunder⁷ to the NASDAQ OMX Audit Committee.

The proposal also deletes an obsolete section from, and corrects a typographical error in, the NASDAQ OMX by-laws, which are clarifying revisions. For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act. The proposal also deletes an obsolete section from, and corrects a typographical error in, the NASDAQ OMX by-laws, which are clarifying revisions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2)⁸ of the Act, that the proposed rule change (File No. SR-BSECC-2011-03) be, and hereby is, approved.⁹

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31601 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65883; File No. SR-Phlx-2011-154]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Routing Fees for PSX

December 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

⁶ 15 U.S.C. 78j-1.

⁷ 17 CFR 240.10A-3.

⁸ 15 U.S.C. 78s(b)(2).

⁹ In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁰ 17 CFR 200.30-3(a)(12).

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 34-65613 (October 24, 2011), 76 FR 67007 (October 28, 2011). In its filing with the Commission, BSECC included statements concerning the purpose of and basis for the proposed rule change. The text of these statements is incorporated into the discussion of the proposed rule change in Section II below.

⁴ 15 U.S.C. 78s(b)(2)(B).

⁵ 15 U.S.C. 78q-1(b)(3)(A).

("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on November 22, 2011, NASDAQ OMX PHLX LLC ("PHLX" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposed rule change to pricing for PHLX members using the NASDAQ OMX PSX System. The new pricing will take effect immediately.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, at the principal office of the Exchange, on the Commission's Web site at <http://www.sec.gov/> and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to adopt fees applicable to the new routing services on PSX. PHLX recently adopted rules that allow it to route orders to other trading venues for execution.³ The different routing strategies, PSTG, PSCN, PMOP, PTFY and PCRT, are defined in PHLX Rule 3315. These routing strategies correlate to some of the routing strategies of NASDAQ, as explained below. PHLX

proposes to amend its fee schedule to adopt fees for the execution of routed orders, which are the same as or less than NASDAQ's, as explained below.

Respecting PSTG⁴ and PSCN⁵ orders, the routing charge is \$0.0027 per share executed at venues other than NYSE and \$0.0023 per share executed at NYSE. Respecting NASDAQ's⁶ comparable STGY and SCAN orders,⁷ this charge is the same for shares executed on NYSE and less than what NASDAQ charges for routed executions at other venues in NASDAQ-listed securities, NYSE-listed securities and for securities listed on exchanges other than NASDAQ or NYSE (\$0.0030 per share).⁸ The Exchange seeks to attract users to its new routing program and has accordingly determined to charge \$0.0027 per share rather than the \$0.0030 that NASDAQ charges for orders executed at NASDAQ and other venues. The Exchange currently charges \$0.0027 per share for executions on its own market, so the Exchange believes that it is reasonable and equitable, as well as appropriate from a business standpoint to charge the same for executions on other markets in order to attract business. The Exchange has determined to charge the same \$0.0023 per share that NASDAQ charges for executions on the NYSE and believes it could be successful attracting this business at that price.

Respecting PMOP⁹ orders, the charge is \$0.0025 per share executed at NYSE and \$0.0035 per share executed at venues other than NYSE. This is the same as what NASDAQ charges for its comparable MOPP orders,¹⁰ which is, following the format of the NASDAQ fee schedule: (i) For NASDAQ-listed securities, \$0.0035 per share;¹¹ (ii) for NYSE-listed securities, \$0.0035 per share executed at venues other than NYSE or charge of \$0.0025 per share

executed at NYSE; and (iii) for securities listed on exchanges other than NASDAQ or NYSE, \$0.0035 per share. The Exchange has determined that this is the appropriate charge to attract PMOP orders.

Respecting PTFY¹² orders, the routing charge is \$0.0022 per share executed at NYSE and \$0.0005 per share executed at venues other than NYSE, NASDAQ or BX; for orders that execute at BX, PHLX will give a credit of \$0.0014 per share and for orders that execute at NASDAQ, PHLX will charge \$0.0027 per share executed. This is the same as what NASDAQ charges for its comparable TFTY orders,¹³ which is \$0.0022 per share executed at NYSE, \$0.0005 per share executed at venues other than NYSE, BX or PSX, and a credit of \$0.0014 for orders that execute at BX, except that NASDAQ has a pass through of all fees assessed and rebates offered by PSX for orders that execute at PSX, which is akin to PSX's basic charge of \$0.0027 per share on PSX and lower than NASDAQ's charge of \$0.0030. In order to attract additional business to PSX, the fee for executions resulting from orders routed to NASDAQ from PSX is less than the charge for removing liquidity directly on NASDAQ.

Respecting PCRT¹⁴ orders, for orders that execute at BX, PHLX will give a credit of \$0.0014 per share and charge \$0.0027 for orders that execute at NASDAQ.¹⁵ This is the same or less than what NASDAQ charges for its comparable CART orders,¹⁶ which is a credit of \$0.0014 for orders that execute at BX (the same), respecting all securities regardless of where they are listed. NASDAQ generally charges \$0.0030 for removing liquidity from NASDAQ and passes through fees assessed and rebates offered by PSX for orders that execute at PSX, which today is a charge of \$0.0027 per share. The proposed PHLX charge of \$0.0027 for orders that execute at NASDAQ would be the same as the PSX charge to remove liquidity and less than NASDAQ's charge of \$0.0030.

Respecting securities priced at less than \$1 executed at a venue other than PHLX, PHLX proposes to adopt a charge of 0.3% of the total transaction cost. This is the same as what NASDAQ charges for orders that route and execute

⁴ See PHLX Rule 3315(a)(1)(A)(iii).

⁵ See PHLX Rule 3315(a)(1)(A)(iv).

⁶ Similar to the fees proposed herein, NASDAQ bases the charge on the type of routing strategy employed and where the order was executed, because routing fees are generally intended to recoup the cost of routing the order to another venue for execution. However, unlike PHLX, NASDAQ also bases its routing fees on where the security is listed. This is not a significant difference because the proposed fees include a separate charge for execution on the NYSE.

⁷ See NASDAQ Rule 4758(a)(1)(A)(iii) and (iv).

⁸ For NASDAQ-listed securities, there is no separate, lower fee for orders executed at NYSE, because NASDAQ-listed securities do not trade on NYSE and thus would not route there.

⁹ See PHLX Rule 3315(a)(1)(A)(vi).

¹⁰ See NASDAQ Rule 4758(a)(1)(A)(vi).

¹¹ For NASDAQ-listed securities, there is no separate, lower fee for orders executed at NYSE, because NASDAQ-listed securities do not trade on NYSE and thus would not route there.

¹² See PHLX Rule 3315(a)(1)(A)(v).

¹³ See NASDAQ Rule 4758(a)(1)(A)(v).

¹⁴ See PHLX Rule 3315(a)(1)(A)(vii).

¹⁵ PCRT orders can only execute on BX, PSX or NASDAQ. See PHLX Rule 3315(a)(1)(A)(vii).

¹⁶ See NASDAQ Rule 4758(a)(1)(A)(xi).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 65469 (October 3, 2011), 76 FR 62486 (October 7, 2011) (SR-Phlx-2011-108).

at an away market,¹⁷ which the Exchange believes is reasonable.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁸ in general, and with Sections 6(b)(4) of the Act,¹⁹ 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 PHLX operates or controls. The new routing fees are reasonable because they seek to recoup the cost of the execution on the other venue, which is generally borne by the order router and, ultimately, the routing exchange.

The proposed fees generally mimic the routing fee structure in effect on NASDAQ for some time.²⁰ The difference in the proposed routing fees as compared to NASDAQ's routing fees is that PHLX is proposing to charge less than NASDAQ (\$0.0027 versus \$0.0030 per share) for PSTG and PSCN orders routed to markets other than the NYSE (as compared to STGY and SCAN orders on NASDAQ). The Exchange believes that this difference is reasonable because it is the same charge that is applicable to orders executed on its own market. Similarly, the proposed \$0.0027 fee for PTFY and PCRT orders executed on NASDAQ is the same charge that is applicable to orders executed on PSX's own market.

The Exchange also believes that the proposed routing fees are equitable. All similarly situated members are subject to the same fee structure, and access to PHLX is offered on fair and non-discriminatory terms; specifically, the same routing fee, credit or pass through fee applies to any participant and does not differ based on user type (e.g., customer or broker-dealer).

Furthermore, the new routing fees are reasonable and equitable in that the decision to send routable orders and to use PHLX as a router is entirely voluntarily; members can avail themselves of numerous other means of directing orders to other venues, including becoming members of those markets or using any of a number of competitive routing services offered by other exchanges and brokers.

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. Because the market for order execution and routing is extremely competitive, members may readily opt to disfavor PHLX's execution and routing services if they believe that alternatives offer them better value. For this reason and the reasons discussed in connection with the statutory basis for the proposed rule change, PHLX does not believe that the proposed fees will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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.²¹ 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 email to rule-comments@sec.gov. Please include File No. SR-Phlx-2011-154 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-Phlx-2011-154. This file number should be included on the subject line if email 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-Phlx-2011-154 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2011-31599 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending November 19, 2011

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural

¹⁷ See NASDAQ Rule 7018(b).

¹⁸ 15 U.S.C. 78f.

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ See NASDAQ Rule 7018.

²¹ 15 U.S.C. 78s(b)(3)(A)(ii).

²² 17 CFR 200.30-3(a)(12).

Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period, DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT-OST-2005-21805.

Date Filed: November 18, 2011.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: December 9, 2011.

Description:

Application of Tyrolean Jet Service Nfg. GmbH & Co KG t/a Tyrolean Jet Services ("Tyrolean Jet Services") requesting an exemption and an amended foreign air carrier permit authorizing Tyrolean Jet Services to conduct (a) Charter services authorized under its existing foreign air carrier permit using large aircraft, and (b) charter transportation authorized by any additional route rights made available to European Union carriers in the future.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2011-31498 Filed 12-8-11; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5452

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5452, Corporate Report of Nondividend Distributions.

DATES: Written comments should be received on or before February 7, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue

Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the form and instructions should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927-9368, or through the Internet at *Joel.P.Goldberger@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Corporate Report of Nondividend Distributions.

OMB Number: 1545-0205.

Form Number: 5452.

Abstract: Form 5452 is used by corporations to report their nontaxable distributions as required by Internal Revenue Code section 604(d)(2). The information is used by IRS to verify that the distributions are nontaxable as claimed.

Current Actions: There is no change to this existing form.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 1,700.

Estimated Number of Respondents: 34 hours, 3 minutes.

Estimated Total Annual Burden Hours: 57,885.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including

through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 30, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011-31584 Filed 12-8-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13704

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 13704, Health Coverage Tax Credit Registration Update Form.

DATES: Written comments should be received on or before February 7, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the form and instructions should be directed to Joel Goldberger, (202) 927-9368, at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Joel.P.Goldberger@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Health Coverage Tax Credit Registration Update Form.

OMB Number: 1545-1954.

Form Number: 13704.

Abstract: Internal Revenue Code Sections 35 and 7527 enacted by Public Law 107-210 (see attachment) require the Internal Revenue Service to provide payments of the HCTC to eligible individuals beginning August 1, 2003. The IRS will use the Registration Update Form to ensure, that the

processes and communications for delivering these payments help taxpayers determine if they are eligible for the credit and understand what they need to do to continue to receive it.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households, Federal Government, State and Local or Tribal Government.

Estimated Number of Responses: 2,000.

Estimated Total Annual Burden Hours: 1,100.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 23, 2011.

Yvette B. Lawrence,
IRS Reports Clearance Officer.

[FR Doc. 2011-31586 Filed 12-8-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8931

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8931, Agricultural Chemicals Security Credit.

DATES: Written comments should be received on or before February 7, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Joel Goldberger, at (202) 927-9368, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at Joel.P.Goldberger@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Agricultural Chemicals Security Credit.

OMB Number: 1545-2122.

Form Number: 8931.

Abstract: Use Form 8931 to claim the tax credit for qualified agricultural chemicals security costs paid or incurred by eligible agricultural businesses. All the costs must be paid or incurred to protect specified agricultural chemicals at a facility.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit institutions.

Estimated Number of Respondents: 66,666.

Estimated Total Annual Burden Hours: 389,330.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to

respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 29, 2011.

Yvette B. Lawrence,
IRS Reports Clearance Officer.

[FR Doc. 2011-31587 Filed 12-8-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to bad debt reserves of banks.

DATES: Written comments should be received on or before February 7, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927-9368, or through the internet Joel.P.Goldberger@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Bad Debt Reserves of Banks.

OMB Number: 1545-1290.

Regulation Project Number: T.D. 8513.

Abstract: Section 585(c) of the

Internal Revenue Code requires large banks to change from reserve method of accounting to the specific charge off method of accounting for bad debts. Section 1.585-8 of the regulation contains reporting requirements in cases in which large banks elect (1) To include in income an amount greater than that prescribed by the Code; (2) to use the elective cut-off method of accounting; or (3) to revoke any elections previously made.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2,500.

Estimated Time per Respondent: 15 min.

Estimated Total Annual Burden Hours: 625.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper

performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 22, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011-31583 Filed 12-8-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Income, Excise, and Estate and Gift Taxes Effective Dates, etc.

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to income, excise, and estate and gift taxes; effective dates and other issues arising under the employee benefit provisions of the tax reform act of 1984.

DATES: Written comments should be received on or before February 7, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to, Joel Goldberger (202) 927-9368, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224 or through the internet at Joel.P.Goldberger@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Income, Excise, and Estate and Gift Taxes Effective Dates and Other Issues Arising Under the Employee Benefit Provisions of the Tax Reform Act of 1984.

OMB Number: 1545-0916.

Regulation Project Number: T.D. 8073 (temporary regulations) and EE-96-85 (notice of proposed rulemaking).

Abstract: The regulations provide rules relating to effective dates and certain other issues arising under sections 91.223 and 511-561 of the Tax Reform Act of 1984. The regulations affect qualified employee benefit plans, welfare benefit funds, and employees receiving benefits through such plans.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and individuals.

Estimated Number of Respondents: 7,800.

Estimated Time per Respondent: 31 minutes.

Estimated Total Annual Burden Hours: 4,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Approved: January 13, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

Editorial Note: This document was received at the Office of the Federal Register on December 5, 2011.

[FR Doc. 2011-31588 Filed 12-8-11; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). The IRS is soliciting comments concerning information collection requirements related to amortization of intangible property.

DATES: Written comments should be received on or before February 7, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the regulations should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927-9368, or through the Internet at *Joel.P.Goldberger@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Amortization of Intangible Property.

OMB Number: 1545-1671. *Regulation Project Number:* (TD 8865).

Abstract: These regulations apply to property acquired after January 25, 2000. Regulations to implement section 197(e)(4)(D) are applicable August 11, 1993, for property acquired after August 10, 1993 (or July 26, 1991, for property acquired after July 25, 1991, if a valid retroactive election has been made under § 1.197-1T).

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 500.

Estimated Time per Respondent: 3 hours.

Estimated Total Annual Burden Hours: 1,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: November 29, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011-31589 Filed 12-8-11; 8:45 am]

BILLING CODE 4830-01-P



FEDERAL REGISTER

Vol. 76

Friday,

No. 237

December 9, 2011

Part II

Department of Labor

Office of Federal Contract Compliance Programs

41 CFR Part 60-741

Affirmative Action and Non-discrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities; Proposed Rule

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Part 60-741**

RIN 1250-AA02

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities**AGENCY:** Office of Federal Contract Compliance Programs, Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is proposing to revise the regulations implementing the non-discrimination and affirmative action regulations of section 503 of the Rehabilitation Act of 1973, as amended. Section 503 prohibits discrimination by covered Federal contractors and subcontractors against individuals on the basis of disability, and requires affirmative action on behalf of qualified individuals with disabilities. The proposed regulations would strengthen the affirmative action provisions, detailing specific actions a contractor must take to satisfy its obligations. They would also increase the contractor's data collection obligations, and establish a utilization goal for individuals with disabilities to assist in measuring the effectiveness of the contractor's affirmative action efforts. Revision of the non-discrimination provisions to implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 is also proposed.

DATES: To be assured of consideration, comments must be received on or before February 7, 2012.

ADDRESSES: You may submit comments, identified by RIN number 1250-AA02, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* (202) 693-1304 (for comments of six pages or less).
- *Mail:* Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693-0103 (voice) or (202) 693-1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C-3325, 200 Constitution Avenue NW., Washington, DC 20210, or via the Internet at <http://www.regulations.gov>. Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking (NPRM) will be made available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C-3325, Washington, DC 20210. Telephone: (202) 693-0103 (voice) or (202) 693-1337 (TTY).

SUPPLEMENTARY INFORMATION:**Background**

Enacted in 1973, the purpose of section 503 of the Rehabilitation Act (section 503), as amended, is twofold. First, section 503 prohibits employment discrimination on the basis of disability by Federal government contractors and subcontractors. Second, it requires each covered Federal government contractor and subcontractor to take affirmative action to employ and advance in employment qualified individuals with disabilities.

The nondiscrimination requirements and general affirmative action requirements of section 503 apply to all Government contractors with contracts or subcontracts in excess of \$10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). See 41 CFR 60-741.4. The requirement to prepare and maintain an affirmative action program, the specific obligations of which are described at 41 CFR 60-741.44, apply to those contractors that have a contract or subcontract of \$50,000 or more and 50 or more employees. In the section 503 context, with the awarding of a Federal contract comes a number of responsibilities, including compliance with the section 503 anti-discrimination and anti-retaliation provisions, meaningful and effective efforts to recruit and employ individuals with disabilities, creation and enforcement of personnel policies

that support its affirmative action obligations, maintenance of accurate records on its affirmative action efforts, and OFCCP access to these records upon request. Failure to abide by these responsibilities may result in various sanctions, from withholding progress payments up to and including termination of contracts and debarment from receiving future contracts.

The framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement has been in place since the 1970's. However, both the unemployment rate of working age individuals with disabilities and the percentage of working age individuals with disabilities that are not in the labor force remain significantly higher than for those without disabilities. Recent data from the U.S. Department of Labor's Bureau of Labor Statistics (BLS) indicates that just 21.8% of working age people with certain functional disabilities were in the labor force in 2010, compared with 70.1% of working age individuals without such disabilities; while the unemployment rate for working age individuals with these disabilities was 14.8%, compared with an unemployment rate of 9.4% for working age individuals without such disabilities. See *Table A. Employment status of the civilian noninstitutional population by disability status and age, 2009 and 2010 annual averages*, available online at <http://www.bls.gov/news.release/disabl.a.htm>.

A substantial disparity in the employment rate of individuals with disabilities continues to persist despite years of technological advancements that have made it possible to apply for and perform many jobs from remote locations, and to read, write, and communicate in an abundance of alternative ways. Strengthening the implementing regulations of section 503, whose stated purpose "requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities," will be an important means by which the government can address the issue of employment for individuals with disabilities.

Prior to publishing this NPRM, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, and other interested parties to understand those features of the section 503 regulations that work well, those that can be improved, and possible new requirements that could

help to effectuate the overall goal of increasing the employment opportunities for individuals with disabilities with Federal contractors. In addition, OFCCP also published an Advance Notice of Proposed Rulemaking (ANPRM) on July 23, 2010, 75 *Federal Register* (FR) 43116, requesting public comment on specific inquiries regarding potential ways to strengthen the section 503 affirmative action regulations. The comment period ended September 21, 2010, and all comments received have been reviewed and given due consideration.

A total of 127 comments were received and are available for review at the Federal eRulemaking Portal at <http://www.regulations.gov>. Comments were received from trade and professional associations; disability and veteran advocacy organizations; employers; federal, state, and local government agencies; representatives of schools and organizations that provide education and/or vocational training; and from several private citizens. These written comments were generally reflective of the comments, suggestions and opinions expressed during the town hall meetings, webinars, and listening sessions, and are summarized briefly below.

47 of the comments received were non-substantive in nature. These commenters provided only generic responses indicating general support or opposition to strengthening the affirmative action regulations and/or to concepts such as the use of hiring goals or voluntary self-identification as an individual with a disability, or addressed issues unrelated to the ANPRM. 80 commenters provided substantive responses to at least some of the ANPRM questions. 51 of these were from the disability/advocacy perspective and 24 were from the contractor community. By and large, the contractor community argued that changes to the affirmative action regulations were not needed, while disability and employment service organizations and agencies requested that OFCCP strengthen the existing affirmative action requirements and consider additional requirements.

Among the most significant inquiries in the ANPRM were two questions regarding the utility of establishing hiring goals for individuals with disabilities similar to the requirements for minorities and women contained in the implementing regulations for Executive Order 11246, and the data source(s) from which such goals could

be derived.¹ A third inquiry in the ANPRM asked about contractors' experiences with the disability employment goals programs of State or local governments.² 57 commenters addressed this issue. Of these, 37 said that hiring goals "like those for race and gender" should be established. These commenters asserted that quantitative and measurable analyses similar to those for minorities and women were needed to make affirmative action for individuals with disabilities "more than a paperwork exercise." Almost all of these commenters referenced the U.S. Census Bureau's American Community Survey (ACS)³ data as the best available source of data about the number of persons with certain types of disabilities in the US. However, these commenters did not offer workable recommendations as to how OFCCP or contractors could use the data for the establishment of goal percentages.

Five of these 37 commenters also responded to the inquiry regarding State or local government goal programs. These commenters all referenced California's State workforce affirmative action program as an example of an affirmative action success story. According to the commenters, the California program requires that State agencies submit annual affirmative action plans that include specific "targets and timetables" for the employment of individuals with disabilities, based on their availability in the State's working age population. Agencies' workforce composition and upward mobility of individuals with disabilities is monitored by the State Personnel Board, and annual reports are required to be submitted to the Governor and State legislature. As a result of these affirmative action efforts, the commenters stated, individuals with disabilities comprised 9.3% of the State

¹ Specifically, the ANPRM asked: "If OFCCP were to require Federal contractors to conduct utilization analyses and to establish hiring goals for individuals with disabilities, comparable to the analyses and establishment of goals required under the regulations implementing Executive Order 11246, what data should be examined in order to identify the appropriate availability pool of such individuals for employment?" and "Would the establishment of placement goals for individuals with disabilities measurably increase their employment opportunities in the Federal contractor sector? Explain why or why not."

² This question asked: "What experience have Federal contractors had with respect to disability employment goals programs voluntarily undertaken or required by state, local or foreign governments?"

³ The American Community Survey conducted by the U.S. Census Bureau inquires about an array of demographic information, including several questions intended to ascertain the existence of certain functional disabilities, focusing on serious aural, visual, intellectual, developmental and mobility impairment.

government workforce in 2009.⁴ Though informative, it should be noted that the commenters provided few details about the design or operation of the California State program, and that, consequently, it is unclear whether the California program represents an appropriate goals model for federal contractors.⁵

The remaining 20 commenters, mostly contractors or contractor representatives, opposed the use of hiring goals in the section 503 context, asserting primarily that available disability data (including ACS data) is not sufficiently comprehensive or robust to be used for this purpose. See the Preamble to section 60–741.46 for further discussion regarding disability data sources.

Another significant issue posed in the ANPRM was whether inviting applicants to self-identify as individuals with disabilities prior to receiving a job offer would enhance the contractor's ability to monitor the impact of their hiring practices and measure the effectiveness of their affirmative action efforts. 55 commenters addressed this question. Of these, 37 commenters said voluntary pre-offer self-identification of disability would have a positive effect on the employment of individuals with disabilities. Several commenters recommended that the contractor be required to invite voluntary self-identification at both the pre- and post-offer employment process stages to alleviate concerns that information about a hidden disability might be improperly used if provided before an employment offer was made. A few commenters recommended that individuals with disabilities be offered the additional option of self-identifying "for recordkeeping purposes only," rather than for purposes of receiving affirmative action. The remaining 19 commenters were against the idea of pre-offer self-identification for various reasons, including 3 commenters who erroneously asserted that it would violate the Americans with Disabilities Act (ADA) of 1990. See the Preamble to section 60–742 for a discussion of the permissibility under the ADA of disability-related inquiries in furtherance of an affirmative action obligation.

⁴ The commenters cite the Annual Census of Employees in the State Civil Service 2008–2009, California State Personnel Board, February 2010 for this statistic. See <http://www.spb.ca.gov/WorkArea/showcontent.aspx?id=5634>.

⁵ For example, no details were provided with regard to the basis of the availability data used in the program, the method(s) used in setting the "targets and timetables," the program's enforcement mechanism(s), if any, and/or the rate of State agencies' compliance with the program.

Support was also expressed among a significant number of commenters for strengthening the implementing regulations regarding contractors' use of linkage agreements⁶ with recruitment and/or training sources, and for adding a mandatory job listing requirement similar to the one in the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

This NPRM proposes several major changes to part 60–741. Many of these changes were informed and significantly shaped by the comments received on the ANPRM, and by the information we received at the town hall meetings, listening sessions, and in webinars. In addition to changes to the regulations implementing section 503's affirmative action requirements, changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 and the subsequent amendment by the Equal Employment Opportunity Commission (EEOC) of their implementing regulations at 29 CFR part 1630, have also been made to the rule's definitions and nondiscrimination provisions. The ADAAA amends section 503 to the same extent as it amends the ADA, and became effective on January 1, 2009. It is, therefore, OFCCP's intention that these changes will have the same meaning as set forth in the ADAAA, and in the revised EEOC regulations published at 76 FR 16978 (March 25, 2011).

The detailed Section-by-Section Analysis below identifies and discusses all proposed changes in each section. Due to the extensive proposed revisions to the section 503 regulations, part 60–741 will be republished in its entirety in this NPRM for ease of reference. However, the Department will only accept comments on the proposed revisions of the regulations detailed herein.

Section-by-Section Analysis

41 CFR Part 60–741

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–741.1 Purpose, Applicability, and Construction

We propose a few minor changes to this section. Paragraph (a) of § 60–741.1 of the current rule sets forth the scope of section 503 and the purpose of its implementing regulations. Existing paragraph (a) discusses the contractor's affirmative action obligations but does not mention the other primary element of section 503—the prohibition of discrimination in employment against

individuals with disabilities. Accordingly, the proposed rule adds language to the first sentence of paragraph (a) including this important element.

Next, the proposal modifies the citation in paragraph (c) to the “Americans With Disabilities Act of 1990” (ADA) to reflect its recent amendment by the ADA Amendments Act of 2008.

Finally, in accordance with changes in the ADAAA, the proposed rule adds a new paragraph (c)(2), and renumbers the existing paragraph (c)(2) as (c)(3). New paragraph (c)(2) reflects the ADAAA's affirmation, in section 6(a)(1), that nothing in the statute “alters the standards for determining eligibility for benefits” under State worker's compensation law or under State and Federal disability benefit programs.

Section 60–741.2 Definitions

The proposed rule incorporates the vast majority of the existing definitions contained in existing § 60–741.2 without change. However, OFCCP proposes several changes to the substance and structure of this section, as set forth below.

With regard to the structure of this section, the current rule lists the definitions in order of subject matter. However, for those who are unfamiliar with the regulations, this ordering makes it difficult to locate specific terms within the section. For the most part, the proposed rule reorders the defined terms in alphabetical order. A few terms that are typically used in connection with specific definitions are defined as subparagraphs of those definitions. So, for example, definitions of the terms “contracting agency” and “modification” are found within the definition of “Government contract.” This modified structure is proposed for ease of reference, and to allow individuals to continue to cite to specific definitions. However, because of this reordering, the citation to specific terms may be different in the proposed rule than it is currently. For instance, the term “contract,” which is § 60–741.2(h) in the current regulations, is § 60–741.2(c) in the proposed regulation.

With regard to substantive changes, the proposed rule makes several revisions that relate to the definition of “disability” and its component parts as a result of the passage of the ADAAA, which became effective on January 1, 2009, and which amends both the ADA and section 503. As noted previously, it is OFCCP's intention that these terms will have the same meaning as set forth

in the ADAAA, and as implemented by the EEOC in its revised regulations.

The proposed section 503 rule replaces the term “individual with a disability” with the ADAAA term “disability.” The ADAAA definition of “disability” retains the three prongs of the definition of “individual with a disability” in the current regulation, but clarifies that the assessment of whether a disability exists is to be made “with respect to an individual.” The proposed rule incorporates this change in paragraph (g)(1). The term “individual with a disability” will be retained in alphabetical order as paragraph (l) in the proposed rule for the convenience of those not yet accustomed to the new terminology. However, proposed paragraph (l) does not contain a definition, but directs readers to refer to the new definition of “disability” in paragraph (g).

New paragraphs (g)(2), (g)(3) and (g)(4) incorporate additional ADAAA requirements regarding the assessment of when an impairment constitutes a “disability.” These requirements are crucial to ensure that “the broad scope of protection” Congress intended for “disability” to provide is not unduly “narrowed” by administrative or court rulings. See ADAAA at section 2. Proposed paragraph (g)(2) provides that the definition of “disability” must be “construed in favor of broad coverage of individuals, to the maximum extent permitted by law,” and that therefore extensive analysis should not be needed in order to determine whether an individual has a disability. New paragraph (g)(3) incorporates the ADAAA's affirmation that “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability;” while new paragraph (g)(4) reflects the ADAAA's requirement that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

New paragraphs (g)(5) and (g)(6) are added for the convenience of persons using the rule. A cross-reference alerting the reader that the terms “major life activities,” “physical or mental impairment,” “record of such impairment,” “regarded as having such an impairment,” and “substantially limits” are separately defined in § 60–741.2 appears in (g)(5). A cross reference informing readers that exceptions to the definition of “disability” are contained in § 60–741.3 of the rule is added as paragraph (g)(6).

The proposed rule incorporates the ADAAA's revision of the definition of “major life activities” in paragraph (n).

⁶ See section 741.2(m) for a definition of “linkage agreement.”

The ADAAA adds several items to the list of examples of major life activities contained in the current regulation. In addition, the ADAAA clarifies that the term “major life activities” includes “major bodily functions” and enumerates several examples of functions that would constitute “major bodily functions.” EEOC’s implementing regulations include additional examples of major life activities and major bodily functions. All of these examples are contained in the proposed rule in paragraphs (n)(1) and (2).

In new paragraph (n)(3), the proposed rule states that the term “major” must not be interpreted to create a demanding standard when determining other examples of major life activities, and cautions that such an assessment is not to be determined by reference to whether the life activity is of “central importance to daily life.” See ADAAA section 2(b)(4).

New paragraph (o) adds a definition of “mitigating measures” that, as prescribed in section 3 of the ADAAA, consists of a non-exhaustive list of examples of mitigating measures. The ADAAA also prescribes definitions of the mitigating measures of “ordinary eyeglasses or contact lenses,” “low-vision devices,” and “auxiliary aids and services,” and these definitions are likewise included in this paragraph of the proposed rule. Consistent with the EEOC’s recently issued implementing regulations, the proposed regulation also adds “psychotherapy, behavioral therapy, or physical therapy” to the non-exhaustive list of mitigating measures in paragraph (o)(1)(v).

The ADAAA replaces the term “qualified individual with a disability” with the term “qualified individual.” The definition of this new term omits the words “with a disability,” thus emphasizing that the assessment of whether a person is qualified for a job is distinct from the assessment of whether the person has a disability, but is otherwise unchanged from the definition in the Americans with Disabilities Act as originally enacted. The proposed rule reflects this statutory change in the definition of “qualified individual” in paragraph (s) by deleting the words “with a disability” that are in the current regulation.

Proposed paragraph (t) makes two changes to the definition of “reasonable accommodation” currently found at § 60–741.2(v). First, it revises footnote 2 in the current rule to emphasize that before providing a reasonable accommodation the contractor is advised to verify with the individual with a disability that the

accommodation it plans to provide will effectively meet the individual’s needs. Second, it adds a new paragraph (4) to reflect the ADAAA’s clarification that individuals who only satisfy the “regarded as” part of the definition of “disability” are not entitled to receive reasonable accommodation. See ADAAA at sec. 6(a)(1)(h).

A clarification has been added to the definition of “record of such an impairment” in proposed paragraph (u). It explains that an individual satisfies the record of prong of “disability” if the individual has “a history” of a substantially limiting impairment “when compared to most people in the general population,” or has been misclassified as having had such an impairment.

The ADAAA also significantly redefines and simplifies the “regarded as” part of the definition of “disability.” Under the new definition of “regarded as having such an impairment,” in proposed paragraph (w)(1), an individual satisfies the “regarded as” prong of the definition of “disability” if “the individual establishes that he or she has been subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity.” Such prohibited actions include, but are not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

In paragraph (w)(2) the proposed rule explains that an individual satisfies the regarded as prong any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts or ultimately establishes a defense for its challenged action. In paragraph (w)(3) the proposed rule clarifies that the establishment that an individual is regarded as having a disability is distinct from the establishment of liability for unlawful discrimination in violation of this part. Such liability is established only when the individual “proves that a contractor discriminated on the basis of disability.”

The ADAAA excludes from the “regarded as” prong of “disability” impairments that are “transitory and minor,” and defines a “transitory” impairment as one that “has an actual or expected duration of six months or

less.” Proposed paragraph (w)(4) incorporates this exclusion. The proposed rule also makes clear that it is incumbent upon the contractor to demonstrate that an impairment is both transitory and minor for it to be excluded from coverage under the regarded as prong of “disability.” Whether the contractor has succeeded in demonstrating that a particular impairment is transitory and minor will be determined objectively. A contractor’s subjective belief that the impairment was transitory and minor is not sufficient to defeat an individual’s coverage under the regarded as prong.

The definition of “substantially limits” at § 60–741.2(q) of the current rule is also significantly revised in accordance with the ADAAA, and to ensure that it is consistent with the EEOC’s implementing regulations. As revised in paragraph (aa), the proposed regulation sets forth rules of construction that must be applied when determining whether an impairment substantially limits a major life activity, but in contrast to the current regulation, does not specify a substantially limits standard. This new approach is in keeping with the ADAAA’s rejection of the current regulatory definition of “substantially limits” as “significantly restricted” as setting too high a standard, and with the statute’s mandate to interpret “substantially limits” “consistently with the findings and purposes” of the ADAAA. See ADAAA sections 2 and 3.

Paragraph (aa)(1) states that the term “substantially limits” must be construed broadly in favor of expansive coverage, to the maximum extent permitted by law, and is not meant to be a demanding standard requiring extensive analysis. An impairment need not “prevent” or “significantly or severely restrict” the individual from performing a major life activity to be considered substantially limiting. Rather, an impairment is substantially limiting if it substantially limits the ability to perform a major life activity “compared to most people in the general population.” In making this comparison, it may be useful, in appropriate cases, to consider the condition under which the individual performs the major life activity, the manner in which the individual performs the major life activity, and/or the duration of time it takes the individual to perform the major life activity. This comparison, though, usually will not require scientific, medical, or statistical analysis. So, for example, scientific, medical, or statistical analysis would not be needed to determine that an individual who, because of an impairment, could only

stand for five minutes at a time is substantially limited in the major life activity of standing, as most people can stand for a significant longer period of time.

In paragraph (aa)(2), the proposed regulation explains that whether an individual's impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of § 60–741.2(g)(1)(iii).

The ADAAA's express prohibition of the consideration of "the ameliorative effects of mitigating measures" when determining whether an impairment "substantially limits a major life activity" is incorporated into paragraph (aa)(3). The exception to this prohibition—the ADAAA's mandate that the ameliorative effects of "ordinary eyeglasses or contact lenses shall be considered" when determining whether an impairment substantially limits a major life activity—is encompassed in proposed (aa)(3)(i). Proposed paragraph (aa)(3)(ii) addresses the non-ameliorative effects of mitigating measures, such as negative side effects from medication, and provides that such detrimental effects may be considered when assessing whether an individual's impairment is substantially limiting.

In paragraph (aa)(4) the proposed regulation emphasizes that the focus of a "substantially limits" determination is not on the outcomes that an individual can achieve, but on whether a major life activity is substantially limited. Thus, for example, someone with a learning disability may be substantially limited in the major life activity of learning because of the additional time or effort required for the individual to read, write or learn, even though the individual has achieved a high level of academic success.

The proposed regulation notes, in paragraph (aa)(5), that the principles set forth in this section are intended to provide for generous coverage of the law by means of an analytical framework that is predictable, consistent, and workable for all individuals and contractors. Accordingly, the individualized assessment of some types of impairments will, "in virtually all cases," result in a factual determination that the individual has either a substantially limiting impairment (actual disability) or a history of a substantially limiting impairment (record of disability). With respect to such an impairment, the necessary individualized assessment of an individual should be particularly simple and straightforward. Proposed paragraph (aa)(5) includes several

examples of such impairments, including deafness, blindness, epilepsy, cancer and HIV, along with the major life activity they most typically substantially limit. It should also be noted that, consistent with the revised EEOC ADAAA implementing regulations, the discussion of the major life activity of working that appears in the current regulation at § 60–741.2(q)(3) has been removed from the text of the proposed regulation. No other major life activity receives special attention in the regulation. Moreover, in light of the expanded definition of disability pursuant to the ADAAA, this major life activity will seldom be used, since impairments that substantially limit an individual's ability to work usually will substantially limit one or more other major life activities. In those rare cases where an individual needs to demonstrate a substantial limitation in working, the individual can continue to do so by showing that an impairment substantially limits his or her ability to perform a class of jobs, or a broad range of jobs in various classes, as compared to most people having comparable training, skills, and abilities.

In addition to the revisions related to the definition of "disability," the proposed rule makes revisions to several other definitions in the section. First, the proposed rule replaces the term "Deputy Assistant Secretary," found currently at § 60–741.2(d), with "Director." The current rule defines "Deputy Assistant Secretary" as "the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee." As a result of the elimination of the Department's Employment Standards Administration in November 2009, the head of OFCCP now has the title of Director. See Secretary's Order 7–2009 (Nov. 6, 2009). Accordingly, the proposed rule reflects this change, which will be made throughout part 60–741.

Lastly, in paragraph (m), the proposed rule adds a definition of "linkage agreement," which is currently only described in the OFCCP Federal Contract Compliance Manual (FCCM). We propose adding this definition to the regulations for ease of reference and clarity to the contractor community.

Section 60–741.3 Exceptions to the Definitions of "Disability" and "Qualified Individual"

This section addresses exceptions to the key definitions of "disability" and "qualified individual." The proposed rule modifies this section by changing the terms "individual with a disability" and "qualified individual with a

disability" in the section title, as well as throughout the section, to "disability" and "qualified individual," respectively, in accordance with the ADAAA.

Section 60–741.4 Coverage and Waivers

The proposed rule replaces the term "Deputy Assistant Secretary," found in paragraphs (b)(1) and (b)(2) of this section, with the term "Director," for the reasons set forth in the discussion of § 60–741.2. The proposal also removes the text of paragraph (a)(2) as the "contract work only" exception applied to "employment decisions and practices occurring before October 29, 1992" and has now expired. Paragraphs (3), (4) and (5) are, accordingly, renumbered as paragraphs (2), (3) and (4).

Section 60–741.5 Equal Opportunity Clause

Paragraph (a) contains the equal opportunity (EO) clause that must be included in all covered Government contracts and subcontracts. The proposed rule makes several substantive changes to the text of the mandated clause.

In paragraph 1 of the EO clause, the phrase "to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disability" is modified to read "to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability." This formulation more closely mirrors the language and intent of the ADAAA.

In paragraph 4, we propose two revisions. First, the proposed regulation revises the parenthetical at the end of the third sentence of this paragraph to replace the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. The proposed regulation also adds the following sentences to the end of proposed paragraph 4 of the EO clause:

With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise

are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

The addition of these sentences is in response to the increased use of telecommuting and other work arrangements that do not include a physical office setting, as well as internet-based application processes in which applicants never enter a contractor's physical office. These revisions therefore would permit equivalent access to the required notices for these employees and applicants.

For paragraph 5, which refers to the contractor's obligation to notify labor organizations or other workers' representatives about its obligations under section 503, we propose adding language clarifying that these obligations include non-discrimination, in addition to affirmative action. The current paragraph 5 does not specifically mention contractors' non-discrimination obligations.

The proposed rule also adds a new paragraph 7 to the EO clause that requires the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of individuals with disabilities protected under section 503. A comparable clause exists in the equal opportunity clause of the Executive Order 11246 regulations, *see* 41 CFR 60-1.4(a)(2), describing the protected classes under that Order. This proposed addition would ensure consistency between the regulations and aid in communicating the contractor's EEO responsibilities to job seekers.

In addition to modifying the text of the EO clause, the proposed rule also amends paragraph (d) of this section to require that the entire equal opportunity clause be included verbatim in Federal contracts. OFCCP has found that contractors are not always aware of their EO clause responsibilities. Subcontractors, in particular, are frequently not informed of their EO responsibilities by the prime contractor and are unaware of their obligations until they are selected by OFCCP for a compliance evaluation. Requiring that the entire EO clause be included verbatim in all covered Federal contracts, including subcontractors, will help ensure that contractors (including subcontractors) read and understand the language in this clause.

Finally, the proposed rule replaces the term "Deputy Assistant Secretary," found in paragraphs (a)(4), (a)(6), and (f) of this section, with the term "Director," for the reasons set forth in the discussion of § 60-741.2.

Subpart B—Discrimination Prohibited Section 60-741.21 Prohibitions

This section of the rule describes types of conduct that would violate the non-discrimination requirements of section 503. The proposed rule makes both minor and substantive changes.

First, the section's introductory sentence is numbered as (a), with appropriate subsection renumbering so that the original paragraphs (a) through (i) become paragraphs (1) through (9).

Next, paragraph (a)(1) of the proposed rule (§ 60-741.21(a) of the current rule) is revised to mirror the language in section 5 of the ADAAA by changing "discriminate against a qualified individual with a disability because of that individual's disability" to "discriminate against a qualified individual on the basis of disability."

The word "qualified" is deleted from the example in proposed paragraph (a)(2), which currently provides, in § 60-741.21(b), that "the contractor may not segregate employees into separate work areas or into separate lines of advancement on the basis of disability." As modified, the example would more accurately reflect the prohibition's requirement that a contractor not "limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability."

The proposed rule adds a new paragraph (iv) to paragraph (a)(6) that clarifies, as provided in the ADAAA, that a contractor is "not required" to provide reasonable accommodation to individuals who "satisfy only the 'regarded as having such an impairment' prong of the definition of disability." However, contractors are not prohibited from providing reasonable accommodation to individuals who are only "regarded as" having a disability, and may choose to do so if they wish. The new paragraph also includes a cross-reference to the definition of "regarded as" having a disability in proposed § 60-741.2(w).

A new paragraph (ii) is added to proposed paragraph (a)(7) to incorporate the ADAAA's specific prohibition on the use of qualification standards, employment tests, or other selection criteria that are "based on an individual's uncorrected vision" unless the standard, test, or other selection criteria, as used by the contractor, "is

shown to be job-related for the position in question and consistent with business necessity." On its face, this provision protects not only individuals with disabilities, but broadly prohibits a contractor from using any "individual's" uncorrected vision as a qualification standard unless the contractor can demonstrate that doing so is justified by business necessity. Thus, the proposed regulation states that an individual need not be an individual with a disability in order to challenge a contractor's use of an uncorrected vision standard, so long as the individual has been adversely affected by the contractor's use of the challenged standard. The proposed rule also renumbers the current paragraph (ii) as paragraph (iii).

A new sentence is added by the proposal to paragraph (a)(9), which currently provides that a contractor may not reduce the compensation provided to an individual with a disability because the individual receives a disability-related pension or benefit from another source. The new sentence clarifies that it would likewise be impermissible for a contractor to reduce the amount of compensation it provides to an individual with a disability because of the "actual or anticipated cost of a reasonable accommodation the individual needs or requests."

Finally, the proposed rule adds a new subsection (b) to incorporate the ADAAA's prohibition on claims of discrimination because of an individual's lack of disability. The ADAAA expressly prohibits claims that "an individual without a disability was subject to discrimination because of the lack of disability." ADAAA at sec. 6(a)(1)(g).

Section 60-741.22 Direct Threat Defense

The proposed rule changes the reference in the parenthetical at the end of this section to "§ 60-741.2(e)," to reflect the new designation of the definition of "direct threat" in the restructured Definitions section, as discussed in § 60-741.2, above.

Section 60-741.23 Medical Examinations and Inquiries

The proposed rule revises paragraph (b)(4) by adding a sentence at the end of the paragraph clarifying that voluntary medical examinations and activities need not be job-related and consistent with business necessity. Paragraph (b)(5) is revised to delete the reference to paragraph (b)(4). This revision is intended to clarify that contractors may not use medical information obtained through voluntary medical

examinations and activities as the basis for an employment decision such as a determination of fitness for duty.

Lastly, the proposed rule revises paragraph (d)(1)(iii) to add “as amended” to the reference to the “Americans with Disabilities Act.”

Section 60–741.25 Health Insurance, Life Insurance and Other Benefit Plans

The proposed rule revises paragraph (d) by changing the current rule’s two references to “qualified individual with a disability” to “individual with a disability.” This paragraph ensures that individuals will not be denied access to insurance or subjected to different terms or conditions of insurance on the basis of disability, if the disability does not impose increased risks. The ability to perform essential functions, as specified in the definition of “qualified individual” in § 60–741.2(s), is not relevant to these insurance considerations. Accordingly, the proposed rule would eliminate the term “qualified” from the paragraph’s references to “individual with a disability.”

Subpart C—Affirmative Action Program

Section 60–741.40 General Purpose and Applicability of the Affirmative Action Program Requirement

This section sets forth which contractors are required to maintain an affirmative action program, and the general timing requirements for its creation and submission to OFCCP. The proposed rule adds a new paragraph (a) that sets forth a statement of purpose that articulates OFCCP’s general expectations for contractors’ affirmative action programs. An affirmative action program must be “more than a paperwork exercise.” Rather, an affirmative action program is a management tool that includes measurable objectives, quantitative analyses, and internal auditing and reporting systems designed to measure the contractor’s progress toward achieving equal employment opportunity for individuals with disabilities.

In light of the addition of new paragraph (a), the existing paragraphs of this section have been renumbered and newly captioned in the proposed regulation. However, except for one minor clarification, the remainder of the text of § 60–741.40 is unchanged. We propose a minor clarification to paragraph (b)(3) of this section, which is paragraph (c) in the current rule, specifying that the affirmative action program shall be reviewed and updated annually “by the official designated by

the contractor pursuant to § 60–741.44(i).” While this is the intent of the existing language, the proposal clarifies this intention and ensures that company officials who are knowledgeable about the contractor’s affirmative action activities and obligations are reviewing the program.

Section 60–741.41 Availability of Affirmative Action Program

This section sets forth the manner by which contractors must make their affirmative action programs available to employees for inspection, including the location and hours during which the program may be obtained. The proposed regulation adds a sentence at the end of this section requiring that, in instances where contractors have employees who do not work at the contractors’ physical establishment, the contractor shall inform these employees about the availability of the affirmative action program by means other than a posting at its establishment. This addition is proposed in light of the increased use of telework and other flexible workplace arrangements.

Section 60–741.42 Invitation To Self-Identify

The proposed revisions to this section make significant, substantive changes to the contractor’s responsibilities and the process through which applicants are invited to voluntarily self-identify as individuals with disabilities protected by section 503 during the hiring process. The proposed rule also adds a new requirement that contractors annually survey their employees, providing an opportunity for each employee who is, or subsequently becomes, an individual with a disability to voluntarily self-identify as such in an anonymous manner, thereby allowing those who have subsequently become disabled or who did not wish to self-identify during the hiring process to be counted.

These changes are proposed in order to collect important data pertaining to the participation of individuals with disabilities in the contractor’s applicant pools and workforces. This will allow the contractor and OFCCP to better identify and monitor the contractor’s hiring and selection practices with respect to individuals with disabilities. Data related to the pre-offer stage will be particularly helpful, as it will provide the contractor and OFCCP with valuable information regarding the number of individuals with disabilities who apply for jobs with contractors. This data will enable OFCCP and the contractor to assess the effectiveness of the contractor’s recruitment efforts over

time, and to refine and improve the contractor’s recruitment strategies, where necessary.

Proposed paragraph (a) of this section requires that the contractor invite all applicants to voluntarily self-identify as individuals with disabilities whenever the applicant applies for or is considered for employment. The invitation may be included with the application materials, but must be separable or detachable from the job application.

The requirement to give applicants and employees the opportunity to self-identify is consistent with the ADA’s restrictions on pre-employment disability-related inquiries. Although the ADA generally prohibits inquiries about disability prior to an offer of employment, it does not prohibit the collection of this information by a contractor in furtherance of its section 503 affirmative action obligation to employ and advance in employment qualified individuals with disabilities. The EEOC’s regulations implementing the ADA state that the ADA “does not invalidate or limit the remedies, rights, and procedures of any Federal law * * * that provides greater or equal protection for the rights of individuals with disabilities” than does the ADA. 29 CFR 1630.1(c)(2). Noting that Section 503 is such a Federal law, EEOC states in the Appendix to its ADA implementing regulations that: “collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by [the ADA or EEOC’s implementing regulations].” Appendix to 29 CFR 1630.14(a).

Proposed paragraph (a)(1) requires that the contractor invite applicants to self-identify “using the language and manner prescribed by the Director and published on the OFCCP Web site.” This will ensure consistency in all pre-offer invitations that are made, and will reassure applicants that the request is routine and executed pursuant to obligations created by OFCCP. It will also minimize any burden to contractors resulting from compliance with this responsibility, as they will not be required to develop suitable self-identification invitations individually. This, in turn, we believe, will facilitate contractor compliance with this proposed section.

The inquiry that OFCCP will prescribe for contractors is a limited one and will be narrowly tailored. To minimize privacy concerns and the possibility of misuse of disability-

related information, we are proposing that the required invitation would ask only for self-identification as to the existence of a “disability,” not asking about the general nature or type of disability the individual has, or the nature or severity of any limitations the individual has as a result of their disability. For example, OFCCP might prescribe that the contractor invite applicants to self-identify at the pre-offer stage using the following language:

1. This employer is a Government contractor or subcontractor subject to section 503 of the Rehabilitation Act of 1973 (section 503), as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. Regulations of the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) implementing section 503 require that Government contractors and subcontractors ask job applicants to indicate whether or not they have a disability. This information is requested in furtherance of our affirmative action obligations as a Government contractor subject to section 503, and to measure the effectiveness of the outreach, recruitment, training and development efforts we have undertaken pursuant to section 503.

A person has a disability as defined in section 503 if that person either: (1) Has a physical or mental impairment which substantially limits one or more of that person’s major life activities; or (2) has a history or record of such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major life activities also include major bodily functions such as functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

Please indicate whether you have a disability as defined in section 503 by checking the box below.

YES, I HAVE A DISABILITY

2. Your submission of this information is voluntary, and your refusal to provide it will not adversely affect our consideration of your application for employment, or subject you to adverse treatment of any kind. The information provided will be used only in ways that are consistent with section 503 of the Rehabilitation Act of 1973, as amended, and OFCCP’s regulations.

3. This means that the information you provide will be used solely for affirmative action purposes, and/or by Government officials engaged in enforcement of the laws administered by OFCCP, or in the enforcement of other Federal EEO laws such as the Americans with Disabilities Act (ADA).

4. Section 503 also requires that Government contractors provide individuals with disabilities with reasonable accommodations that are needed to ensure equal employment opportunity. If you require an assistive device, sign language interpreter, or other assistance, change or modification to enable you to fully participate in the application process, please let us know.

OFCCP invites public comment on this potential self-identification invitation text, including suggestions for specific alternate text. An alternative would be to harmonize the approach to collecting such data that is used by the Federal government for government employees. Specifically, it is anticipated that the EEOC will use an applicant flow form to collect disability-related data pre-employment and OPM uses SF256 to collect data once an applicant is hired. Such forms ask for sufficient information to determine if an individual has certain “severe” or targeted disabilities, or has any of various other types of disabilities. We request comment on these alternative approaches in the context of the need to strike a balance between more specific data and encouraging responses, and in consideration of the objectives of ensuring applicant comprehension of what is being asked, achieving, to the extent possible, comparability of data with other sources, and compliance with the ADAAA.

Proposed paragraph (b) retains but modifies the current rule’s requirement that contractors invite individuals, after an offer of employment is extended, but before the applicant begins his or her job duties, to voluntarily self-identify as an individual with a disability. We propose to retain this requirement, in addition to the new requirement to invite self-identification at the pre-offer stage, so that individuals with hidden disabilities who fear potential discrimination if their disability is revealed prior to receiving a job offer will, nevertheless, have the opportunity to provide this valuable data.

Proposed paragraph (b)(1) requires that the contractor invite self-identification using the language and manner prescribed by the Director, as published on the OFCCP Web site. Again, we believe that this requirement will ensure consistency in all post-offer invitations that are made, minimize any burden to contractors of compliance with this responsibility and, consequently, facilitate such contractor compliance.

Proposed paragraph (c) requires that, on an annual basis, the contractor shall anonymously survey all of its employees using the language and

manner prescribed by the Director. Because baseline data are not available, at a minimum, it is important to provide all employees with an opportunity to self-identify. Annual surveying, however, would be meaningful because an employee may become disabled at any time or may feel more comfortable self-identifying once he or she has been employed for some time. Assuring that employee responses to the annual survey will be anonymous will likely increase the response rate, thereby providing that the most accurate data possible is available to assist contractors and OFCCP. Such data will assist contractors and OFCCP in evaluating and refining the contractor’s affirmative action efforts. Surveying of employees may be accomplished by the contractor using a paper and/or electronic format, using the method(s) generally used by the contractor to communicate with employees regarding work-related matters. Proposed paragraph (d) emphasizes that the contractor is prohibited from compelling or coercing individuals to self-identify. While proposed paragraph (e) emphasizes that all information regarding self-identification as an individual with a disability shall be kept confidential and maintained in a data analysis file in accordance with § 60–741.23 of this part. Paragraph (e) also states that self-identification information must be provided to OFCCP, upon request, and that the information may only be used in accordance with this part.

The proposed rule eliminates Appendix B of the current regulations. Appendix B provides a sample invitation to self-identify as an individual with a disability to assist the contractor in developing its own pre-employment self-identification invitation. Since the proposed regulation provides that OFCCP will prescribe the text that the contractor must use when inviting applicants and employees to voluntarily self-identify, there is no longer a need for a sample invitation.

Finally, the proposed rule renumbers existing paragraphs (c) and (d) as paragraphs (f) and (g). Proposed paragraph (g) is revised slightly to clarify that the contractor is not relieved from liability for discrimination in violation of “section 503 or this part.”

Section 60–741.44 Required Contents of Affirmative Action Programs

This section details the elements that the contractor’s affirmative action programs must contain. These elements include: (1) An equal employment opportunity policy statement; (2) a comprehensive annual review of

personnel processes; (3) a review of physical and mental job qualifications; (4) a statement that the contractor is committed to making reasonable accommodations for persons with physical and mental disabilities; (5) a statement that the contractor is committed to ensuring a harassment-free workplace for individuals with disabilities; (6) external dissemination of the contractor's affirmative action policy, as well as outreach and recruitment efforts; (7) internal dissemination of the contractor's affirmative action policy to all of its employees; (8) development and maintenance of an audit and reporting system designed to evaluate affirmative action programs; and (9) training regarding the implementation of the affirmative action program for all personnel involved in employment-related activities, such as the conduct of recruitment, screening, selection, and discipline of employees.

The first substantive proposed revisions to this section focus on the contractor's policy statement set forth in paragraph (a). The proposed regulation would revise the second sentence to clarify the contractor's duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It would also revise the parenthetical at the end of the sentence, replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves.

The proposed regulation would also revise the third sentence of paragraph (a) regarding the content of the policy statement, replacing the provision that the policy statement "should indicate the chief executive officer's attitude on the subject matter" with the requirement that the policy statement "shall indicate the chief executive officer's support for the affirmative action program." This proposed change is made to clarify the intent to mandate the inclusion of a statement from the contractor's CEO in the affirmative action policy statement that will signal to the contractor's employees that support for the affirmative action program goes to the very top of the contractor's organization.

In paragraph (b), the proposed rule requires that the contractor must review its personnel processes on at least an annual basis to ensure that its obligations are being met. The current rule requires that the contractor review

these processes "periodically." This standard is vague and subject to confusion. Indeed, OFCCP's efforts to enforce this requirement in recent years have been complicated by contractors' various subjective interpretations of what constitutes "periodic" review. This proposal sets forth a clear, measurable, and uniform standard that will be easily understood by the contractor and more easily enforced by OFCCP. In addition, the proposed rule requires that the contractor ensure that its use of information and communication technology is accessible to applicants and employees with disabilities. The contractor is required to review its technological processes annually, make any necessary changes and include a description of its review and any modifications made in its affirmative action program.

Further, the proposed revisions mandate certain specific steps that the contractor must take, at a minimum, in the review of its personnel processes. These specific steps are those currently set forth in Appendix C to the regulation. Appendix C currently suggests that the contractor: (1) Identify the vacancies and training programs for which applicants and employees with disabilities are considered; (2) provide a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describe the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs. Previously, these steps were recommended as an appropriate set of procedures. OFCCP's enforcement efforts have found that many contractors do not follow these recommended steps, and that the documentation contractors maintain of the steps they do take are often not conducive to a meaningful review by the contractor or OFCCP, particularly in the event of employee/applicant complaints. Such a meaningful review has always been the goal of the requirements in paragraph (b), as it ensures that the contractor remains aware of and actively engages in its overall affirmative action obligations toward individuals with disabilities. The proactive approach set forth in the current Appendix C would provide greater transparency between the contractor, its applicants/employees, and OFCCP as to the reasons for the contractor's personnel actions. Requiring that contractors record the specific reasons for their personnel actions and make them available to an

employee or applicant upon request would also aid them in clearly explaining their personnel actions to applicants and employees, which could subsequently reduce the number of complaints filed against contractors. Thus, we propose requiring the contractor to take these steps outlined currently in Appendix C (which are incorporated into paragraph (b) in the proposed rule), and encourage the contractor to undertake any additional appropriate procedures to satisfy its affirmative action obligations.

The proposed paragraph (c) clarifies that all physical and mental job qualification standards must be reviewed and updated, as necessary, on an *annual* basis. As with paragraph (b), the current rule's requirement that the contractor review these standards "periodically" is vague and subject to confusion. OFCCP has concluded that contractors inconsistently interpret what constitutes "periodic" review. The proposed change provides a clear, measurable, and uniform standard.

The proposed paragraph (c)(1) adds language requiring the contractor to document the results of its annual review of physical and mental job qualification standards. The regulation has long required this review to ensure that job qualification standards that tend to screen out individuals with disabilities are job-related and consistent with business necessity. The proposed change would merely require that the contractor document the review it has already been required to perform. It is anticipated that this documentation will list the physical and mental job qualifications for the job openings during a given AAP year—which should already be available from the contractor's job postings—and provide an explanation as to why each requirement is related to the job to which it corresponds. Documenting this review will ensure that the contractor critically analyzes its job requirements and proactively eliminates those that are not job-related. It will also allow OFCCP to conduct audits and investigations in a more thorough and efficient manner.

Paragraph (c)(3) currently provides that, as a defense to a claim by an individual that certain mental or physical qualifications are not job-related and consistent with business necessity, the contractor may assert that the individual poses a "direct threat" to the health or safety of the individual or others in the workplace. The definition of "direct threat" in these regulations spells out the criteria that the contractor must consider in determining whether a "direct threat" exists. The proposed paragraph (c)(3) would require the

contractor to contemporaneously create a written statement of reasons supporting its belief that a direct threat exists, tracking the criteria set forth in the “direct threat” definition in these regulations, and to maintain the written statement as set forth in the recordkeeping requirement in § 60–741.80. Once again, this is to ensure that the contractor’s “direct threat” analysis—which is already required under these regulations—is well-reasoned and available for review by OFCCP. Finally, for both the proposed documentation requirements in paragraphs (c)(1) and (c)(3), the proposed regulation requires that the contractor treat the created documents as confidential medical records in accordance with § 60–741.23.(d).

Perhaps the most significant substantive changes in the proposed rule address the scope of the contractor’s recruitment efforts and the dissemination of its affirmative action policies described in paragraphs (f) and (g) of this section. While these two paragraphs generally would require that the contractor engage in recruitment and disseminate its policies, the current rule recommends rather than requires the specific methods for carrying out these obligations.

The current paragraph (f) suggests a number of outreach and recruitment efforts that the contractor can undertake in order to increase the employment opportunities for individuals with disabilities. See 41 CFR 60–741.44(f)(1). The proposed paragraph (f) would require that the contractor engage in a minimum number of outreach and recruitment efforts (as described in proposed paragraph (f)(1)). The proposed paragraph (f) also includes a list of additional outreach and recruitment efforts that are suggested (proposed paragraph (f)(2)), a new requirement that the contractor conduct self-assessments of their outreach and recruitment efforts (proposed paragraph (f)(3)), and a clarification of the contractor’s recordkeeping obligation with regard to its outreach and recruitment efforts (proposed paragraph (f)(4)).

Proposed paragraph (f)(1) requires the contractor to promptly list all of its employment opportunities, with limited exceptions, with the nearest Employment One-Stop Career Center. It also requires the contractor to engage in a minimum of three additional outreach and recruitment efforts. First, the contractor is required to enter into linkage agreements and establish ongoing relationships with the local State Vocational Rehabilitation Agency office nearest the contractor’s

establishment, or a local organization listed in the Social Security Administration’s Ticket to Work Employment Network Directory.

Second, the contractor is required to enter into a linkage agreement with at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities. The listed organizations and agencies include: Entities, such as the Employer Assistance and Resource Network (EARN), that are funded by the Department of Labor to provide recruitment or training services for individuals with disabilities. EARN provides employers with free consulting services and resources to support the recruitment and hiring of individuals with disabilities; the nearest Employment One-Stop Career Center, established under the Workforce Investment Act to provide a full range of job seeker assistance under one roof; the nearest Department of Veterans Affairs Regional Offices, which, in part, provide services to disabled veterans; local disability groups, organizations or Centers for Independent Living that provide services to individuals with disabilities; placement or career offices of educational institutions; and private recruitment sources, such as professional organizations or employment placement services.

Third, proposed paragraph (f)(1) also requires that the contractor consult the Employer Resources section of the National Resource Directory, a partnership and online collaboration among the Departments of Labor, Defense, and Veterans Affairs. New contractors and subcontractors often inquire about how they can find qualified individuals with disabilities to comply with their AAP obligations. The National Resource Directory is a leading government Web site that provides prospective employers of disabled veterans access to veterans’ service organizations, existing job banks, and other resources at the national, state and local levels. Finally, proposed paragraph (f)(1) requires that the contractor send written notification of company policy related to affirmative action efforts to its subcontractors, including subcontracting vendors and suppliers in order to request appropriate action on their parts and to publicize the contractor’s commitment to affirmative action on behalf of individuals with disabilities. While the proposed regulations would not require that the contractor send written notification to vendors and suppliers who are not subcontractors as defined by these regulations, such disclosure remains an encouraged activity, just as

it is under the current regulation. See 41 CFR 60–741.44(f)(6).

We believe that the required linkage agreements we propose in paragraph (f)(1) will greatly facilitate the contractor’s efforts to attract qualified applicants with disabilities. We encourage comments from stakeholders regarding this proposal, particularly if stakeholders have information on recruitment sources not included in this proposal that might increase employment of individuals with disabilities.

In paragraph (f)(2) of the proposed rule, we list a number of outreach and recruitment efforts that are suggested measures for increasing employment opportunities for individuals with disabilities. The efforts listed in proposed paragraph (f)(2) are very similar to the efforts that are suggested in paragraphs (f)(1) through (f)(7) of the current rule. This includes: (1) Holding briefing sessions with representatives from recruiting resources; (2) incorporating efforts to locate individuals with disabilities into recruitment activities at educational institutions; (3) participating in work-study programs for students, trainees, or interns with disabilities; (4) making available individuals with disabilities for participation in career days, youth motivation programs, and related activities in their communities; (5) any other positive steps the contractor deems necessary to attract qualified individuals with disabilities, including contacts with any local disability-related organizations; and (6) considering applicants who are known individuals with disabilities for all available positions when the position applied for is unavailable.

Paragraph (f)(3) of the proposed rule requires the contractor, on an annual basis, to review the outreach and recruitment efforts it has undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities, and document its review. Contractors that do not proactively monitor their outreach and recruitment efforts often lose opportunities to consider and hire qualified individuals with disabilities. This requirement will allow the contractor to look at its measurable accomplishments and reconsider unproductive methods. We believe requiring this review on an annual basis strikes the proper balance by ensuring that adjustments to recruitment efforts are made on a timely basis if needed, while also ensuring that the contractor has enough data on existing recruitment

efforts to be able to determine if adjustments need to be made.

We recognize that the “effectiveness” of an outreach or recruitment effort is not easily defined, and may include a number of factors that are unique to a particular contractor establishment. Generally speaking, a review of the efficacy of a contractor’s efforts should include the number of candidates with disabilities that each effort identifies. Recognizing that other unique and intangible characteristics may contribute to the assessment of the “effectiveness” of a given effort, the proposed regulation allows the contractor some flexibility in making this assessment. However, the proposed regulation would require that the contractor consider the numbers of individuals with disabilities who were referrals, applicants, and hires for the current year and two previous years as criteria in evaluating its efforts, and document all other criteria that it uses to assess the effectiveness of its efforts, so that OFCCP compliance officers are able to understand clearly the rationale behind the contractor’s self-assessment. The contractor’s conclusion as to the effectiveness of its outreach must be reasonable as determined by OFCCP in light of these regulations. The primary indicator of effectiveness is whether qualified individuals with disabilities have been hired. Further, should the contractor determine that its efforts were not effective, the proposed rule requires the contractor to identify and implement one or more of the alternative efforts listed in proposed paragraphs (f)(1) and (f)(2) in order to fulfill its obligations. The general purpose of this self-assessment is to ensure that the contractor thinks critically about its recruitment and outreach efforts, and modifies its efforts as needed to ensure that its obligations are being met.

Paragraph (f)(4) of the proposed rule requires that the contractor document its linkage agreements and the activities it undertakes in order to comply with paragraph (f), and retain these documents for a period of five (5) years. This requirement will enable the contractor and OFCCP to more effectively review recruitment and outreach efforts undertaken to ensure that the affirmative action obligations of paragraph (f) are satisfied.

Paragraph (g) of this section requires that the contractor develop internal procedures to communicate to its employees its obligation to engage in affirmative action efforts. The current paragraph (g)(2) contains several suggested means by which the contractor may accomplish this. The

proposed rule mandates that the contractor include its affirmative action policy in its policy manual and discuss the policy in orientation and management training programs. In addition, if the contractor is party to a collective bargaining agreement, then the proposed rule requires the contractor to meet with union officials and representatives to inform them about the policy and seek their cooperation.

A newly proposed paragraph (g)(3) requires the contractor to document the activities it undertakes in order to comply with paragraph (g), and retain these documents as records subject to the recordkeeping requirements of § 60–741.80. This will allow for a more effective review by the contractor and OFCCP to ensure that the affirmative action obligations of paragraph (g) are being met.

Other suggested elements would remain in the proposed rule at newly created paragraph (g)(4) as suggested additional dissemination efforts the contractor can make. This includes suggesting that the contractor use company newspapers, magazines, annual reports, handbooks, or other media to publicize its affirmative action obligations and feature individuals with disabilities and their accomplishments. See current regulation at 41 CFR 60–741.44(g)(2)(vii) and (viii). The proposed rule also suggests that the contractor discuss its affirmative action policies at meetings with employees and/or supervisors and managers where personnel practices or equal employment opportunity matters are discussed.

Paragraph (h) of this section details the contractor’s responsibilities in designing and implementing an audit and reporting system for its affirmative action program, including the specific computations and comparisons that are part of the audit. The proposed regulations add a new paragraph (h)(1)(vi) requiring the contractor to document the actions taken to comply with paragraphs (h)(1)(i)–(v), and maintain such documents as records subject to the recordkeeping requirements of § 60–741.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The only substantive proposed change in paragraph (i) (Responsibility for implementation) requires that the identity of the officials responsible for a contractor’s affirmative action activities must appear on all internal and external communications regarding the contractor’s affirmative action program.

In the current regulation, this disclosure is only suggested. Requiring this disclosure will increase transparency, making it clear to applicants, employees, OFCCP, and other interested parties, which individual(s) is responsible for the implementation of the contractor’s affirmative action program.

Paragraph (j) of the current rule requires that the contractor train those employees who implement the personnel decisions pursuant to its affirmative action program. The proposed regulation specifies the topics that must be included in the contractor’s training: The business and societal benefits of employing individuals with disabilities; appropriate sensitivity toward recruits, applicants, and employees with disabilities; and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. Training employees on these issues will facilitate a greater understanding of the purpose of the affirmative action plan among the contractor’s decision makers, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of individuals with disabilities.⁷ The proposed regulation also requires that the contractor record which of its personnel receive this training, the dates they receive it, and the person(s) who administers the training, and maintain these records, along with all written or electronic training materials used, in accordance with the recordkeeping requirements of § 60–741.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The proposed regulation adds a new paragraph (k) that requires the contractor to maintain several quantitative measurements and comparisons regarding individuals with disabilities who have been referred by state employment services, have applied for positions with the contractor, and/or have been hired by the contractor. The impetus behind this new section is that, as stated in the discussion of § 60–741.44(a), no structured data regarding

⁷ Contractors needing assistance in developing their training will find resources available on the OFCCP Web site and/or may request free technical assistance from the nearest OFCCP field office. In addition, the Department of Labor’s Office of Disability Employment Policy (ODEP) provides extensive resources and technical assistance for employers on its Web site, <http://www.dol.gov/odep>.

the number of individuals with disabilities who are referred for, or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting candidates with disabilities. The proposed regulations provide for the collection of referral data as well as applicant and hire data (see § 60–741.42(a)). Accordingly, proposed paragraph (k) requires that the contractor document and update annually the following calculations: (1) For referral data, the total number of referrals from applicable employment service delivery systems and from groups and organizations with which the contractor has a linkage agreement; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known to be individuals with disabilities, and the “applicant ratio” of known applicants with disabilities to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known individuals with disabilities hired, and the “hiring ratio” of hires with known disabilities to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled. These basic measurements will provide the contractor and OFCCP with important information that does not currently exist. This will aid the contractor in evaluating and tailoring its recruitment and other affirmative action strategies.

We seek comment on the amount of time it will take contractors to develop the computations and comparisons required in this proposed paragraph, however, OFCCP does not think these requirements will present an onerous burden to contractors. Although the measurements specific to disability are new requirements of this proposed regulation, the non-disability-specific data, such as the total number of applicants, the total number of job openings, and the number of jobs filled is information that contractors are already required to maintain pursuant to Executive Order 11246 and Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended.

OFCCP is also considering adding a reporting requirement, and invites public comment on this option. Under this proposal, contractors would be

required to provide OFCCP with a report containing the measurements and computations required by proposed paragraph (k), and including the percentage of applicants, new hires, and total workforce for each EEO–1 category. The report would be provided to OFCCP on an annual basis, regardless of whether the contractor has been selected for a compliance evaluation.

Section 60–741.45 Reasonable Accommodation Procedures

Current § 60–741.45 entitled “Sheltered workshops” has been revised and moved to § 60–741.48, and is discussed later in the preamble.

This proposed section is new. It requires the contractor to develop and implement written procedures for processing requests for reasonable accommodation. We believe that the development and implementation of written procedures for processing requests for reasonable accommodation will assist the contractor in consistently satisfying its reasonable accommodation obligation by serving as a “blueprint” for the prompt handling of reasonable accommodation requests. The maintenance and dissemination of such procedures will also ensure that applicants and employees know how to request a reasonable accommodation, who is responsible for handling such a request, and the maximum amount of time within which the contractor must complete the processing of such a request.

Proposed paragraph (a) requires that any contractor that is obligated to develop an affirmative action program also develop and implement written reasonable accommodation procedures. It also encourages any contractor that is not required to develop an affirmative action program to consider adopting and implementing written reasonable accommodation procedures to assist it in meeting its nondiscrimination obligations under section 503. Proposed paragraph (a)(1) requires that the reasonable accommodation procedures be included in the section 503 affirmative action program and be developed and implemented in conformance with section 503 and its implementing regulations in this part.

Proposed paragraph (a)(2) states that the minimum elements that the contractor shall include or address in its reasonable accommodation procedures are described in paragraph (d). The purpose of including these elements is to ensure that applicants and employees know how to request a reasonable accommodation and the steps that will be taken by the contractor to process requests for accommodation; to ensure

that supervisors and managers know what to do should they receive a request; and to ensure that all accommodation requests are processed swiftly and within established timeframes.

Proposed paragraph (b) requires the contractor to designate an official to be responsible for the implementation of the reasonable accommodation procedures. This official may be the same official responsible for the implementation of the contractor’s affirmative action program, and shall have the authority, resources, support, and access to top management necessary to effectively implement the reasonable accommodation procedures.

Proposed paragraph (c) requires the contractor to disseminate its reasonable accommodation procedures to all employees. Notice of the reasonable accommodation procedures may be provided by inclusion in an employee handbook that is distributed to all employees and/or by email or electronic posting on a company Web page where work-related notices are ordinarily posted. Employees who work off-site shall be provided with notice of the reasonable accommodation procedures in the same manner that notice of other work-related matters is ordinarily provided to such employees. Proposed paragraph (c)(2) requires the contractor to inform all applicants of the reasonable accommodation procedures regarding the application process. Reasonable accommodation procedures regarding the application process is further addressed in proposed paragraph (d)(2)(iii).

Proposed paragraph (d) acknowledges that the specific requirements of a contractor’s reasonable accommodation procedures may vary depending upon the size, structure, and resources of the contractor. However, paragraph (d) lists specific elements that shall be included in every contractor’s reasonable accommodation procedures. These elements are:

(1) *Responsible official contact information.* The proposed rule requires inclusion of the name, title/office, and contact information of the official designated as responsible for implementation of the reasonable accommodation procedures pursuant to paragraph (b), and notes that this information should be updated when changes occur.

(2) *Requests for reasonable accommodation.* The proposed rule requires that the contractor’s reasonable accommodation procedures state that a request for accommodation may be either oral or written, and may be made

by an applicant, employee, or a third party on his or her behalf.

Proposed paragraph (d)(2)(i) requires that the contractor's reasonable accommodation procedures address instances of a recurring need for an accommodation, such as a sign language interpreter for a hearing impaired employee, and provides that an individual needing such an accommodation will not be required to repeatedly submit or renew his or her request for accommodation each time it is needed. In the absence of a reasonable belief that the individual's recurring need for the accommodation has changed, requiring the repeated submission of a request for the same accommodation could be considered harassment on the basis of disability in violation of this part.

Proposed paragraph (d)(2)(ii) requires the contractor to identify to whom a request for reasonable accommodation may be submitted. At a minimum, an employee in need of accommodation must be able to submit a request to any supervisor or management official in his or her chain of command, or to the official responsible for the implementation of the contractor's reasonable accommodation procedures.

Proposed paragraph (d)(2)(iii) requires that the contractor's procedures ensure that all applicants, including those using the contractor's online or other electronic application system, are made aware of the contractor's reasonable accommodation obligation, and are invited to request reasonable accommodation to enable their full participation in the application process. The contractor's procedures also must provide all applicants with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation. With regard to applicants, the contractor's procedures must provide that reasonable accommodation requests are processed expeditiously, using timeframes tailored to the application process.

(3) *Written confirmation of receipt of a request.* The proposed rule requires that written confirmation of the contractor's receipt of an accommodation request be provided to each accommodation requester, by letter or email. The written confirmation shall include the date the accommodation request was received and be signed by the authorized decision maker or his or her designee.

(4) *Timeframe for processing requests of reasonable accommodations.* The proposed rule requires that the contractor's procedures indicate that requests for accommodation will be

processed as expeditiously as possible. The rule permits the contractor to set its own timeframes for completing the processing of requests, within certain parameters. Specifically, the proposed rule requires that the timeframe for processing requests shall not be longer than 5 to 10 business days if no supporting medical documentation is needed. If medical documentation is needed, or if special equipment must be ordered, the timeframe, excepting extenuating circumstances, shall not exceed 30 calendar days. Proposed paragraph (d)(4)(i) requires the contractor to provide written notice to the requester when the processing of their accommodation request will not be completed within the established timeframes. The notice shall include the reason(s) for any delay, project a date for processing completion, and be duly signed and dated.

(5) *Description of process.* The proposed rule requires that the reasonable accommodation procedures contain a description of the steps the contractor will take when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request. If specific information must be provided to the contractor in order to obtain a reasonable accommodation, the description shall identify this information. For example, the contractor's procedures may require that the contractor be informed of the existence of a disability, the disability-related limitation(s) or workplace barrier(s) that needs to be accommodated, and, if known, the desired reasonable accommodation before providing a reasonable accommodation. The description shall also indicate that the contractor may initiate an interactive process with the accommodation requester if the need for accommodation is not obvious, or if additional information is needed in order to provide the accommodation.

(6) *Supporting medical documentation.* The proposed rule requires that the contractor's procedures provide an explanation of the circumstances under which medical documentation may be requested and reviewed before a reasonable accommodation is provided. Paragraph (d)(6)(i) requires that the procedures explain that any request for medical documentation must be limited to documentation of the individual's disability and functional limitations for which reasonable accommodation is sought. Proposed paragraph (d)(6)(ii) requires that the procedures contain a statement that submission of medical

documentation is not required when the disability for which a reasonable accommodation is sought is known or readily observable and the need for accommodation is known or obvious.

(7) *Denial of reasonable accommodation.* The proposed rule requires that any denial or refusal to provide a reasonable accommodation must be provided by the contractor to the accommodation requester in writing. The written denial shall include the basis for the denial and a statement of the requester's right to file a complaint with OFCCP. The written denial shall be signed by the authorized decision maker or his/her designee and dated. The rule further states that if the contractor offers an internal appeal or reconsideration process, the written denial shall inform the requester about this process, and include a clear statement that participation in the internal process does not toll the time for filing a complaint with OFCCP or EEOC.

(8) *Confidentiality.* The proposed rule requires that the contractor's reasonable accommodation procedures indicate that requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor will be treated as a confidential medical record and maintained in a separate medical file, in accordance with section 503.

Proposed paragraph (e) contains a training requirement. The effectiveness of the contractor's reasonable accommodation procedures is dependent upon the contractor's supervisors and managers being trained in their implementation. Contractors would be required to train all supervisors and managers on the accommodation procedures on an annual basis and upon significant changes in policy or procedure. The rule notes that the required training may be provided in conjunction with other required equal employment opportunity or affirmative action training.

Section 60-741.46 Utilization Goals

This section of the proposed rule is new and proposes to establish a single, national utilization goal for individuals with disabilities.⁸ A utilization goal is neither a hiring quota, nor a restrictive hiring ceiling. Rather, it is an equal employment opportunity objective, and

⁸ This provision, as well as all other provisions in subpart C of this part, applies only to those contractors that have 50 or more employees and a contract of \$50,000 or more. See 60-741.40(b).

an important tool for measuring the contractor's progress toward equal employment opportunity and assessing where barriers to equal employment opportunity remain.

The Need for a Goal

Before considering the appropriate methodology for such a goal, OFCCP first considered the option of not having any goal. The current section 503 regulations require affirmative action but lack a goal. This has been the case since their inception in the 1970's. As discussed, below, the intervening years have resulted in little improvement in the unemployment and workforce participation rates of individuals with disabilities. In light of the long-term and intractable nature of the substantial employment disparity between those with and without disabilities, we concluded that process requirements, without a quantifiable means of assessing whether progress toward equal employment opportunity is occurring, are insufficient. We concluded, therefore, that the establishment of a utilization goal for individuals with disabilities is warranted. Though aspirational, establishing a goal would create more accountability within the contractor's organization and might be key to ensuring that the goal is achieved.

Little Government data measuring the unemployment and workforce participation rates of individuals with disabilities exists prior to the 2000 Census. However, illustrative data can be found in the 1989 legislative history of the Americans with Disabilities Act. Explaining the need for inclusion of employment provisions in the then-pending legislation, the Senate reported that individuals with disabilities "experience staggering levels of unemployment." Senate Committee on Labor and Human Resources, S. Rep. No. 101-116, 101st Cong, 1st Sess. (1989) at 9. More specifically, the Senate reported that two-thirds of all disabled Americans of working age were not working at all, even though a large majority of those not working (66%) wanted to work. *Id.* (citing a poll by the Lou Harris company).

Today, more than twenty years later, there continues to be a substantial discrepancy between the workforce participation and unemployment rates of working age⁹ individuals with and without disabilities. According to the U.S. Department of Labor's Bureau of Labor Statistics (BLS), just 21.8% of

working age individuals with certain functional disabilities were in the labor force in 2010, compared with 70.1% of working age individuals without such disabilities. This same data also indicates that the unemployment rate for those with these disabilities was 14.8%, compared with a 9.4% unemployment rate for those without a disability.

Similarly, according to the U.S. Census Bureau's 2009 American Community Survey (the most recent year for which data are available), just 23% of individuals with certain functional disabilities age 16 and over¹⁰ were employed, compared to 65.8% of those 16 and over without such disabilities. The survey also reported that nearly three-quarters of individuals with these disabilities (72.2%) age 16 and over were not in the labor force, compared with just 27.3% of those age 16 and over without such disabilities.

The establishment of a utilization goal for individuals with disabilities is not, by itself, a "cure" for this longstanding problem. We believe, however, that the goal proposed in this section is a vital element that, in conjunction with other requirements of this part, will enable contractors and OFCCP to assess the effectiveness of specific affirmative action efforts, and to identify and address specific workplace barriers to employment.

Methodology for Setting the Utilization Goal

The utilization goal established in this section is derived, in part from the disability data collected as part of the American Community Survey. The American Community Survey (ACS) was designed to replace the census "long form" of the decennial census, last sent out to U.S. households in 2000, to gather information regarding the demographic, socioeconomic and housing characteristics of the nation. Whereas the Census Bureau now only administers a very short survey for the decennial census, a more detailed view of the social and demographic characteristics of the population is provided by the ACS, which collects data from a sample of 3 million residents on a continuing basis.¹¹

The ACS was first launched in 2005, after a decade of testing and

¹⁰ See 2009 American Community Survey, Table S1811, Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status (U.S. Census Bureau).

¹¹ A national sample of approximately 3 million addresses nationwide receives the ACS each year, with a portion of this total receiving the survey each month. For more information on the American Community Survey visit the Census Bureau's ACS Web page at www.census.gov/acs.

development by the Census Bureau. Refinement of the questions designed to characterize disability status has been continuous, with the current set of disability-related questions incorporated into the ACS in 2008. Taken together, the six dichotomous ("yes" or "no") disability-related questions¹² comprise the function-based definition of "disability," used in the ACS and by most of the other major surveys administered by the Federal Statistical System.

The definition of disability used by the ACS, however, is clearly not as broad as that of the Rehabilitation Act and the ADA. For example, since the ACS questions do not say that one should respond without considering mitigating measures (e.g., medication or aids), some individuals with disabilities that are well-controlled by medication (e.g., depression or epilepsy) or in remission might respond to the ACS in a way that leads them not to be coded as "disabled." Likewise, since the ACS questions do not include major bodily functions, an individual who has a disability that substantially limits a major bodily function such as HIV, cancer, or diabetes but does not limit an activity such as hearing, seeing or walking, might respond that he or she does not have a disability on the ACS. Despite its limitations, the ACS is the best source of nationwide disability data available today, and, thus, an appropriate starting place for developing a utilization goal.

In developing the utilization goal proposed in this section, OFCCP considered two general approaches. The first approach OFCCP considered aimed to mirror precisely the goals framework for minorities and women that is used by supply and service (non-construction) contractors subject to Executive Order (EO) 11246. Accordingly, it would require individual contractor establishments to set their own goals for each of their job groups¹³ based on the percentage of

¹² The six questions are: Is this person deaf or does he/she have serious difficulty hearing? Is this person blind or does he/she have serious difficulty seeing even when wearing glasses? Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions? Does this person have serious difficulty walking or climbing stairs? Does this person have difficulty dressing or bathing? Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor's office or shopping? 2009 American Community Survey, Questions 17-19.

¹³ Job groups usually contain one to three jobs each. However, contractors with fewer than 150 employees may use the broader EEO-1 job categories in place of smaller job groups.

⁹ The working age population consists of people between the ages of 16 and 64, excluding those in the military and people who are in institutions.

individuals with disabilities available in the particular recruitment area from which the contractor sought to fill the jobs in the job group. Where there are fewer than expected incumbent disabled employees in a job group given their availability percentage, a contractor would be required to establish a goal for the specific job group that is at least equal to the availability percentage in the job group's recruitment area. See 41 CFR 60-2.12-60-2.16 for a more detailed description of the EO 11246 goals provisions for supply and service contractors.

After careful consideration of the available data and consultation with the U.S. Census Bureau regarding the level of geographic aggregation at which the data could be analyzed, OFCCP became concerned that replicating the supply and service goals framework might not be the most effective approach for the establishment of goals for individuals with disabilities. Supply and service contractors establishing goals for minorities and women typically use the Special EEO Tabulation of census data to assist them. The results of the 2000 decennial census can be tabulated for 472 occupation categories and thousands of geographic areas. However, the ACS disability data, which is based on sampling, cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender based on the decennial census. That is, the confidence intervals on such estimates are large and the estimates are not statistically significant when broken down to the degree of detail required by the supply and service goals framework. Contractors therefore would not be able to use the job groups established under EO 11246 to establish goals for individuals with disabilities, and would often be unable to utilize the geographic recruitment areas established under the Executive Order when determining the availability of individuals with the disabilities (as queried in the ACS). In addition, the Executive Order supply and service goals framework does not include consideration of discouraged workers in computing availability, a factor particularly important in the context of disability, as discussed below.

In light of the difficulties replicating the supply and service goals approach in the context of disability, OFCCP considered other options. For a variety of reasons, OFCCP believes that the establishment of a single, national goal¹⁴ for all jobs in all geographic areas

¹⁴ Disability rates by State for the civilian labor force has a mean of 6.32, median of 6.20, and standard deviation of 1.29. There are only two

is a more viable approach to the establishment of a goal for individuals with disabilities. This approach would also allow for the continued use of the contractor's EO 11246 job groups, and require that those job groups be used to measure the representation of individuals with disabilities in the contractor's workforce.

OFCCP proposes to set a goal for individuals with disabilities, based on the most recent 2009 ACS disability data for the "civilian labor force" and the "civilian population,"¹⁵ first averaged by EEO-1 job category, and then averaged across EEO-1 category totals. Specifically, we use the mean across these EEO-1 groups (5.7%) as a starting point for deriving a range of values upon which we will take comment. 5.7% is OFCCP's estimate of the percentage of the civilian labor force that has a disability as defined by the ACS. However, OFCCP acknowledges that this number does not encompass all individuals with disabilities as defined under the broader definition in section 503 and the ADAAA; therefore, 5.7% should not be construed as an affirmative action goal for individuals with disabilities under these authorities, nor to convey a false sense of precision. Even if the 5.7% represented a complete availability figure for all individuals with disabilities as defined under the ADAAA, we are concerned that such an availability figure does not take into account discouraged workers, or the effects of historical discrimination against individuals with disabilities that has suppressed the representation of such individuals in the workforce. Discouraged workers are those individuals who are not now seeking employment, but who might do so in the absence of discrimination or other employment barriers. There are undoubtedly some individuals with disabilities who, for a variety of reasons, would not seek employment even in the absence of employment barriers. However, given the acute disparity in the workforce participation rates of those with and without disabilities, it is reasonable to assume that at least a

states, Alaska (9.0%) and Oklahoma (9.5%) that are outside the 95% confidence interval of this otherwise almost uniform distribution. This general uniformity is consistent with the use of a single national goal. See Table 15 in *Affirmative Action for People with Disabilities—Volume I: Data Sources and Models*, Economic Systems, Inc. (April 30, 2010) at 55.

¹⁵ The civilian labor force is the sum of people who are employed and those who are unemployed and looking for work. The civilian population is the civilian labor force plus civilians who are not in the labor force, excluding those in institutions.

portion of that gap is due to a lack of equal employment opportunity.

One way one might go about estimating the size of the discouraged worker effect would be to compare the percent of the civilian population with a disability (per the ACS definition) who identified as having an occupation to the percent of the civilian labor force with a disability who identified as having an occupation. Though not currently seeking employment, it might be reasonable to believe that those in the civilian population who identify as having an occupation, but who are currently not in the labor force, remained interested in working should job opportunities become available. Using the 2009 ACS EEO-1 category data, the result of this comparison is 1.7%.¹⁶

Adding this figure to the 5.7% availability figure above, results in 7.4%.¹⁷ OFCCP uses this level, rounded to 7% to avoid implying a false level of precision, as its initial approximation of the availability for employment of individuals with disabilities. Because of the various data limitations and underlying measurement issues discussed above, OFCCP requests comment on using 7% as its utilization goal as well as on a range of values between 4% and 10%. The lower and upper bounds of this range are designed to take into account the variability across the EEO-1 categories, the potential for geographic variation in availability, and whether or not a discouraged worker effect should be taken into account.

OFCCP also takes comment on whether there might be other approaches for setting a utilization goal, particularly approaches to setting ranges that recognize that in some geographic areas and some occupations, there may be fewer people with disabilities. OFCCP requests comment on whether and, if so, how to take into account discouraged workers in assessing the availability of workers with disabilities. OFCCP is also very interested in public comment on whether there are empirically-based approaches that recognize that there are many more people who have disabilities as characterized by the ADAAA than the ACS and that there is likely a discouraged worker effect.

¹⁶ This number was derived from an updated 2009 version of Table 24 in *Affirmative Action for People with Disabilities—Volume I: Data Sources and Models*, Economic Systems, Inc. (April 30, 2010) at 64. The original table uses ACS data from 2008.

¹⁷ As it is derived from ACS data, the 1.7% is also a limited number that does not fully encompass all individuals with disabilities as defined in section 503 and the ADA.

OFCCP recognizes that including a discouraged worker component in the establishment of a proposed goal is a new approach. We therefore invite public comment on the methodology used to calculate the discouraged worker effect, and on the application of the discouraged worker effect in the goal-setting context.

OFCCP believes that a single-goal approach will serve the equal opportunity and affirmative action objectives of the Rehabilitation Act and this part better than the supply and service approach of EO 11246. It will allow contractors to use their existing job groups and not require the use of multiple geographic availability comparisons as would the supply and service goals approach. OFCCP invites public comment on the impact of this proposal on contractors. In particular, we invite small businesses with current federal prime contracts or subcontracts, or those interested in future prime or subcontract work with the federal government, to identify any impacts unique to small businesses and to propose potential alternatives to alleviate the difficulties identified.

Section-by-Section Analysis

Paragraph (a) of the proposed rule states that the utilization goal for employment of individuals with disabilities is 7% for each job group in the contractor's workforce.

Proposed paragraph (b) states that the purpose of this section is to establish a benchmark against which contractors can measure the representation of individuals with disabilities within each of their job groups. The goal serves as an equal opportunity objective that should be attainable by complying with all of the affirmative action requirements of part 60-741.

Proposed paragraph (c) provides that the Director of OFCCP will periodically review and update, as appropriate, the utilization goal established in proposed paragraph (a) of this section.

Proposed paragraph (d) sets out the steps that the contractor must use to determine whether it has met the utilization goal. Proposed paragraph (d)(1) states that the purpose of a utilization analysis is to evaluate the representation of individuals with disabilities in each job group within a contractor's workforce and compare the rate against the utilization goal set forth in § 60-741.46(a).

Proposed paragraph (d)(2) clarifies that in evaluating the representation of individuals with disabilities in its workforce, the contractor must use the same job groups it established pursuant to EO 11246, either as prescribed in 41

CFR 60-2.12, or in accordance with 41 CFR part 60-4. OFCCP considered permitting contractors to compare the individuals with disabilities in its workforce as a whole with the proposed 7% goal. We decided against this approach because of its potential for masking discrimination and segregation. For example, a contractor that has segregated all of its employees with disabilities into one or two low-paying jobs might be able to conceal this discrimination and satisfy the 7% goal if only a single whole-workforce comparison were required by this section. Nevertheless, as we are mindful of the burden required of contractors in making the job group-by-job group comparisons required in this proposed paragraph, we are mandating the use of the EO 11246 job groups for this purpose, by eliminating the need for any geographic assessment, and by providing the single goal to which each job group will be compared.

Proposed paragraph (d)(3) requires that the contractor evaluate its utilization of individuals with disabilities in each job group annually.

When the percentage of employees with disabilities in one or more job groups is less than the utilization goal proposed in paragraph (a) of this section, proposed paragraph (e) requires that the contractor must develop and execute "action-oriented programs" designed to correct any identified problems and attain the established goal. Such programs may include additional efforts from among those listed in §§ 60-741.44(f)(1) and (f)(2) and/or any other appropriate actions.

Paragraph (f) of the proposed rule clarifies that a contractor's determination that it has not attained the utilization goal in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part. It is also important to point out that such a determination, whether by OFCCP or the contractor, will not impede or prevent OFCCP from finding that one or more unlawful discriminatory practices caused the contractor's failure to meet the utilization goal. In such a circumstance, OFCCP will take appropriate enforcement measures.

Lastly, proposed paragraph (g) states that the goal proposed in this section shall not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities.

Sub-Goal Option

OFCCP is considering the option of including within the 7% goal for individuals with disabilities a sub-goal of 2% for individuals with certain

particularly severe disabilities. The federal government currently monitors internal hiring with respect to a list of particularly severe disabilities, referred to as "targeted disabilities" in furtherance of its affirmative action obligation to employ and advance in employment individuals with disabilities in the Government pursuant to section 501 of the Rehabilitation Act. The list of targeted disabilities is defined in the President's July 2010 Executive Order "Increasing Federal Employment of Individuals with Disabilities," as set forth in Standard Form 256 (SF256). Subject to updating, SF 256 currently identifies the following as "targeted/severe disabilities:" Total deafness, blindness, missing extremities (hand, foot, arm or leg), partial paralysis, complete paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism.¹⁸ If such a sub-goal is adopted, the Director would similarly prescribe the language and manner in which contractors should invite applicants and employees to self-identify. This will ensure consistency in all pre-offer invitations that are made, and will reassure applicants that the request is routine and executed pursuant to obligations created by OFCCP.

OFCCP invites comments from the public on this sub-goal option. If OFCCP adopts the use of a sub-goal, it will be included in the Final Rule.¹⁹ We are seeking public input and comment on both the concept of a sub-goal, as well as the disabilities to be included within that sub-goal. Comments on the questions below will be especially helpful.

1. What data or research is available that informs the design of an appropriate sub-goal including, but not limited to which severe disabilities should be covered by the sub-goal, and the appropriate sub-goal target?

2. How does a sub-goal further the overall objective of increasing employment opportunities for individuals with severe disabilities?

3. What data or research is available on the need for a sub-goal for specific disabilities?

¹⁸ See OPM Form SF 256 available on-line at http://www.opm.gov/forms/pdf_fill/sf256.pdf.

¹⁹ The adoption of the sub-goal option would also necessitate modification to the mandated text of the invitation to voluntarily self-identify as an individual with a disability in proposed section 60-741.42 to include voluntary self-identification as an individual with a disability encompassed in the sub-goal. In addition, the adoption of the sub-goal option would necessitate modification to the data collection analysis in proposed section 60-741.44(k) to provide for the collection and computation of data related to "targeted disabilities."

Section 60–741.47 Providing Priority Consideration in Employment

This proposed new section encourages the contractor to voluntarily develop and implement programs that provide priority consideration to individuals with disabilities in recruitment and/or hiring. While the current regulations do not prohibit contractors from establishing such priority consideration programs, they fail to highlight the availability to contractors of this important affirmative action tool. In contrast, the proposed regulation would ensure the contractor's awareness of, and encourage the use of, voluntary strategies that may be used in their efforts to take affirmative action and increase employment opportunities for individuals with disabilities.

Providing priority consideration for individuals with disabilities does not violate the ADA or section 503, as it would not result in discrimination on the basis of disability. Furthermore, as explicitly stated in the ADA Amendments Act, neither the ADA nor the Rehabilitation Act provides "the basis for a claim * * * that [an] individual was subject to discrimination because of the individual's lack of disability." ADAAA at sec. 6(a)(1)(g). Thus, it is permissible for contractors to provide priority consideration to individuals with disabilities when selecting candidates for training, hiring, and/or promotion.

Proposed paragraph (a) encourages contractors to voluntarily develop and implement priority consideration programs as part of their affirmative action efforts. Examples of priority consideration programs are provided, but the contractor may, and is encouraged to, develop other types of programs that enhance their affirmative action efforts on behalf of individuals with disabilities.

Proposed paragraph (a)(1) requires that a contractor that elects to utilize a priority consideration program shall include a description of the program in its affirmative action program. An annual report describing the contractor's activities and outcomes pursuant to the priority consideration program should also be included in the contractor's affirmative action program. In proposed paragraph (a)(2) we note that contractors may use information garnered from the applicant and employee self-identification required by proposed § 60–741.42 to identify individuals who may be eligible to participate in the contractor's priority consideration program.

Proposed paragraph (b) prohibits contractors from using a priority

consideration program to segregate individuals with disabilities, or to limit or restrict the employment opportunities of any individual with a disability. Similarly, in paragraph (c), the proposed rule prohibits discrimination against any individual with a disability who has received priority consideration with respect to any term, condition or benefit of employment. Such discrimination would constitute discrimination on the basis of disability prohibited by section 503 and this part.

Section 60–741.48 Sheltered Workshops

This section has been relocated from § 60–741.45 of the existing regulation. The proposed rule replaces the phrase "qualified disabled individuals" in the first sentence of the current regulation with "qualified individuals with disabilities." This revised phrasing reflects the terminology used elsewhere in this part, but does not alter the meaning of the section.

Subpart D—General Enforcement and Complaint Procedures

Section 60–741.60 Compliance Evaluations

This section details the form and scope of the compliance evaluations of the contractor's affirmative action programs conducted by OFCCP. The proposed rule contains several changes to this section.

First, the proposed rule modifies the wording of paragraph (a) to more clearly state the section 503 obligation of the contractor to employ, "advance in employment and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices." Next, the proposal adds a sentence to paragraph (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP. This new language merely clarifies OFCCP's long-standing policy that, in order to fully investigate and understand the scope of potential violations, OFCCP may need to examine information after the date of the scheduling letter in order to determine, for instance, if violations are continuing or have been remedied. The language does not represent a change in policy or new contractor obligations.

Third, the proposed rule contains a change to the nature of document production under paragraph (a)(3). This paragraph, which specifies a "compliance check" as an investigative procedure OFCCP can use to monitor a contractor's recordkeeping, currently states that the contractor may provide

relevant documents either on-site or off-site "at the contractor's option." The proposed regulation would eliminate this quoted clause and provide that OFCCP may request the documents to be provided either on-site or off-site.

The proposed rule also contains a minor change to the scope of "focused reviews" set forth in paragraph (a)(4). Focused reviews allow OFCCP to target one or more components of a contractor's organization or employment practices, rather than conducting a more comprehensive compliance review of an entire organization. Currently, the regulations provide that these focused reviews are "on-site," meaning they must take place at the contractor's place of business. The increased use of electronic records that are easily accessible from multiple locations affords compliance officers greater flexibility in conducting focused reviews. Therefore, we propose to delete the word "on-site" from this section, which will allow compliance officers to conduct reviews of relevant materials at any appropriate location.

Finally, the proposed rule contains a new paragraph (c) which details a new procedure for pre-award compliance evaluations under section 503. This proposed procedure is based on the pre-award compliance procedures contained in the Executive Order regulations (*see* § 60–1.20(d)).

Section 60–741.61 Complaint Procedures

This section outlines the manner in which applicants or employees who are individuals with disabilities may file complaints alleging violations of section 503 or its regulations.

The proposed rule revises the text of existing paragraph (c)(2) for clarity. The paragraph provides, in pertinent part, that when a written complaint is filed by an authorized representative on behalf of another person, the complaint need not identify the name of the person on whose behalf it is filed. However, the person's identity and contact information must be provided to OFCCP, which will then verify with the person their authorization of the complaint. The proposed rule's revision of this paragraph does not represent a change in policy or practice, but is merely a clarification of the language used to express the existing policy.

The proposed rule also revises the citation to the Americans with Disabilities Act to reflect its recent amendment by the ADA Amendments Act, and replaces the term "Deputy Assistant Secretary" with the term "Director" in paragraphs (b), (f)(1), (f)(2)

and (f)(3), for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.62 Conciliation Agreements

This section describes OFCCP's use of conciliation agreements as a means to correct violations and/or deficiencies by contractors. The proposed rule renumbers the current rule as paragraph (a) and adds a new paragraph (b) to § 60–741.62. Proposed paragraph (b) specifically permits the establishment of benchmarks in conciliation agreements as one possible form of remedial action. Benchmarks may be established for outreach, recruitment, hiring, or other employment activities of the contractor, as appropriate, and will provide a quantifiable method for measuring the contractor's progress toward correcting identified violations and/or deficiencies.

Section 60–741.64 Show Cause Notice

This section describes how OFCCP notifies a contractor when OFCCP believes the contractor has violated section 503 or its regulations. The proposed rule replaces the term "Deputy Assistant Secretary" in this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.65 Enforcement Proceedings

This section describes the procedures for formal enforcement proceedings against a contractor in the event OFCCP finds a violation of section 503 or its regulations that has not been corrected. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a)(2) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2. In paragraph (b)(2), the proposed rule replaces the term "Associate Solicitor for Civil Rights" with "Associate Solicitor for Civil Rights and Labor-Management" to reflect the reorganization of the Office of the Solicitor.

Section 60–741.66 Sanctions and Penalties

This section discusses the types of sanctions and penalties that may be assessed against a contractor if it is found to have violated the act or this part. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.67 Notification of Agencies

This section provides that agency heads will be notified if any contractors are debarred. The proposed rule replaces the term "Deputy Assistant Secretary" in this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.68 Reinstatement of Ineligible Contractors

This section outlines the process by which a contractor that has been debarred may apply for reinstatement. The proposed rule adds a sentence at the end of paragraph (a) to clarify that the Director shall issue a written decision on a contractor's request for reinstatement. The proposed rule also replaces the term "Deputy Assistant Secretary" in paragraphs (a) and (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2. The term "Associate Solicitor for Civil Rights" in proposed paragraph (b) of this section is replaced with "Associate Solicitor for Civil Rights and Labor-Management" to reflect the reorganization of the Office of the Solicitor.

Section 60–741.69 Intimidation and Interference

This section forbids the contractor from retaliating against individuals who have engaged in or may engage in certain specified protected activities, and describes the contractor's affirmative obligations in preventing retaliation. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2. In proposed paragraphs (a)(2) and (a)(3) the term "disabled persons" is replaced with the term "individuals with disabilities" to reflect the terminology used elsewhere in this part.

Subpart E—Ancillary Matters

Section 60–741.80 Recordkeeping

This section describes the recordkeeping requirements that apply to the contractor under section 503, and the consequences for the failure to preserve records in accordance with these requirements. The proposed regulation adds a sentence at the end of paragraph (a) of this section clarifying that the newly proposed recordkeeping requirements set forth in proposed § 60–741.44(f)(4) (linkage agreements and other outreach and recruiting efforts), and in proposed § 60–741.44(k) (collection of referral, applicant and hire data) must be maintained for five (5)

years, for the reasons set forth in the discussion of those sections, *supra*.

Section 60–741.81 Access to Records

This section describes a contractor's obligations to permit access to OFCCP during compliance evaluations and complaint investigations. The proposed rule adds some language clarifying the contractor's obligations, particularly in light of the increased use of electronically stored records. First, the proposed rule adds a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of an evaluation or investigation. This change reflects the increasing use of electronic records from multiple locations, and accordingly gives OFCCP greater flexibility in conducting its evaluations and investigations.

Second, the proposed rule would require that the contractor specify to OFCCP all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the format(s) selected by OFCCP. This change is proposed in light of numerous instances in which OFCCP has conducted extensive review and analysis of a contractor's records only to find subsequently that the records were available in more readily accessible formats. Specifying the variety of available formats upon request, and providing records to OFCCP in the format(s) it selects, will facilitate a more efficient investigation process.

Lastly, the proposed rule revises the citation to the Americans with Disabilities Act to reflect its recent amendment by the ADA Amendments Act.

Section 60–741.83 Rulings and Interpretations

In the current regulation, this section establishes that rulings and interpretations of section 503 will be made by the Deputy Assistant Secretary of OFCCP. The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.84 Effective Date

This section of the current regulations established an effective date of August 29, 1996. The proposed rule deletes this section as it is now obsolete.

Appendix A to Part 60–741—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The proposed rule includes several changes to Appendix A that would mandate activities that previously were only suggested. These changes primarily

reflect proposed revisions to § 60–741.42 and the newly proposed § 60–741.45 regarding the contractor's adoption of written affirmative action procedures, *supra*, that would alter the contractor's responsibilities.

First, in paragraph 1, to conform more closely to the terminology used in the ADA, as amended, and this part, the term "otherwise qualified" would be changed to "qualified." The proposed rule also adds a reference to the new requirement, in proposed § 60–741.45, that the contractor develop, implement and disseminate procedures for processing requests for reasonable accommodation.

Next, in paragraph 2, the proposed rule changes the appendix to reflect the revision to § 60–741.42, requiring the contractor to invite applicants to voluntarily self-identify as an individual with a disability at both the pre-offer and post-offer stages of the selection process. The proposed rule also notes that the mandated invitation to self-identify also invites individuals with disabilities to request any reasonable accommodation that they might need.

In the last sentence of paragraph 4, the proposed rule requires, rather than merely encourages, that in the event an accommodation constitutes an undue hardship for the contractor, the individual with a disability in need of the accommodation be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor. In the fifth sentence of paragraph 5, we propose changing the language to require a contractor to seek the advice of the individual with a disability in providing reasonable accommodation.

Lastly, the proposed rule changes the reference to "§ 60–741.2(v)" in paragraphs 5 and 8 of the appendix to "§ 60–741.2(t)." This is to reflect the revised alphabetical structure of the definitions section in the proposed rule, as discussed in § 60–741.2, *supra*. The references to various information resources in paragraph 5 is also updated, and the term "TDD" is replaced with "TTY" to reflect current technology.

Appendix B to Part 60–741—Sample Invitation To Self-Identify

As previously noted, this proposal eliminates Appendix B of the current regulations. Appendix B provides a sample invitation to self-identify as an individual with a disability to assist the contractor in developing its own pre-employment self-identification invitation. Since § 60–741.42 of the proposed regulation mandates the text

that the contractor must use when inviting applicants and employees to voluntarily self-identify, there is no longer a need for a sample invitation.

Appendix C to Part 60–741—Review of Personnel Processes

The proposed rule eliminates Appendix C and moves its content, with some edits, to proposed § 60–741.44(b). See the Section-by-Section Analysis of § 60–741.44, *supra*, for further discussion.

Appendix D to Part 60–741—Guidelines Regarding Positions Engaged in Carrying Out a Contract

The proposed rule eliminates Appendix D as it applied only to the contractor's employment decisions and practices occurring prior to October 29, 1992.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

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 (while recognizing that some benefits and costs are difficult to quantify), reducing costs, harmonizing rules, and promoting flexibility. This rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The Need for the Regulation

The guiding principle and overall benefit of this proposed regulation is to reduce barriers to equal employment opportunity for individuals with disabilities and alleviate the inefficiencies in the job market that these barriers create. This includes facilitating the process of connecting job seekers with disabilities with contractor employers looking to hire, and helping individuals with disabilities succeed once they are employed. As we have stated previously in this NPRM, the framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement have remained largely

unchanged since the section 503 implementing rules were first published. While DOL is not aware of any existing data that show the number or percentage of Federal contractor employees with disabilities, for the U.S. at large both the percentage of people with disabilities not in the labor force and the unemployment rate of people with disabilities have increased. These individuals possess valuable skills that are highly sought after in the job market. However, they face substantial obstacles in finding employment. Addressing these barriers is a high priority of the current Administration and, as discussed in the background section, has been the focus of a number of Federal efforts.

To help determine how we could assist individuals with disabilities in their search for employment, and facilitate contractors' satisfaction of affirmative action obligations designed to employ more individuals with disabilities, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with the public to determine how we could help to carry out the overall goal of increasing the employment opportunities for qualified individuals with disabilities with Federal contractors. From the information we received, we pinpointed specific changes that could be made to the implementing regulations of section 503 that would help increase employment opportunities for individuals with disabilities.

The changes set forth in this proposal create four broad categories of benefits. First and foremost, the proposed changes will help to connect job-seeking individuals with disabilities with contractors looking to hire. Many commenters suggested that mandatory listing be a part of the outreach requirements. Therefore, as an initial matter, the proposal adds a mandatory job listing requirement and requires contractors to provide additional, regularly updated information to employment service delivery systems to ensure their job openings are listed accurately. This will help to ensure that individuals with disabilities can easily learn about all available jobs with federal contractors in their state. The proposal also helps to ensure that contractors can find qualified applicants with disabilities by requiring contractors to engage in recruitment efforts and enter into linkage agreements with several disability-focused employment sources (many of which are specifically listed by OFCCP in the proposed rule), while allowing contractors flexibility to determine the sources that work best for them.

Second, many of the proposed changes ensure that the contractor understands and effectively communicates its affirmative action obligations to its workforce and the other entities with which it does business. While bringing job-seeking individuals with disabilities and employers together is an important first step, it is equally important that the contractors, their employees, and applicants with disabilities understand the protections and benefits of section 503. Accordingly, the proposed rule seeks to promote this clear communication in several ways, including:

- Requiring dissemination of the contractor's affirmative action policy in its internal policy manual and discussing the policy at employee orientation and training programs. These steps will facilitate a greater understanding of the purpose of the affirmative action policies among the contractor's employees, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of individuals with disabilities;
- Providing notices of rights under section 503 in accessible formats for those working offsite (*i.e.*, electronically-accessible postings) as well as those with visual impairments, so that all parties understand their respective rights and obligations under the law;
- Requiring contractors to review their personnel processes on an annual basis, and to document personnel actions taken with regard to individuals with disabilities to provide greater transparency between the contractor, its applicants/employees, and OFCCP as to the reasons for the contractor's personnel actions;
- Requiring the contractor to meet with and/or otherwise send notification of its AAP obligations to third parties with which it does business, such as union officials and subcontractors.

Third, the proposed rule provides increased mechanisms by which the contractor can assess its affirmative action efforts. Until now, contractors had few objective measures they could use to determine how the time and money they were spending on AAP compliance could be used most effectively. To that end, the proposed rule requires contractors to collect data by which contractors may more accurately assess their efforts. This includes collecting data on referrals and applicants so contractors know how many individuals with disabilities they are reaching. Contractors will be able to use this information to objectively

measure their recruitment efforts and determine which ones are most fruitful in attracting qualified disabled candidates.

Finally, the proposed rule's changes to the manner in which OFCCP conducts its compliance reviews will benefit both individuals with disabilities and contractors. These changes include a greater emphasis on identifying electronic data that OFCCP can review, greater flexibility in where reviews take place, and a new procedure allowing for a pre-award compliance review. The emphasis on using electronic data and flexibility will allow OFCCP to complete reviews far more efficiently.

Discussion of Impacts

OFCCP has separately determined the costs of compliance with those requirements of section 503 that fall under the scope of the Paperwork Reduction Act. *See* Analysis of Paperwork Reduction Act burden, *infra*. Additional costs outside the scope of the PRA, stemming from new or revised obligations in the proposed rule, are discussed below.

To determine the number of impacted contractor establishments, OFCCP reviewed the FY 2009 EEO-1 data on contractor establishments²⁰ with 50 or more employees, resulting in a total of 87,013 contractor establishments. This was then combined with an additional 10,518 establishments identified through a cross-check of other contractor databases for a total of 97,531 establishments. Lastly, since contractors subject to the written affirmative action plan (AAP) requirement must develop AAPs for all of their facilities, even those with fewer than 50 employees, we added in those 73,744 contractor establishments with fewer than 50 employees for a final total of 171,275 employed contractor establishments.

60-741.44(f)(3): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require the contractor to review the effectiveness of its outreach and recruitment efforts on an annual basis. The general purpose of this self-assessment is to ensure that the contractor thinks critically about its recruitment and outreach efforts, and requiring the assessment will allow contractors to look at their measurable accomplishments, maintain methods

²⁰ A single firm, business or "entity" may have multiple establishments or facilities. Thus, the number of contractor establishments or facilities is significantly greater than the number of parent contractor firms, or companies. Unless otherwise noted, the NPRM uses the term "contractor" to refer to establishments.

that are successful in recruiting individuals with disabilities, and reconsider unproductive methods. OFCCP expects that contractors will conduct this assessment in conjunction with the correlating assessments required under EO11246 and VEVRAA. We estimate that adding the proposed section 503 review to these other similar assessments will take approximately 30 minutes. OFCCP further estimates that 1% of the 171,275 federal contractor establishments are first-time contractors during an abbreviated AAP year, and therefore would not be able to complete an annual outreach and recruitment effort. $171,275 \times .99 = 169,562$. $169,562 \times 30 \text{ mins}/60 \text{ mins} = 84,781 \text{ hours}$.

60-741.44(g): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require the contractor to discuss the policy at employee orientation and training programs. This paragraph requires only that contractors discuss their affirmative action policies at any employee orientation or management training programs that they already provide. Consequently, the burden imposed by this requirement will be minimal. Specifically, OFCCP estimates that contractors will have a one-time preparation burden of 20 minutes and a recurring burden of 5 minutes for actually presenting the additional information at the training session. Therefore, the average burden per contractor establishment would be the following: $171,275 \times 20/60 = 57,092 \text{ hours}$; $171,275 \times 5/60 = 14,273 \text{ hours}$.

60-741.44(j): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would also require specific training for those involved in recruitment, screening, hiring, promotion, and related processes to ensure that they are making such decisions in compliance with section 503. Training on these issues will benefit contractors and individuals with disabilities by facilitating a greater understanding of the purpose of the affirmative action plan among decision makers for the contractor, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of individuals with disabilities. Furthermore, proactive training on these issues holds the real promise of reducing the number of section 503 violations. While this is a new requirement under section 503, the cost/benefit and PRA elements of this burden have already been partially incorporated under the equivalent provision in the Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance

Act, published at 76 FR 23358 (April 26, 2011). As the same person will likely be identified to provide/coordinate the training for both section 503 and 4212 regulations, the only additional section 503-related burden would result from incorporating into the training those elements unique to section 503, such as the proposed reasonable accommodation procedures requirement. OFCCP estimates contractors would have a one-time development burden of 40 minutes and a recurring presentation burden of 20 minutes. Therefore, the burden costs for section 503 are calculated as follows: $171,275 \times 40/60 = 114,183$; $171,275 \times 20/60 = 57,092$.

60-741.45: As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require contractors to develop and implement specific reasonable accommodation procedures to be included as part of their written affirmative action plan. This requirement benefits both contractors and the disability community by ensuring consistent handling of requests for reasonable accommodation made by both applicants and employees. Although a contractor's obligation to consider/make reasonable accommodation upon request is covered under the ADA, as amended, and the implementing regulations published by EEOC, the requirement to develop a specific implementation plan is exclusive to OFCCP and new to the section 503 regulations and therefore is addressed herein. The documentation-related elements of this provision are covered under the PRA analysis, *infra*. Furthermore, based on comments received in response to the ANPRM (75 FR 43116 (July 23, 2010)) as well as information provided by ODEP, OFCCP estimates that approximately 10% of the contractor community will already have similar procedures in place and, therefore, the only burden will be the inclusion of those procedures in the AAP. Therefore, OFCCP estimates that initial development of procedures will affect 154,148 contractors and that these contractors will spend 2 hours on average to develop their procedures. The average non-PRA burden per contractor establishment would be the following: $171,275 \times .90 = 154,148$. $154,148 \times 2 \text{ hours} = 308,296 \text{ hours}$.

The estimated annualized cost to respondent contractors is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for management, professional, and related occupations as \$50.07 per hour

and administrative support as \$22.67 per hour. OFCCP estimates that 52% percent of the burden hours will be management, professional, and related occupations and 48% percent will be administrative support. We have calculated the total one-time, recurring, and overall estimated costs for the combined burden hours from the obligations described above (i.e., those that do not fall under the scope of the Paperwork Reduction Act) as follows:

One Time Costs:

Mgmt. Prof.: $171,275 \text{ contractors} \times 3 \text{ hours} \times .52 \times \$50.07/\text{hr} =$
\$13,378,153

Adm. Supp.: $171,275 \text{ contractors} \times 3 \text{ hours} \times .48 \times \$22.67/\text{hr} =$
\$5,591,238

Total annualized cost estimate =
\$18,969,391

Estimated annual average cost per establishment is: $\$18,969,391/171,275 = \111

Recurring Costs:

Mgmt. Prof.: $171,275 \text{ contractors} \times 0.9 \text{ hours} \times .52 \times \$50.07/\text{hr} =$
\$4,013,446

Adm. Supp.: $171,275 \text{ contractors} \times 0.9 \text{ hours} \times .48 \times \$22.67/\text{hr} =$
\$1,677,371

Total annualized cost estimate =
\$5,690,817

Estimated annual average cost per establishment is: $\$5,690,817/171,275 = \33

Therefore, the overall total cost (both one-time and recurring) per establishment would be: $\$18,969,391 + \$5,690,817 = \$24,660,208/171,275 = \144 .

Summary of Costs

While OFCCP seeks comments in this proposed rule regarding the effects of the rule and its cost estimates, OFCCP preliminarily estimates the overall annualized total cost for complying with those provisions that fall outside the Paperwork Reduction Act to be \$24,660,208 (or \$144 per contractor establishment). OFCCP estimates the total annual cost for complying with those provisions that fall under the Paperwork Reduction Act to be \$54,583,152 (or \$319 per contractor establishment). See Paperwork Reduction Act discussion, *infra*. OFCCP further estimates the total annual operations and maintenance costs from this rule to be \$1,820,859 (or \$11 per contractor establishment). OFCCP estimates the total annual cost of the proposed rule is approximately \$81,064,219 (or \$473 per contractor establishment).

It should be noted however, that the above totals include both one-time (first

year only) and recurring costs as follows:

- *One-Time Costs*: OFCCP estimates the total one-time cost for complying with those provisions that fall outside the Paperwork Reduction Act to be \$18,969,391 (or \$111 per contractor establishment). OFCCP estimates the total one-time cost for complying with those provisions that fall under the Paperwork Reduction Act to be \$10,543,855 (or \$62 per contractor establishment). See Paperwork Reduction Act discussion, *infra*. OFCCP further estimates the total one-time operations and maintenance costs from this rule to be \$0. Therefore, OFCCP estimates the total one-time cost of the proposed rule to be approximately \$29,513,246 (or \$172 per contractor establishment).

- *Recurring Costs*: OFCCP estimates the total recurring cost for complying with those provisions that fall outside the Paperwork Reduction Act to be \$5,690,817 (or \$33 per contractor establishment). OFCCP estimates the total recurring cost for complying with those provisions that fall under the Paperwork Reduction Act to be \$44,049,297 (or \$257 per contractor establishment). See Paperwork Reduction Act discussion, *infra*. OFCCP further estimates the total recurring operations and maintenance costs from this rule to be \$1,820,859 (or \$11 per contractor establishment). OFCCP estimates the total recurring cost of the proposed rule to be approximately \$51,550,973 (or \$301 per contractor establishment).

Summary of Benefits

In short, OFCCP believes that the societal benefits discussed in the Section-by-Section Analysis and in this section outweigh the societal costs of the proposed rule. These benefits include improved outreach to and recruitment of individuals with disabilities, the establishment of clear procedures to ensure that needed reasonable accommodations can be swiftly requested and promptly provided, and ensuring that those in the workplace understand their rights and respective obligations under section 503. In addition, the proposed rule will provide contractors with much needed tools, such as increased data, to measure the success of their affirmative action efforts and to determine whether refinements are needed to improve equal employment opportunity for individuals with disabilities.

Generally, these benefits will result from proposed requirements that will improve human resource functions. Improving such functions will

contribute to job market efficiencies and other efficiency gains. Employers subject to policies that improve human resource functions tend to provide more training and contribute to a more qualified workforce.²¹ A policy that utilizes an outreach program resulting in more recruits raises the competition for job openings and thus raises efficiency by employing the highest qualified individuals. The proposed rule would reduce barriers to equal employment opportunity for individuals with disabilities and alleviate the inefficiencies in the job market that these barriers create. Moreover, as more individuals with disabilities are hired, employers naturally create mentors and expand networking opportunities for such individuals. Mentors are essential not only for recruiting purposes but also as a retention strategy, because they provide a support mechanism for new hires. Retention is a direct benefit to employers because employers will not lose their initial investment in recruiting and training individuals with disabilities. Without improved affirmative action policies, individuals with disabilities may have fewer job opportunities. Because individuals with disabilities are almost three times more likely to live in poverty than other groups,²² improving employment opportunities will only help such individuals move out of poverty or working poor status. OFCCP invites comments from stakeholders on the cost/benefit analysis included in this section.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, requires agencies promulgating proposed rules to consider the impact they are likely to have on small entities. More specifically, the RFA requires agencies to “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations.” If a proposed rule is expected to have a “significant economic impact on a substantial number of small entities,” the agency must prepare an initial regulatory flexibility analysis (IRFA). However, if a proposed rule is not expected to have a significant economic impact on a substantial number of small entities, the

agency may so certify, and need not perform an IRFA.

Based on the analysis below, in which OFCCP has estimated the impact on small entities that are covered contractors of complying with the requirements contained in this proposed rule, OFCCP certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. OFCCP invites comments on its analysis, and requests that commenters provide any relevant additional data they may have.

In making this certification, OFCCP first determined the approximate number of small entities that have covered federal contracts and whether this is a substantial number of such entities. OFCCP’s review of the FY 2009 EEO–1 data revealed that 20,490 small entities (not establishments) with between 50 and 500 employees had federal contracts subject to the obligations of the proposed regulation.²³ The most recent data provided by the Small Business Administration Office of Advocacy reports that there are 27.4 million small entities in the United States.²⁴ See Firm Size Data at www.sba.gov/advo/research/data.html#us. The proposed rule will therefore impact less than 1%²⁵ of small entities nationwide.²⁶ Although the RFA does not specifically define “substantial number,” OFCCP has determined that an impact on less than 1% of small entities does not constitute a substantial number. See *A Guide for Government Agencies: How To Comply With the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business Administration at 20 (“The interpretation of the term “substantial number” is not likely to be five small firms in an industry with more than 1,000 firms.”).

Having determined that a substantial number of small entities will not be impacted by the proposed rule, we need not assess whether the impact on those small entities affected would be economically significant. Nevertheless, we also conclude that the \$331 approximate cost of this rule per contractor establishment is not likely to have a significant economic impact on

the small entities subject to the proposed rule.

We note, too, the significant benefits of the proposed rule to both individuals with disabilities and federal contractors. These benefits are discussed extensively in the Section-by-Section Analysis section of this NPRM and in the discussion of this proposal’s conformity with Executive Order 12866. Generally, the proposed rule will benefit individuals with disabilities and the contractor by providing effective mechanisms, such as mandatory job listing requirements and linkage agreements with disability-related organizations that facilitate the ability of contractors to connect with qualified applicants with disabilities, who, with a workforce participation rate of just 21.8%, represent a largely untapped potential labor source. Tapping into this underutilized pool can help stabilize an aging and shrinking workforce, thereby maintaining (or even increasing) productivity. Increasing employment opportunities for individuals with disabilities will also likely result in a decrease in the number of individuals receiving Social Security Disability Insurance (SSDI) benefits and disability payments through contractor-sponsored insurance plans, as individuals with disabilities join the workforce and discontinue such payments. This will increase the incomes of these newly working individuals with disabilities, which, in turn, will likely increase the demand for goods and services, including those provided by small businesses.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department’s collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number. The public is not required to

²¹ Holzer, H. and Neumark, D., “Assessing Affirmative Action,” *Journal of Economic Literature*, Vol. XXXVII (2000).

²² World Institute on Disability, <http://www.wid.org/about-wid>.

²³ The EEO–1 data base separately identifies contractor entities and the facilities that comprise them. The FPDS–NG data base, by contrast, identifies contractor facilities, but does not identify the larger entities of which they are a part.

²⁴ This figure includes 6,049,655 employer firms and 21,351,320 non-employer firms.

²⁵ 20490 is .075% of 27.4 million and .34% of 6,049,655.

²⁶ Since federal contracts are not limited to specific industries, it is appropriate to assess the impact of this proposed rule on small entities nationwide.

respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. Until any final regulations become effective and OFCCP publishes a notice announcing OMB's approval of these proposed information collections, they will not take effect.

The information collection requirements contained in the existing section 503 regulations, with the exception of those related to complaint procedures, are currently approved under OMB Control No. 1250-0003 (Recordkeeping and Reporting Requirements-Supply and Service) and OMB Control No. 1250-0001 (Construction Recordkeeping and Reporting). The information collection requirements contained in the existing complaint procedures regulation are currently approved under OMB Control No. 1250-0002.

The proposed rule contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. This proposal includes several new requirements shown below with their respective burden estimates.

The information collections discussed below relate to Federal contractor and subcontractor responsibilities under section 503 as amended and its implementing regulations at 41 CFR 60-741. OFCCP invites the public to comment on whether each of the proposed collections of information:

- (1) Is necessary to the proper performance of the agency, including whether the information will have practical utility;
- (2) Estimates the projected burden, including the methodology and assumptions used, accurately; and
- (3) Is structured to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g. permitting electronic submission of responses).

Where estimates are provided or assumptions are described, contractors and other members of the public are encouraged to provide data they have that could help OFCCP refine the estimates of amount of time needed to fulfill specific requirements.

• 60-741.5

□ Contractor must provide Braille, large print, or other versions of the EEO poster so that visually impaired individuals may read the notice themselves (§4 of EO Clause). Contractors may obtain copies of the joint EEOC-OFCCP EEO poster in accessible formats, upon request, from EEOC.

■ OFCCP used Bureau of Labor Statistics (BLS) Data, the "Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted" for November 2010. This data shows 5,784,000 individuals with disabilities in the civilian labor force out of a total of 147,914,000. Since approximately 22% of the US workforce works for a federal contractor, OFCCP estimates that 22% of 5,784,000, or 1,272,480 disabled individuals, works for a federal contractor. Data on visually impaired employed individuals is not separated out from the total of employed individuals with disabilities, therefore, OFCCP estimates 10% of disabled individuals are visually impaired, for an estimated total of 127,248 visually impaired individuals working for federal contractors. This total would include disabled veterans who should not be counted twice. OFCCP had previously estimated 6,200 visually impaired disabled veterans. OFCCP has counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The calculations were as follows:
The FY 2008 VETS-100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request and accommodation, therefore the estimate is 10% of the SDVs may request an accommodation due to visual impairment.

Therefore, $127,248 - 6200 = 121,048$. OFCCP estimates that it takes 5 minutes for the contractor to receive the accommodation request and 5 minutes for recordkeeping and providing the notice in an alternative format, for a total of 10 minutes per request. Therefore, $10 \text{ minutes} \times 121,048 = 1,210,480 \text{ minutes}/60 = 20,175 \text{ total Federal contractor hours}$.

□ Posting of notice for employees working at a site other than the contractor's physical location. (§4 of EO Clause). OFCCP has counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the offsite notification for both section 4212 and section 503 occurs in the same EEO poster, which contractors may obtain, upon request, from OFCCP or EEOC. Therefore, no additional contractor burden exists for this paragraph.

□ Contractor must state in all solicitations and advertisements that it is an EEO employer of individuals with disabilities (§7 of EO Clause). (This is a third party disclosure burden.) The contractor already must state that it is an EEO employer due to many state and federal requirements, including the Executive Order 11246 EEO requirements. This revision would simply

require the contractor to add individuals with disabilities to the list of categories of protected EEO groups. OFCCP estimates 5 minutes additional burden per contractor, or $171,275 \times 5 \text{ minute}/60 = 14,273 \text{ total third party disclosure hours}$.

□ Contractor must include the entire clause verbatim in Federal contracts (d). (This is a third party disclosure burden.) OFCCP estimates 5 minutes per contractor to download and incorporate the required text, or $171,275 \times 5 \text{ minute}/60 = 14,273 \text{ total third party disclosure hours}$.

• 60-741.41

□ Contractor must inform employees who do not work at contractor's physical establishment regarding the availability of AAP for review. OFCCP has counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the offsite notification for both section 4212 and section 503 would occur in the same notice. Therefore, no additional contractor burden exists for this paragraph.

• 60-741.42

□ .42(a) and (b)—The proposed regulation would require that the contractor invite all applicants to self-identify as a protected individual with a disability prior to and after an offer of employment. OFCCP provides mandatory text for the invitations to self-identify so that the contractor will not have the burden of creating these invitations. We estimate it will take 5 minutes for the contractor to download and save the prescribed text of the invitations to self-identify into a separate document that it can store electronically, include it in electronic applications or print out to include in a hard copy application package as needed. Therefore, $5 \text{ minute} \times 171,275 \text{ establishments}/60 = 14,273 \text{ total Federal contractor hours adapting the self-identification forms for contractor use}$.

OFCCP estimates that protected individuals with disabilities will have zero burden complying with this proposal in the course of completing their applications for employment with a contractor and checking the appropriate boxes in the self-identification forms. No written documentation is required and the applicant need only check a box on a form already provided.

□ .42(c)—The proposed regulation would require that the contractor annually re-invite all employees to self-identify as an individual with a disability. We estimate it will take 5 minutes for the contractor to download and save the prescribed text of the invitation to self-identify into a separate document that it can store electronically and transmit to its employees. $5 \text{ minute} \times 171,275 \text{ establishments}/60 = 14,273 \text{ total Federal contractor hours adapting the self-identification forms for contractor use}$.

OFCCP estimates that protected employees with disabilities will have zero burden complying with this proposal in the course of completing the annual resurvey. No

written documentation is required as the employee need only check a box on a form already provided.

□ .42(e)—Contractor must maintain self-identification data. The contractor was required to maintain some self-identification data prior to this proposed regulation. Reviewing the entire data collection process required under .42, we estimate that simply maintaining the completed self-identification forms, whether collected under (a), (b), or (c) of this section, will take 1 minute per contractor, or $171,275 \text{ minutes}/60 = 2,855$ total Federal contractor hours. No additional contractor burden has been calculated for processing/analyzing the self-identification results as the only requirement under this paragraph is that the contractor maintains the data to provide to OFCCP upon request. Any burden imposed by the actual use/analysis of the data would be covered under the appropriate analysis sections such as .44(h) (Audit and Reporting System) and/or .44(k) (Data Collection Analysis).

• 60-741.44

□ .44(a) Policy statement. Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired persons may read the policy themselves. OFCCP used Bureau of Labor Statistics (BLS) Data, the “Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted” for November 2010. This data shows 5,784,000 individuals with disabilities in the civilian labor force out of a total of 147,914,000. Since approximately 22% of the U.S. workforce works for a federal contractor, OFCCP estimates that 22% of 5,784,000 or 1,272,480 disabled individuals works for a federal contractor. Data on visually impaired employed individuals is not separated out from the total of employed individuals with disabilities, therefore, OFCCP estimates 10% of disabled individuals are visually impaired, for an estimated total of 127,248 visually impaired individuals working for federal contractors. This total would include disabled veterans who should not be counted twice. OFCCP previously estimated that there are 6,200 visually impaired disabled veterans in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The calculations were as follows:
The FY 2008 VETS-100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request an accommodation, therefore the estimate is 10% of the SDVs may request an accommodation due to visual impairment.

Therefore, $127,248 - 6200 = 121,048$. OFCCP estimates that it takes 5 minutes for the contractor to receive the accommodation request and 5 minutes for recordkeeping and providing this document in an alternative format, for a total of 10 minutes. Therefore, $10 \text{ minutes} \times 121,048 = 1,210,480 \text{ minutes}/60 \text{ minutes} = 20,175$ total Federal contractor hours complying with this paragraph.

□ .44(b) Review of personnel processes. Contractor must review personnel processes annually, and is required to go through a

specific analysis for doing so which would include: (1) identifying the vacancies and training programs for which applicants and employees with disabilities were considered; (2) providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.

■ The contractor needs to identify vacancies as part of the review. OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the identified vacancies for both section 4212 and section 503 would be identical. Therefore, no additional contractor burden exists for this paragraph.

■ The contractor needs to identify training programs for individuals with disabilities applicants and employees. OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the identified training programs for both section 4212 and section 503 would be identical. Therefore, no additional contractor burden exists for this paragraph.

■ For providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations, OFCCP estimates 30 minutes per contractor per year, or $30 \times 171,275/60 = 85,638$ total Federal contractor hours.

■ For describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs. OFCCP used Bureau of Labor Statistics (BLS) Data, the “Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted” for November 2010. This data shows 5,784,000 individuals with disabilities in the civilian labor force out of a total of 147,914,000. Since approximately 22% of the U.S. workforce works for a federal contractor, OFCCP estimates that 22% of 5,784,000 or 1,272,480 disabled individuals works for a federal contractor. This total would include disabled veterans who should not be counted twice. OFCCP previously estimated that there are 62,000 disabled veterans in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The calculations were as follows:

The FY 2008 VETS-100 report identified 62,000 Special Disabled Veterans (SDVs). Thus, there will be a total of 62,000 inquiries. Therefore, $1,272,480 - 62,000 = 1,210,480$. OFCCP estimates 10% of referrals leading to

an accommodation request, and 30 minutes per accommodation request. Therefore, the hours would be $30 \times 1,210,480 \times 10\%/60 = 60,524$ total Federal contractor hours.

□ .44(c)(1) Physical and mental qualifications. Contractor must review physical and mental job qualifications annually to ensure that they are job-related and consistent with business necessity. This provision exists in the current section 503 regulations (as well as the current section 4212 regulations); the only difference is that the proposed regulations call for the review to occur “annually,” rather than “periodically.” Therefore, all existing or previous contractors should have experience in performing the required review.

OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor’s review of physical and mental qualifications would occur only once for both section 4212 and section 503. Therefore, no additional contractor burden exists for this paragraph.

□ .44(c) Direct Threat. Contractor must document the results of its annual review of physical and mental job qualifications, and document any employment action taken on the basis of a believed “direct threat.”

OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor’s documentation of its review of physical and mental qualifications would occur only once for both section 4212 and section 503. Therefore, no additional contractor burden exists for this paragraph.

• 60-741.44(f)

□ .44(f)(1)(i) Contractor must list job openings with the nearest Employment One-Stop Career Center.

OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would list the same job openings to comply with the section 4212 NPRM as it would for the section 503 NPRM. Therefore, no additional contractor burden exists for this paragraph.

□ .44(f)(1)(ii) Linkages. Contractor must enter into linkage agreements with:

■ Either a local State Vocational Rehabilitation Service Agency (SVRA) or an organization in the Ticket to Work Employment Network Directory;

■ One of the following organizations: (1) the Employer Assistance and Resource Network (EARN); (2) the nearest Employment One-Stop Career Center, established under the Workforce Investment Act; (3) the nearest Department of Veterans Affairs Regional Offices; (4) any other local disability group, organization or Centers for Independent Living that provide services to individuals with disabilities; (5) placement or career offices of educational institutions; or (6) private recruitment sources; and

■ One or more of the disabled veterans’ service organizations listed in the Employer

Resources section of the National Resource Directory (NRD), or any future service that replaces or complements it, other than the agencies listed above.

Therefore, each contractor must enter into 3 linkage agreements. Linkage Agreement means an agreement describing the connection between the contractor and appropriate recruitment and/or training sources. To assist contractors, OFCCP will provide a sample linkage agreement on its Web page.

The contractor has a variety of ways to establish section 503 linkage agreements. The contractor can receive nationwide assistance from OFCCP Compliance Officers (COs) to help it establish the 3 linkage agreements. Secondly, during the normal course of an OFCCP compliance review, the CO will contact all appropriate linkage resources to obtain specific information on availability of applicants and potential trainees for positions in the contractor's labor force. If possible, the CO will arrange a meeting between the recruitment/referral resources and the contractor.

Where a resource indicates that it can provide applicants or trainees, the CO will include the contractor's commitment to utilize the linkage source along with other actions in the Letter of Commitment or in the Conciliation Agreement.

OFCCP estimates that 30% of the contractors, or 51,383, will accept OFCCP assistance to help set up their linkage agreements and it will take these contractors on average 1.5 hours to establish one new linkage agreement. For the remaining 119,892 contractors, OFCCP estimates that establishing a new linkage agreement will take an average of 5.5 hours. Beyond the first year after this rule becomes effective, it is estimated the contractor will set up one new agreement a year. It is estimated that maintaining a single, ongoing linkage agreement will take an average of 15 minutes for all 171,275 contractors.

For those contractors setting up linkage agreements on their own, OFCCP estimates that on average, a contractor will establish one new agreement and maintain two ongoing agreements in a given year, which would be 5.5 hours + .25 hours + .25 hours = 6 hours. If the contractor establishes linkage agreements with OFCCP's assistance, we estimate an annual average of 1.5 hours per contractor to establish a new linkage agreement and .25 hours to maintain each of the two ongoing linkage agreements, which would be 1.5 hours + .25 hours + .25 hours = 2 hours. Therefore, 6 hours \times 119,892 contractors = 719,352 hours, and 51,383 \times 2 hours = 102,766 hours, for a total of 822,118 Federal contractor hours.

However, NRD is also used as a resource in the section 4212 NPRM, and those burden hours are already counted under the section 4212 NPRM and should not be counted twice. To adjust the section 503 burden hours accordingly, OFCCP reduced the total of 822,118 hours by one-third, for a total of 550,819 Federal contractor hours.

□ .44(f)(1)(iii) Contractor must send written notification of company AAP policies to subcontractors, vendors, and suppliers. (This is a third party disclosure burden)

As the same provision exists in the section 4212 NPRM, and the creation of the notice is already counted there, OFCCP estimates that it would take the contractor an additional 5 minutes to revise the section 4212 notification to include the required reference to section 503. Therefore, 5 minutes per contractor \times 171,275/60 minutes = 14,273 total third party disclosure hours.

□ .44(f)(3) Assessment. Contractor must document its review of outreach and recruitment efforts.

OFCCP estimates that documenting this required review of outreach and recruitment will take 10 minutes annually. OFCCP further estimates that 1% of federal contractors are first-time contractors during an abbreviated AAP year, therefore would not be able to complete an annual outreach and recruitment effort. Therefore, reducing the 171,275 by 1% (1,713 contractors) = 169,562 contractors, at 10 minutes each/60 = 28,260 total Federal contractor hours. The burden and cost of actually conducting the review does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866.

□ .44(f)(4). Linkage Recordkeeping. Contractor must document (f)(1) linkage agreements and maintain these documents for 5 years.

Since establishing a linkage agreement includes its documentation, there is no additional burden for this paragraph beyond that already set forth in the burden calculation for .44(f)(1)(i) and (ii).

□ .44(g). Internal dissemination of policy. Contractor is required to undertake efforts to internally disseminate its EEO policy, including, if the contractor is a party to a collective bargaining agreement, meeting with union officials to inform them of the policy. (This is a third party disclosure burden):

The January 22, 2010, Bureau of Labor Statistics News Release states that in 2009, union membership was 12.3%. In its most recent Supply and Service (S&S) PRA Justification, OFCCP estimated 30 minutes composition time for union notification. For this NPRM, we estimate 15 minutes preparation for this new notification requirement, as contractors party to a collective bargaining agreement already have a notification template in place. We also estimate 15 additional minutes to meet with union officials as they are already required to meet with union officials in S&S. The total third party disclosure burden hours would be 171,275 \times 12.3% \times 30 minutes/60 = 10,533 total Federal contractor hours.

The burden and cost of other requirements of .44(g) does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866.

□ .44(g)(3). Contractor must document internal dissemination efforts in (g), retain these documents as employment records subject to the recordkeeping requirements of § 60–741.80.

Since much of the documentation will occur during the preparation time, OFCCP estimates an additional 5 minutes of recordkeeping per contractor, which means 5 minutes \times 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours.

□ .44(h). Audit and reporting system. Contractor must document the actions taken to comply with audit and reporting system, and retain these documents as employment records subject to the recordkeeping requirements of § 60–741.80.

Since much of the documentation will occur when conducting the annual audit, OFCCP estimates an additional 5 minutes recordkeeping burden per contractor, which means 5 minutes \times 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours.

□ .44(i) Responsibility for implementation. Contractor must identify responsible official for AAP on all internal and external communications regarding the AAP. OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The same person will likely be identified for both section 503 and section 4212 regulations. Therefore, no additional contractor burden exists for this paragraph.

□ .44(j) Training. Contractor must document its training efforts as set forth by the regulation, and maintain these documents as required by 60–741.80.

OFCCP estimates that much of the documentation will be included in the training preparation time. OFCCP estimates an additional 5 minutes recordkeeping time per contractor, which means 5 minutes \times 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours. The burden and cost of the actual training preparation and conducting the training does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866 and the Regulatory Flexibility Act.

□ .44(k) Data collection analysis. Contractor must make several quantitative tabulations and comparisons using referral data, applicant data, hiring data, and the number of job openings; must maintain these records for 5 years:

(1) The number of referrals of individuals with disabilities that the contractor received from applicable employment service delivery system(s), such as State Vocational Rehabilitation Service Agencies and Employment One-Stop Career Centers;

(2) The number of referrals of individuals with disabilities that the contractor received from other entities, groups or organizations with which the contractor has a linkage agreement pursuant to paragraph (f)(1)(i);

(3) The number of applicants who self-identified as individuals with disabilities pursuant to § 60–741.42(a), or who are otherwise known to be individuals with disabilities;

(4) The total number of job openings and total number of jobs filled;

(5) The ratio of jobs filled to job openings;

(6) The total number of applicants for all jobs;

(7) The ratio of applicants with disabilities to all applicants ("applicant ratio");

(8) The number of applicants with disabilities hired;

(9) The total number of applicants hired; and

(10) The ratio of individuals with disabilities hired to all hires ("hiring ratio").

The number of hires shall include all employees as defined in § 60–741.2.

The calculations for #4, 5, 6, and 9 are already included in the Executive Order 11246 AAP. Therefore, there is no additional burden for #4, 5, 6, and 9.

The remaining calculations, for #1, 2, 3, 7, 8, and 10, OFCCP estimates at 10 minutes each per contractor, or 60 minutes recordkeeping time per contractor. Therefore, the total burden would be 60 minutes \times 171,275/60 = 171,275 total Federal contractor hours.

• 60–741.45

.45(a) Development and implementation. Contractor must develop and implement procedures for processing reasonable accommodation requests.

OFCCP estimates that much of the documentation will be included in the development and implementation of these procedures. OFCCP estimates an additional 30 minutes recordkeeping time per contractor, which means 30 minutes \times 171,275 = 5,138,250 minutes/60 = 85,638 total Federal contractor hours. The burden and cost of the actual development and implementation does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866 and the Regulatory Flexibility Act. 1

.45(b) Designation of responsibility. Contractor must designate responsible official for implementing reasonable accommodation procedures.

That official should already be in place for current contractors. For 1% first time contractors, 171,275 \times 1% = 1,713 contractors, OFCCP estimates 5 minutes per contractor, or 1,713 \times 5 minutes = 8,565 minutes/60 = 143 total Federal contractor hours.

.45(c) Dissemination of procedures. Contractor must disseminate its reasonable accommodation procedures to employees, including off-site employees, and applicants.

OFCCP estimates that it would take the contractor 15 minutes to post the procedures on its Web site in an accessible format. Therefore, 15 minutes per contractor \times 171,275/60 minutes = 42,819 total Federal contractor hours.

.45(d) Required Elements. A contractor's reasonable accommodation procedures must include specific required elements, including official contact information, processing requests for employees and applicants, timeframes, and a description of these processes. These burden hours are already included in .45(a) Development and Implementation.

.45(e) Training. A contractor must train its managers and supervisors on reasonable accommodation.

OFCCP estimates that much of the documentation will be included in the training preparation time. OFCCP estimates an additional 5 minutes recordkeeping time per contractor, which means 5 minutes \times 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours. The burden and cost of the actual training preparation and conducting the training does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866.

• 60–741.46

Contractor must set a utilization goal of 7%.

Minimum Goal. OFCCP has established a utilization goal of 7% as a benchmark against which the contractor must measure the representation of individuals with disabilities within each job group in its workforce.

Since the goal is provided by OFCCP, OFCCP estimates 5 minutes recordkeeping time per contractor to document the goal requirement, which means 5 minutes \times 171,275/60 = 14,273 total Federal contractor hours.

Comparing incumbency to the goal: The contractor shall compare the percentage of its incumbent employees who are individuals with disabilities with the goal in paragraph (a) of this section on an annual basis. When making this comparison the contractor shall:

(1) Use the job groups it established pursuant to 41 CFR 60–2.12 or part 60–4. Supply and service contractors under OMB Information Collection Request OMB Control No. 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service) have already established job groups so there are no additional hours associated with developing job groups.

(2) Separately state the percentage of individuals with disabilities it employs in each job group. This rule requires contractors to invite all applicants to self-identify as individuals with disabilities prior to employment (.42(a) and (b)). The burden for self-identification is listed at (.42(a) and (b)). Therefore contractors will know whether their applicants are individuals with disabilities. In addition, contractors must annually survey its employees so that any employee may self-identify as an individual with a disability. The burden hours for the survey are at (.42(c)). However, burden hours must be assigned to identifying the percentage of individuals within each job group.

• As this is a new requirement, OFCCP estimates that it will take 60 minutes for contractors to determine whether they have met the goal the first year, and 30 minutes for all subsequent years. Therefore, 60 \times 171,275 Federal contractors/60 minutes = 171,275 hours.; 30 \times 171,275/60 = 85,638 hours.

This task is informed by the results of several other proposed requirements, including the review of the effectiveness of contractors' outreach and recruitment efforts required by section 60–741.44(f)(3) and the review of physical and mental job qualifications required by section 60–741.44(c). The burden and costs associated with these requirements are listed and discussed separately.

Action-oriented programs. When the percentage of individuals with disabilities in one or more job groups is less than the goal established in paragraph (a) of this section, the contractor must develop and execute action-oriented programs designed to correct any identified problems areas. Entering linkage agreements with recruitment sources is considered action-oriented programs. This NPRM already requires contractors to enter into 3 linkage agreements, in order to

increase the number of individuals with disabilities within their workforce. Burden hours have already been given for these programs under section (.44(f)(1)) and will not be duplicated for this action.

• 60–741.60

.60(a)(3)—Contractor must provide documents to OFCCP on-site or off-site at OFCCP's request, not at the contractor's option.

These hours not included in burden as they are excepted under 5 CFR 1320.4(a)(2) (“an administrative action, investigation, or audit involving an agency against specific individuals or entities”).

.60(c)—New procedure for pre-award compliance evaluations.

These hours not included in burden as they are excepted under 5 CFR 1320.4(a)(2) (“an administrative action, investigation, or audit involving an agency against specific individuals or entities”).

• 60–741.80

See new 5 year recordkeeping requirements in sections 741.44(f)(4) and 741.44(k).

No additional burden hours as they are included in the individual calculations above.

• 60–741.81

Contractor must provide off-site access to documents if requested by OFCCP. Such records are never requested except during the course of a specific investigation of a particular contractor.

Consequently, these hours are not included in burden as they are excepted under 5 CFR 1320.4(a)(2) (“an administrative action, investigation, or audit involving an agency against specific individuals or entities”).

Contractor must specify to OFCCP all formats in which its records are available.

These hours not included in burden as they are excepted under 5 CFR 1320.4(a)(2) (“an administrative action, investigation, or audit involving an agency against specific individuals or entities”).

The Department has submitted a copy of the information collections associated with this proposed rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review and approval. In addition to filing comments with OFCCP, interested persons may submit comments about the information collections, including suggestions for reducing their burden, to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street NW., Room 10235, Washington, DC 20503. Attention: Desk Officer for DOL/OFCCP. To ensure proper consideration comments to OMB should reference ICR reference number: [insert the number from ROCIS when OFCCP creates the package]. Upon receiving OMB approval of the new information, the Department will submit non-substantive change requests to OMB Control Numbers 1250–0001 and 1250–0003 in order to remove regulatory citations for any information collected purely under the new collection.

TABLE 1—REPORTING, RECORDKEEPING, AND THIRD PARTY DISCLOSURE BURDEN

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must provide Braille, large print, or other versions of poster so that visually impaired may read the notice themselves (§4 of EO Clause).	60-741.5	.....	.....	10 minutes per accommodation request. Total Hours 20,175.
Contractor must state in all solicitations and advertisements that it is an EEO employer of individuals with disabilities (§7 of EO Clause). [Note: Burden is based on one-time action of adding "individuals with disabilities" to list of protected groups].	60-741.5	5 minutes per contractor. Total third party disclosure burden hours 14,273.		
Contractor must cite to EEO clause in Federal contracts using specific text provided by OFCCP (.5(d)) [Note: Burden is based on one-time action of downloading & saving text provided by OFCCP].	60-741.5	5 minutes per contractor. Total third party disclosure burden hours 14,273.		
Contractor must invite all applicants to self-identify as individuals with disabilities prior to and subsequent to offer of employment (.42(a) and (b)). [Note: Burden is based on one-time cost of downloading OFCCP-prescribed mandatory invitation language].	60-741.42	5 minutes per contractor. Total Hours 14,273.		
Contractor must annually survey its employees so that any employee may self-identify as an individual with a disability (.42(c)). [Note: Burden is based on one-time cost of downloading OFCCP-prescribed mandatory invitation language].	60-741.42	5 minutes per contractor. Total Hours 14,273.		
Contractor must maintain self-identification data (.42(e)).	60-741.42	.....	1 minute per contractor. Total Hours 2,855.	
Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)).	60-741.44	.....	.....	10 minutes per accommodation request. Total Hours 20,175.
Contractor must review personnel processes annually, and is required to go through a specific analysis for doing so which would include: Providing a statement of reasons for rejecting individuals with disabilities describing the nature and type of accommodations for individuals with disabilities (.44(b)).	60-741.44	.....	30 minutes per contractor (statement of reasons). Subtotal Hours 85,638.	30 minutes per accommodation request. Subtotal Hours 60,524, Total Hours 146,162.
Contractor must enter into linkage agreement with nearest SVRA, one of the organizations listed in (f)(1), and an organization listed in the National Resource Directory (.44(f)(1)).	60-741.44	.....	Total Hours 550,819.	
Contractor must send written notification of company AAP policies to subcontractors, vendors, and suppliers (.44(f)(1)(iii)).	60-741.44	.....	5 minutes per contractor. Total third party disclosure burden hours 14,273.	
Contractor must review outreach and recruitment efforts on an annual basis and evaluate their effectiveness; contractor must identify and implement further outreach efforts if existing efforts are found ineffective (.44(f)(3)).	60-741.44	.....	10 minutes per contractor (non first time contractors). Total Hours 28,260.	
If the contractor is a party to a collective bargaining agreement it must meet with union officials to inform them of the policy (.44(g)).	60-741.44	.....	30 minutes per unionized contractor. Total third party disclosure burden hours 10,533.	
Contractor must document internal dissemination efforts in (g) and retain these documents (.44(g)(4)).	60-741.44	.....	5 minutes per contractor. Total Hours 14,273.	
Contractor must document the actions taken to comply with audit and reporting system and retain these documents (.44(h)).	60-741.44	.....	5 minutes per contractor. Total Hours 14,273.	
Contractor must document its training efforts as set forth by the reg, and maintain these documents (.44(j)).	60-741.44	.....	5 minutes per contractor. Total Hours 14,273.	

TABLE 1—REPORTING, RECORDKEEPING, AND THIRD PARTY DISCLOSURE BURDEN—Continued

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must make several quantitative tabulations and comparisons using referral data, applicant data, hiring data, and the number of job openings; and must maintain these records (.44(k)).	60–741.44	.....	60 minutes per contractor. Total Hours 171,275.	
Contractor is required to develop and implement reasonable accommodation procedures (.45(a)).	60–741.45	.....	30 minutes per contractor. Total hours 85,638.	
Contractor must identify responsible official for reasonable accommodation procedures (.45(b)).	60–741.45	5 minutes per first time contractor. Total Hours 143.		
Contractor must disseminate reasonable accommodation procedures (.45(c)).	60–741.45	15 minutes per contractor. Total Hours 42,819.		
Contractor must train managers and supervisors (.45(e)).	60–741.45	.....	5 minutes per contractor. Total Hours 14,273.	
Contractor must set hiring goals (.46)	60–741.46	5 minutes per contractor (initial documentation). Subtotal Hours 14,273. 60 minutes per contractor (first year analysis). Subtotal hours 171,275.	30 minutes per contractor (analysis). Subtotal hours 85,638. Total hours 271,186.	
Total Recordkeeping burden hours	1,425,145			
Total Reporting burden hours.				
Total Third Party burden hours	53,352			
Total all hours	1,478,497			

The estimated annualized cost to respondent contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation

for management, professional, and related occupations as \$50.07 per hour and administrative support as \$22.67 per hour. OFCCP estimates that 52% percent of the burden hours will be management, professional, and related

occupations and 48% percent will be administrative support. We have calculated the total one-time, recurring, and overall estimated annualized costs as follows:

One-Time Costs:	
Mgmt. Prof. 285,602 hours × .52 × \$50.07 =	\$7,436,048
Adm. Supp. 285,602 hours × .48 × \$22.67 =	3,107,807
Operations & Maintenance Cost (see discussion below)	0
Total cost estimate =	10,543,855
Estimated average cost per establishment is: \$10,543,855/171,275 =	
62	
Recurring Costs:	
Mgmt. Prof. 1,192,895 hours × .52 × \$50.07 =	31,058,691
Adm. Supp. 1,192,895 hours × .48 × \$22.67 =	12,980,606
Operations & Maintenance Cost (see discussion below)	1,820,859
Total annualized cost estimate =	45,860,156
Estimated average cost per establishment is: \$ 45,860,156/171,275 =	
268	
Total Costs:	
Mgmt. Prof. 1,478,497 hours × .52 × \$50.07 =	38,494,739
Adm. Supp. 1,478,497 hours × .48 × \$22.67 =	16,088,413
Operations & Maintenance Cost (see discussion below)	1,820,859
Total annualized cost estimate =	56,404,011
Estimated average cost per establishment is: \$56,404,011/171,275 =	
329	

Operations and Maintenance Costs

OFCCP estimates that the contractor will have some operations and maintenance costs in addition to the time burden calculated above associated with this collection.

60-741.5

Contractor must provide the EO poster for review by employees and applicants, including in alternative formats upon request such as Braille, large print, or other versions so that visually impaired individuals may read the notice themselves (§ 4 of EO Clause). OFCCP does not expect the contractor to incur any cost for this element as the poster may be acquired from OFCCP or, in alternative formats from EEOC.

60-741.42

OFCCP estimates that the contractor will have some operations and maintenance cost associated with the invitation to self-identify. The contractors must invite all applicants with the pre- and post-offer invitation, and must also survey its employees annually with an invitation to self-identify. Given the increasingly

widespread use of electronic applications, any contractor that uses such applications would not incur copy costs. However, to account for contractors who may still choose to use paper versions, we are including printing and/or copying costs. Therefore, we estimate 1 page for the pre- and post-offer invitations printed for 60 applicants per year, and 1 page for the employee survey invitation printed for 60 employees per year. We also estimate an average copying cost of .08 cents per page. The estimated total cost to contractors will be: pre- and post-offer— $171,275 \times 1 \times 60 \times \$.08 = \$822,120$; survey— $171,275 \times 1 \times 60 \times \$.08 = \$822,120$; total cost $\$822,120 \times 2 = \$1,644,240$

60-741.44

Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)). OFCCP estimates that the contractor will have some operations and maintenance costs associated with providing the AA policy statement. We estimate that the cost of an alternative

format, such as Braille or audio, to be \$1.00 per contractor. The estimated total cost to contractors will be: $\$1.00 \times 171,275$ federal contractor establishments = \$171,275

60-741.44

Contractor must provide its AAP to OFCCP during a desk audit. Contractor must provide its AAP to OFCCP during a desk audit. In light of the increased use of electronic formats and the proposed requirement, in section 60-741.81, that contractors provide records to OFCCP in electronic format, where available, we estimate that only 30 percent of contractors will be submitting paper copies of their AAPs. Given an average copying cost of \$.08 per page and an average size of an AAP of 7 pages, the estimated total copying cost to contractors will be: $7 \text{ pages} \times \$.08 \times 1,501$ (5,004 FY 2009 Compliance Evaluations—30%) = \$841 In addition, we estimate an average mailing cost of \$3.00 per contractor. The total mailing cost for contractors will be $\$3.00 \times 1,501 = \4503 . The total estimated costs would be $\$841 + \$4503 = \$5,344$

TABLE 3—OPERATIONS AND MAINTENANCE COSTS

Contractor must post EO poster for review by employees and applicants (§4 of EO Clause)	60-741.5	\$0
Contractor must provide Braille, large print, or other versions of EO poster so that visually impaired individuals may read the notice themselves (§4 of EO Clause)	60-741.5	0
Contractor must invite all applicants and employees to self-identify as an individual with a disability (.42(a)(b)(c))	60-741.42	1,644,240
Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired individuals may read the notice themselves (.44(a))	60-741.44	171,275
Copying and mailing costs of AAPs (.44)	60-741.44	\$5,344
Total O&M Costs .....	.....	1,820,859

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Office of Federal Contract Compliance Programs, Department of Labor.

Title: Disclosures and Recordkeeping Under Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities

OMB ICR Reference Number: [Provide from ROCIS].

Affected Public: Business or other for-profit; individuals.

Estimated Number of Annual Responses: 171,275.

Frequency of Response: On occasion.
Estimated Total Annual Burden Hours: 1,464,224.

Estimated Total Annual Burden Cost (Start-up, capital, operations, and maintenance): \$1,820,859.

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 Fairness 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 the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this NPRM does not include any Federal mandate that may result in excess of \$100 million in expenditures

by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This proposed 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.”

Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

This NPRM does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The NPRM would not 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.

Executive Order 13045 (Protection of Children)

This NPRM would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this NPRM in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and DOL NEPA procedures, 29 CFR part 11, indicates the NPRM would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This NPRM is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This NPRM is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This NPRM was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The NPRM was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Parts 60–741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, and

Reporting and recordkeeping requirements.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

For the reasons set forth in the preamble, OFCCP proposes to revise 41 CFR part 60–741 to read as follows:

PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.

- 60–741.1 Purpose, applicability and construction.
- 60–741.2 Definitions.
- 60–741.3 Exceptions to the definitions of “disability” and “qualified individual.”
- 60–741.4 Coverage and waivers.
- 60–741.5 Equal opportunity clause.

Subpart B—Discrimination Prohibited

- 60–741.20 Covered employment activities.
- 60–741.21 Prohibitions.
- 60–741.22 Direct threat defense.
- 60–741.23 Medical examinations and inquiries.
- 60–741.24 Drugs and alcohol.
- 60–741.25 Health insurance, life insurance and other benefit plans.

Subpart C—Affirmative Action Program

- 60–741.40 General purpose and applicability of the affirmative action program requirement.
- 60–741.41 Availability of affirmative action program.
- 60–741.42 Invitation to self-identify.
- 60–741.43 Affirmative action policy.
- 60–741.44 Required contents of affirmative action programs.
- 60–741.45 Reasonable Accommodation Procedures.
- 60–741.46 Utilization goals.
- 60–741.47 Providing priority consideration in employment.
- 60–741.48 Sheltered workshops.

Subpart D—General Enforcement and Complaint Procedures

- 60–741.60 Compliance evaluations.
- 60–741.61 Complaint procedures.
- 60–741.62 Conciliation agreements.
- 60–741.63 Violations of conciliation agreements.
- 60–741.64 Show cause notices.
- 60–741.65 Enforcement proceedings.
- 60–741.66 Sanctions and penalties.
- 60–741.67 Notification of agencies.
- 60–741.68 Reinstatement of ineligible contractors.
- 60–741.69 Intimidation and interference.
- 60–741.70 Disputed matters related to compliance with the act.

Subpart E—Ancillary Matters

- 60–741.80 Recordkeeping.
- 60–741.81 Access to records.

- 60–741.82 Labor organizations and recruiting and training agencies.
- 60–741.83 Rulings and interpretations.

Appendix A to Part 60–741—Guidelines on a Contractor’s Duty To Provide Reasonable Accommodation

Authority: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

§ 60–741.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to set forth the standards for compliance with section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), which prohibits discrimination against individuals with disabilities and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.

(b) *Applicability.* This part applies to all Government contracts and subcontracts in excess of \$10,000 for the purchase, sale or use of personal property or nonpersonal services (including construction): *Provided*, That subpart C of this part applies only as described in § 60–741.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part: *Provided*, That compliance shall also satisfy the employment provisions of the Department of Labor’s regulations implementing section 504 of the Rehabilitation Act of 1973 (see 29 CFR 32.2(b)) when the contractor is also subject to those requirements.

(c) *Construction—(1) In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title I of the Americans with Disabilities Act (ADA) of 1990, as amended, (42 U.S.C. 12101 *et seq.*) or the regulations issued by the Equal Employment Opportunity Commission pursuant to that title (29 CFR part 1630). The Interpretive Guidance on Title I of the Americans with Disabilities Act set out as an appendix to 29 CFR part 1630 issued pursuant to that title may be relied upon for guidance in interpreting the parallel non-discrimination provisions of this part.

(2) *Benefits under State worker’s compensation laws.* Nothing in this part alters the standards for determining eligibility for benefits under State worker’s compensation laws or under

State and Federal disability benefit programs.

(3) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision that provides greater or equal protection for the rights of individuals with disabilities as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

§ 60-741.2 Definitions.

For the purpose of this part:

(a) *Act* means the Rehabilitation Act of 1973, as amended, 29 U.S.C. 706 and 793.

(b) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of section 503 of the Rehabilitation Act of 1973.

(c) *Contract* means any Government contract or subcontract.

(d) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract in excess of \$10,000.

(e) *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

(f) *Director* means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

(g) *Disability*—(1) The term disability means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment (as defined in paragraph (w) of this section).

(2) As used in this part, the definition of "disability" must be construed in favor of broad coverage of individuals, to the maximum extent permitted by law. The question of whether an individual meets the definition under this part should not demand extensive analysis.

(3) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(4) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(5) See paragraphs (n), (p), (u), (w), and (aa) of this section, respectively, for definitions of "major life activities," "physical or mental impairment," "record of such an impairment," "regarded as having such an impairment," and "substantially limits."

(6) See § 60-741.3 for exceptions to the definition of "disability."

(h) *Equal opportunity clause* means the contract provisions set forth in § 60-741.5, "Equal opportunity clause."

(i) *Essential functions*—(1) *In general.* The term *essential functions* means fundamental job duties of the employment position the individual with a disability holds or desires. The term *essential functions* does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(j) *Government* means the Government of the United States of America.

(k) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term "Government contract" does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) *Construction*, as used in paragraphs (k) and (y)(1) of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(2) *Contracting agency* means any department, agency, establishment, or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

(3) *Modification* means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

(4) *Nonpersonal services*, as used in paragraphs (k) and (y)(1) of this section, includes, but is not limited to, the following: Utility, construction, transportation, research, insurance, and fund depository.

(5) *Person*, as used in paragraphs (k), (q), (v), (y), and (z) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(6) *Personal property*, as used in paragraphs (k) and (y)(1) of this section, includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).

(l) *Individual with a disability*—See definition of “disability” in paragraph (g) of this section.

(m) *Linkage agreement* means an agreement describing the connection between contractors and appropriate recruitment and/or training sources. A linkage agreement is to be used by the contractor as a source of potential applicants with disabilities, as required in § 60–741.44(f). The contractor’s representative that signs the linkage agreement should be the company official responsible for the contractor’s affirmative action program and/or has hiring authority.

(n) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) *Major bodily functions.* For purposes of paragraph (n)(1) of this section, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(o) *Mitigating measures*—(1) *In general.* The term mitigating measures includes, but is not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services” (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(2) *Ordinary eyeglasses or contact lenses.* The term *ordinary eyeglasses or contact lenses* means lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(3) *Low-vision devices.* The term *low-vision devices* means devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses.

(4) *Auxiliary aids and services.* The term *auxiliary aids and services* includes—

(i) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(ii) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(iii) Acquisition or modification of equipment or devices; and

(iv) Other similar services and actions.

(p) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(q) *Prime contractor* means any person holding a contract in excess of \$10,000, and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” includes any person who has held a contract subject to the act.

(r) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(s) *Qualified individual* means an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. See § 60–741.3 for exceptions to this definition.

(t) *Reasonable accommodation*—(1) *In general.* The term *reasonable*

accommodation means modifications or adjustments:

(i) To a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires;¹ or

(ii) To the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) That enable the contractor’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor’s other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustments or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.² This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor’s duty to provide reasonable accommodation.)

(4) Individuals who meet the definition of “disability” solely under the “regarded as” prong of the definition of “disability” as defined in paragraph (w)(1) of this section are not entitled to receive reasonable accommodation.

¹ A contractor’s duty to provide a reasonable accommodation with respect to applicants with disabilities is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

² Before providing a reasonable accommodation, the contractor is strongly encouraged to verify with the individual with a disability that the accommodation will effectively meet the individual’s needs.

(u) *Record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An individual shall be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.

(v) *Recruiting and training agency* means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

(w) *Regarded as having such an impairment*—(1) Except as provided in paragraph (w)(4) of this section, an individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

(2) Except as provided in paragraph (w)(4) of this section, an individual is “regarded as having such an impairment” any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts, or may or does ultimately establish a defense to such action.

(3) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability for unlawful discrimination in violation of this part. Such liability is established only when an individual proves that a contractor discriminated on the basis of disability as prohibited by this part.

(4) *Impairments that are transitory and minor.* Paragraph (w)(1) of this section shall not apply to an impairment that is shown by the contractor to be transitory and minor. The contractor must demonstrate that the impairment is both “transitory” and “minor.” Whether the impairment at issue is or would be “transitory and “minor” is to be determined objectively. The fact that a contractor subjectively believed the impairment was transitory and minor is not sufficient to defeat an individual’s

coverage under paragraph (w)(1) of this section.

(i) An impairment is transitory if it has an actual or expected duration of six months or less.

(ii) [Reserved]

(x) *Secretary* means the Secretary of Labor, United States Department of Labor, or his or her designee.

(y) *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken, or assumed.

(z) *Subcontractor* means any person holding a subcontract in excess of \$10,000 and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” any person who has held a subcontract subject to the act.

(aa) *Substantially limits*—(1) *In general.* The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law. “Substantially limits” is not meant to be a demanding standard and should not demand extensive analysis.

(i) An impairment is substantially limiting within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(ii) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. However, nothing in this section is intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(iii) In determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general

population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. This may include consideration of facts such as the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

(2) *Non-applicability to the “regarded as” prong.* Whether an individual’s impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of § 60–741.2(g)(1)(iii).

(3) *Ameliorative effects of mitigating measures.* Except as provided in paragraph (aa)(3)(i) of this section, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures as defined in § 60–741.2(o).

(i) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered when determining whether an impairment substantially limits a major life activity. See § 60–741.2(o)(2) for a definition of “ordinary eyeglasses or contact lenses.”

(ii) *Non-ameliorative effects of mitigating measures.* The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.

(4) In determining whether an individual is substantially limited the focus is on how a major life activity is substantially limited, and not on the outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(5) *Predictable assessments.* The determination of whether an impairment substantially limits a major life activity requires an individualized

assessment. However, the principles set forth in this section are intended to provide for generous coverage through a framework that is predictable, consistent, and workable for all individuals and contractors with rights and responsibilities under this part. Therefore, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under §§ 60–741.2(g)(1)(i) or (ii). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. With respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(i) *Examples of predictable assessments.* Applying the principles set forth in this section it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis (MS) substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may also substantially limit additional major life activities not explicitly listed above.

(ii) [Reserved]

(bb) *Undue hardship*—(1) *In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (bb)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(cc) *United States*, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 60–741.3 Exceptions to the definitions of “disability” and “qualified individual.”

(a) *Current illegal use of drugs*—(1) *In general.* The terms “disability” and “qualified individual” do not include individuals currently engaging in the illegal use of drugs, when the contractor acts on the basis of such use.

(2) *“Drug” defined.* The term drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(3) *“Illegal use of drugs” defined.* The term *illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as updated pursuant to that act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) *Construction.* (i) Nothing in paragraph (a)(1) of this section shall be construed to exclude from the definition of *disability* or *qualified individual* an individual who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) In order to be protected by section 503 and this part, an individual described in paragraph (a)(4)(i) of this section must, as appropriate, satisfy the requirements of the definition of *disability* and *qualified individual*.

(5) *Drug testing.* It shall not be a violation of this part for the contractor to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (a)(4)(i)(A) and (B) of this section is no longer engaging in the illegal use of drugs. (See § 60–741.24(b)(1).)

(b) *Alcoholics*—(1) *In general.* The terms *disability* and *qualified individual* do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desire, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(c) *Contagious disease or infection*—(1) *In general.* The terms *disability* and *qualified individual* do not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason

of the currently contagious disease or infection, is unable to perform the essential functions of the employment position such individual holds or desires.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (c)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (c)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(d) *Homosexuality and bisexuality.* Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

(e) *Other conditions.* The term *disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

§ 60-741.4 Coverage and waivers.

(a) *Coverage—(1) Contracts and subcontracts in excess of \$10,000.*

Contracts and subcontracts in excess of \$10,000 are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, “call-type” contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will not be in excess of \$10,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal

opportunity clause shall be applied to such contract whenever the amount of a single order exceeds \$10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Employment activities within the United States.* This part applies only to employment activities within the United States and not to employment activities abroad. The term *employment activities within the United States* includes actual employment within the United States, and decisions of the contractor made within the United States, pertaining to the contractor's applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(b) *Waivers—(1) Specific contracts and classes of contracts.* The Director may waive the application to any contract of the equal opportunity clause in whole or part when he or she deems that special circumstances in the national interest so require. The Director may also grant such waivers to groups or categories of contracts: where it is in the national interest; where it is found impracticable to act upon each request individually; and where such waiver will substantially contribute to convenience in administration of the act. When a waiver has been granted for any class of contracts, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(2) *National security.* Any requirement set forth in the regulations of this part shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the contracting agency will notify the Director in writing within 30 days.

(3) *Facilities not connected with contracts.* (i) Upon the written request of the contractor, the Director may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities if the Director finds that the contractor has demonstrated that:

(A) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(B) Such a waiver will not interfere with or impede the effectuation of the act.

(ii) The Director's findings as to whether the facility is separate and distinct in all respects from activities of the contractor related to the performance of a contract shall include consideration of the following factors:

(A) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

(B) The extent to which the facility benefits, directly or indirectly, from a Government contract;

(C) Whether any costs associated with operating the facility are charged to a Government contract;

(D) Whether working at the facility is a prerequisite for advancement in job responsibility or pay, and the extent to which employees at facilities connected to a Government contract are recruited for positions at the facility;

(E) Whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility, and the extent to which employees at the facility are interchangeable with employees at facilities connected to a Government contract; and

(F) Such other factors that the Director deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

(iii) The Director's findings as to whether granting a waiver will interfere with or impede the effectuation of the act shall include consideration of the following factors:

(A) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under the act;

(B) The contractor's compliance with the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

(C) The impact of granting the waiver on OFCCP enforcement efforts; and

(D) Such other factors that the Director deems are necessary or appropriate for considering whether the granting of the waiver would interfere with or impede the effectuation of the act.

(iv) A contractor granted a waiver under paragraph (b)(3) of this section shall:

(A) Promptly inform the Director of any changed circumstances not reflected in the contractor's waiver request; and

(B) Permit the Director access during normal business hours to the contractor's places of business for the purpose of investigating whether the facility granted a waiver meets the standards and requirements of paragraph (b)(3) of this section, and for inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation.

(v)(A) A waiver granted under paragraph (b)(3) of this section shall terminate on one of the following dates, whichever is earliest:

(1) Two years after the date the waiver was granted.

(2) When the facility performs any work that directly supports or contributes to the satisfaction of the work performed on a Government contract.

(3) When the Director determines, based on information provided by the contractor under this section or upon any other relevant information, that the facility does not meet the requirements of paragraph (b)(3) of this section.

(B) When a waiver terminates in accordance with paragraph (b)(3)(v)(A) of this section the contractor shall ensure that the facility complies with this part on the date of termination, except that compliance with §§ 60–741.40 through 60–741.45, if applicable, must be attained within 120 days of such termination.

(vi) False or fraudulent statements or representations made by a contractor under paragraph (b)(3) of this section are prohibited and may subject the contractor to sanctions and penalties under this part and criminal prosecution under 18 U.S.C. 1001.

§ 60–741.5 Equal opportunity clause.

(a) *Government contracts.* Each contracting agency and each contractor

shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES

1. The contractor will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability in all employment practices, including the following:

i. Recruitment, advertising, and job application procedures;

ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

iii. Rates of pay or any other form of compensation and changes in compensation;

iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

v. Leaves of absence, sick leave, or any other leave;

vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor;

vii. Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

viii. Activities sponsored by the contractor including social or recreational programs; and

ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

3. In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

4. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The contractor must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable to the individual applicant or employee (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at

a lower height for easy viewing by a person using a wheelchair). With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

5. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, as amended, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, individuals with physical or mental disabilities.

6. The contractor will include the provisions of this clause in every subcontract or purchase order in excess of \$10,000, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to section 503 of the act, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

7. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability.

[End of Clause]

(b) *Subcontracts.* Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

(c) *Adaptation of language.* Such necessary changes in language may be made to the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

(d) *Inclusion of the equal opportunity clause in the contract.* It shall be necessary to include the equal opportunity clause verbatim in the contract.

(e) *Incorporation by operation of the act.* By operation of the act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the act and the

regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

(f) *Duties of contracting agencies.*

Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities under the act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in § 60-741.66 as may be ordered by the Secretary or the Director.

Subpart B—Discrimination Prohibited

§ 60-741.20 Covered employment activities.

The prohibition against discrimination in this part applies to the following employment activities:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;

(g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by the contractor including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

§ 60-741.21 Prohibitions.

(a) The term *discrimination* includes, but is not limited to, the acts described in this section and § 60-741.23.

(1) *Disparate treatment.* It is unlawful for the contractor to deny an employment opportunity or benefit or

otherwise to discriminate against a qualified individual on the basis of disability.

(2) *Limiting, segregating and classifying.* Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. For example, the contractor may not segregate employees into separate work areas or into separate lines of advancement on the basis of disability.

(3) *Contractual or other arrangements—(i) In general.* It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(ii) *Contractual or other arrangement defined.* The phrase *contractual or other arrangement or relationship* includes, but is not limited to, a relationship with: An employment or referral agency; a labor organization, including a collective bargaining agreement; an organization providing fringe benefits to an employee of the contractor; or an organization providing training and apprenticeship programs.

(iii) *Application.* This paragraph (a)(3) applies to the contractor, with respect to its own applicants or employees, whether the contractor offered the contract or initiated the relationship, or whether the contractor accepted the contract or acceded to the relationship. The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

(4) *Standards, criteria or methods of administration.* It is unlawful for the contractor to use standards, criteria, or methods of administration, that are not job-related and consistent with business necessity, and that:

(i) Have the effect of discriminating on the basis of disability; or

(ii) Perpetuate the discrimination of others who are subject to common administrative control.

(5) *Relationship or association with an individual with a disability.* It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social, or other relationship or association.

(6) *Not making reasonable accommodation.* (i) It is unlawful for the

contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability as defined in §§ 60-741.2(g)(1)(i) or (ii), unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(ii) It is unlawful for the contractor to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(iii) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

(iv) A contractor is not required to provide reasonable accommodation to an individual who satisfies only the "regarded as having such an impairment" prong of the definition of "disability," as defined in § 60-741.2(w)(1).

(7) *Qualification standards, tests and other selection criteria—(i) In general.* It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude an individual with a disability if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude an individual with a disability or a class of individuals with disabilities on the basis of disability but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions.

(ii) *Qualification standards and tests related to uncorrected vision.* It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the contractor, is shown to be job-related for the position in question and consistent with business necessity. An individual challenging a contractor's application of a qualification standard, test, or other criterion based on uncorrected vision need not be an individual with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

(iii) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3, do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

(8) *Administration of tests.* It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant, except where such skills are the factors that the test purports to measure.

(9) *Compensation.* In offering employment or promotions to individuals with disabilities, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related pension or other disability-related benefit the applicant or employee receives from another source. Nor may the contractor reduce the amount of compensation offered to an individual with a disability because of the actual or anticipated cost of a reasonable accommodation the individual needs or may request.

(b) *Claims of No Disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of the lack of disability, or because an individual with a disability was granted an accommodation that was denied to an individual without a disability.

§ 60-741.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the

essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60-741.2(e) defining *direct threat*.)

§ 60-741.23 Medical examinations and inquiries.

(a) *Prohibited medical examinations or inquiries.* Except as stated in paragraphs (b) and (c) of this section, it is unlawful for the contractor to require a medical examination of an applicant or employee or to make inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability.

(b) *Permitted medical examinations and inquiries—(1) Acceptable pre-employment inquiry.* The contractor may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(2) *Employment entrance examination.* The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(3) *Examination of employees.* The contractor may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. The contractor may make inquiries into the ability of an employee to perform job-related functions.

(4) *Other acceptable examinations and inquiries.* The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. These medical examinations and activities do not have to be job-related and consistent with business necessity.

(5) Medical examinations conducted in accordance with paragraph (b)(2) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees with disabilities as a result of such examinations or inquiries, the contractor must demonstrate that the

exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) *Invitation to self-identify.* The contractor shall invite the applicant to self-identify as an individual with a disability as specified in § 60-741.42.

(d) *Confidentiality and use of medical information.* (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, as amended, shall be provided relevant information on request.

(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

§ 60-741.24 Drugs and alcohol.

(a) *Specific activities permitted.* The contractor:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the contractor holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear

Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies that apply to employment in sensitive positions subject to such regulations.

(b) *Drug testing*—(1) *General policy*. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of § 60–741.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation employees*. Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §§ 60–741.23(b)(5) and (c).

§ 60–741.25 Health insurance, life insurance, and other benefit plans.

(a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(b) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(c) The contractor may establish, sponsor, observe, or administer the

terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(d) The contractor may not deny an individual with a disability equal access to insurance or subject an individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

(e) The activities described in paragraphs (a), (b), and (c) of this section are permitted unless these activities are used as a subterfuge to evade the purposes of this part.

Subpart C—Affirmative Action Program

§ 60–741.40 General purpose and applicability of the affirmative action program requirement.

(a) *General purpose*. An affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities. An affirmative action program institutionalizes the contractor's commitment to equality in every aspect of employment and is more than a paperwork exercise. Rather, an affirmative action program is dynamic in nature and includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities.

(b) *Applicability of the affirmative action program*. (1) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$50,000 or more.

(2) Contractors described in paragraph (b)(1) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. This program may be integrated into or kept separate from other affirmative action programs.

(3) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60–741.44(i).

(c) *Submission of program to OFCCP*. The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor also shall make the affirmative action program promptly available on-site upon OFCCP's request.

§ 60–741.41 Availability of affirmative action program.

The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment. In the event that the contractor has employees who do not work at a physical establishment, the contractor shall inform such employees about the availability of the affirmative action program by other means.

§ 60–741.42 Invitation to self-identify.

(a) *Pre-offer*. (1) As part of the contractor's affirmative action obligation, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60–741.2(g)(i) or (ii) of this part. This invitation shall be provided to each applicant when the applicant applies or is considered for employment, whichever comes first. The invitation may be included in the application materials for a position, but must be separable or detachable from the application.

(2) The contractor shall invite an applicant to self-identify as required in paragraph (a) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(b) *Post-offer*. (1) At any time after the offer of employment, but before the applicant begins his or her job duties, the contractor shall invite the applicant to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60–741.2(g)(i) or (ii) of this part.

(2) The contractor shall invite an applicant to self-identify as required in paragraph (b) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(c) *Survey of employees*. The contractor shall invite each of its employees to inform the contractor, in an anonymous manner, whether he or she believes themselves to be an individual with a disability as defined in § 60–741.2(g)(i) or (ii) of this part. This survey shall be conducted annually, using the language and manner prescribed by the Director and published on the OFCCP Web site.

(d) The contractor may not compel or coerce an individual to self-identify as an individual with a disability.

(e) The contractor shall keep all information on self-identification confidential, and shall maintain it in a data analysis file (rather than in the

medical files of individual employees) in accordance with § 60–741.23(d). The contractor shall provide self-identification information to OFCCP upon request. Self-identification information may be used only in accordance with this part.

(f) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees of whose disability the contractor has knowledge.

(g) Nothing in this section shall relieve the contractor from liability for discrimination in violation of section 503 or this part.

§ 60–741.43 Affirmative action policy.

Under the affirmative action obligations imposed by the act, contractors shall not discriminate because of physical or mental disability and shall take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–741.20.

§ 60–741.44 Required contents of affirmative action programs.

Acceptable affirmative action programs shall contain, but not necessarily be limited to the following elements:

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees with disabilities are provided the notice in a form that is accessible and understandable to the individual with a disability (*e.g.*, providing Braille or large print versions of the notice, or posting a copy of the notice at a lower height for easy viewing by a person using a wheelchair). The policy statement shall indicate the chief executive officer's support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things that the contractor will: Recruit, hire, train, and promote persons in all job titles, and ensure that all other personnel actions are administered without regard to disability; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and

applicants shall not be subjected to harassment, intimidation, threats, coercion, or discrimination because they have engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of section 503 or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;

(3) Opposing any act or practice made unlawful by section 503 or its implementing regulations in this part, or any other Federal, State or local law requiring equal opportunity for individuals with disabilities; or

(4) Exercising any other right protected by section 503 or its implementing regulations in this part.

(b) *Review of personnel processes.* The contractor must ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that its personnel processes do not stereotype individuals with disabilities in a manner which limits their access to all jobs for which they are qualified. In addition, the contractor shall ensure that its use of information and communication technology is accessible to applicants and employees with disabilities.³ The contractor shall review such processes on at least an annual basis and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the

³ There are a variety of resources that may assist contractors in assessing and ensuring the accessibility of its information and communication technology. These include the Web Content Accessibility Guidelines (WCAG 2.0) of the World Wide Web Consortium Web Accessibility Initiative, online at <http://www.w3.org/WAI/intro/wcag.php>, and the regulations implementing the accessibility requirements for federal agencies prescribed in section 508 of the Rehabilitation Act. Information on section 508 may be found online at <http://www.section508.gov/index.cfm>. This web site also provides information about various State accessibility requirements and initiatives.

Government. These procedures shall, at a minimum, include the following steps:

(1) For each applicant with a disability, the contractor must be able to identify:

(i) Each vacancy for which the applicant was considered; and

(ii) Each training program for which the applicant was considered.

(2) For each employee who is an individual with a disability, the contractor must be able to identify:

(i) Each promotion for which the employee was considered; and

(ii) Each training program for which the employee was considered.

(3) In each case where an applicant or employee who is an individual with a disability is rejected for employment, promotion or training, the contractor shall prepare a statement of the reason as well as a description of any accommodation considered. The statement of the reason for rejection (if the reason is medically related), and the description of accommodation(s) considered, shall be treated as confidential medical records in accordance with § 60–741.23(d). These materials shall be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible to place an individual with a disability on the job, the contractor shall make a record containing a description of the accommodation. The record shall be treated as a confidential medical record in accordance with § 60–741.23(d).

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to a schedule for the annual review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out individuals on the basis of disability, they are job-related for the position in question and are consistent with business necessity. The contractor shall document the methods used to complete the annual review, the results of the annual review, and any actions taken in response. These documents shall be retained as employment records subject to the recordkeeping requirements of § 60–741.80.

(2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion, or training, to the extent that qualification standards tend to screen out individuals on the basis of

disability, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor has the burden to demonstrate that it has complied with the requirements of paragraph (c)(2) of this section.

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60–741.2(e) defining direct threat.) Once the contractor believes that a direct threat exists, the contractor shall create a statement of reasons supporting its belief, addressing each of the criteria for “direct threat” listed in § 60–741.2(e). This statement shall be treated as a confidential medical record in accordance with § 60–741.23(d), and shall be retained as an employment record subject to the recordkeeping requirements of § 60–741.80.

(d) *Reasonable accommodation to physical and mental limitations.* As is provided in § 60–741.21(a)(6), as a matter of nondiscrimination, the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, the contractor must ensure that its electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software. Also as a matter of affirmative action, if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee’s disability. If the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(e) *Harassment.* The contractor must develop and implement procedures to ensure that its employees are not harassed on the basis of disability.

(f) *External dissemination of policy, outreach, and positive recruitment.* (1) *Required outreach efforts.* The contractor shall undertake the outreach and positive recruitment activities listed below:

(i) The contractor shall promptly list all employment openings with the Employment One-Stop Career Center (One-Stops) nearest the contractor’s establishment. The contractor must provide the information about each job vacancy in the manner and format required by the appropriate One-Stop. The term *all employment openings* as used in this paragraph includes all full-time, part-time, and temporary positions *except* executive and senior management positions, positions that will be filled from within the contractor’s organization, and positions lasting three days or less.

(ii) The contractor shall establish linkage agreements enlisting the assistance and support of either the local State Vocational Rehabilitation Service Agency (SVRA) office nearest the contractor’s establishment or a local Employment Network (EN) organization (other than the contractor if the contractor is an EN) listed in the Social Security Administration’s Ticket to Work Employment Network Directory (<http://www.yourtickettowork.com/endir>); and at least one of the following persons and organizations in recruiting and developing training opportunities for individuals with disabilities to fulfill its commitment to provide meaningful employment opportunities to such individuals:

(A) Entities funded by the Department of Labor that provide recruitment or training services for individuals with disabilities, such as the services currently provided through The Employer Assistance and Resource Network (EARN) (<http://www.earnworks.com>);

(B) The Employment One-Stop Career Center (One-Stops) nearest the contractor’s establishment (any linkage agreement with the One-Stop must be in addition to the job listing requirement in paragraph (f)(1)(i));

(C) The Department of Veterans Affairs Regional Office nearest the contractor’s establishment (http://www.va.gov/landing2_locations.htm);

(D) Local disability groups, organizations, or Centers for Independent Living (CIL) near the contractor’s establishment;

(E) Placement or career offices of educational institutions; and

(F) Private recruitment sources, such as professional organizations or employment placement services.

(iii) The contractor shall also consult the Employer Resources section of the National Resource Directory (http://www.nationalresourcedirectory.gov/employment/employer_resources), or any future service that replaces or complements it, and establish a linkage

agreement with one or more of the disabled veterans’ service organizations listed on the directory, other than the agencies listed in (f)(1)(ii)(A) through (E) of this section, for such purposes as advice, technical assistance, and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training, and accommodations contractors may undertake, but no such resource providing technical assistance shall have authority to approve or disapprove the acceptability of affirmative action programs.

(iv) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

(2) *Suggested outreach efforts.* The contractor should consider taking the actions listed below to fulfill its commitment to provide meaningful employment opportunities to individuals with disabilities:

(i) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Contractor facility tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company’s selection process, and recruiting literature should be an integral part of the briefing. At any such briefing sessions, the company official in charge of the contractor’s affirmative action program should be in attendance when possible. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(ii) The contractor’s recruitment efforts at all educational institutions should incorporate special efforts to reach students who are individuals with disabilities.

(iii) An effort should be made to participate in work-study programs for students, trainees, or interns with disabilities. Such programs may be found through outreach to State and local schools and universities, and through EARN.

(iv) Individuals with disabilities should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(v) The contractor should take any other positive steps it deems necessary to attract individuals with disabilities not currently in the work force who have requisite skills and can be

recruited through affirmative action measures. These persons may be located through State and local agencies supported by the U.S. Department of Education's Rehabilitation Services Administration (RSA) (<http://www2.ed.gov/about/offices/list/osers/rsa>), local Ticket-to-Work Employment Networks (<http://www.yourtickettowork.com>), or local chapters of groups or organizations that provide services for individuals with disabilities.

(vi) The contractor, in making hiring decisions, shall consider applicants who are known to have disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(3) *Assessment of external outreach and recruitment efforts.* The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective. Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as to the effectiveness of its outreach efforts shall be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified individuals with disabilities, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

(4) *Recordkeeping obligation.* The contractor shall document all linkage agreements and all other activities it undertakes to comply with the obligations of this section, and retain these documents for a period of five (5) years.

(g) *Internal dissemination of policy.* (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. It

is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory, and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

(2) The contractor shall implement and disseminate this policy internally as follows:

(i) Include it in the contractor's policy manual;

(ii) Discuss the policy thoroughly in any employee orientation and management training programs;

(iii) If the contractor is a party to a collective bargaining agreement, it shall meet with union officials and/or employee representatives to inform them of the contractor's policy and request their cooperation;

(3) The contractor shall document those activities it undertakes to comply with the obligations of paragraph (g) of this section and retain these documents as employment records subject to the recordkeeping requirements of § 60-741.80.

(4) The contractor is encouraged to additionally implement and disseminate this policy internally by taking optional steps, such as the following:

(i) If the contractor has a company newspaper, magazine, annual report, or other paper or electronic publication distributed to employees, it should publicize its affirmative action policy in these publications, and include in these publications, where appropriate, features on employees with disabilities and articles on the accomplishments of individuals with disabilities, with their consent;

(ii) The contractor should discuss its affirmative action policies at employee meetings regarding personnel practices or equal employment opportunity;

(iii) The contractor should discuss its affirmative action policies with executive, management, and supervisory personnel at meetings regarding personnel practices or equal employment opportunity.

(h) *Audit and reporting system.* (1) The contractor shall design and implement an audit and reporting system that will:

(i) Measure the effectiveness of the contractor's affirmative action program;

(ii) Indicate any need for remedial action;

(iii) Determine the degree to which the contractor's objectives have been attained;

(iv) Determine whether known individuals with disabilities have had

the opportunity to participate in all company sponsored educational, training, recreational, and social activities;

(v) Measure the contractor's compliance with the affirmative action program's specific obligations; and

(vi) Document the actions taken to comply with the obligations of paragraphs (h)(1)(i) through (v) of this section, and retain these documents as employment records subject to the recordkeeping requirements of § 60-741.80.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) *Responsibility for implementation.* An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity shall appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) *Training.* In addition to the training set forth in paragraph (g)(2)(ii) of this section, all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented. This training shall include, but not be limited to: the benefits of employing individuals with disabilities, appropriate sensitivity toward applicants and employees with disabilities, and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. The contractor shall create contemporaneous records documenting the specific subject matter(s) covered in the training, who conducted the training, who received the training, and when the training took place. The contractor shall retain these documents, and any written or electronic materials used for the training required by this section, as employment records subject to the recordkeeping requirements of § 60-741.80.

(k) *Data Collection Analysis.* The contractor shall document and maintain the following computations or comparisons pertaining to applicants and hires on an annual basis:

(1) The number of referrals of individuals with disabilities that the contractor received from applicable employment service delivery system(s), such as State Vocational Rehabilitation Service Agencies and Employment One-Stop Career Centers;

(2) The number of referrals of individuals with disabilities that the contractor received from other entities, groups, or organizations with which the contractor has a linkage agreement pursuant to paragraph (f)(1)(i).

(3) The number of applicants who self-identified as individuals with disabilities pursuant to § 60-741.42(a), or who are otherwise known to be individuals with disabilities;

(4) The total number of job openings and total number of jobs filled;

(5) The ratio of jobs filled to job openings;

(6) The total number of applicants for all jobs;

(7) The ratio of applicants with disabilities to all applicants ("applicant ratio");

(8) The number of applicants with disabilities hired;

(9) The total number of applicants hired; and

(10) The ratio of individuals with disabilities hired to all hires ("hiring ratio"). The number of hires shall include all employees.

§ 60-741.45 Reasonable accommodation procedures.

(a) *Development and implementation.* The contractor shall develop and implement written procedures for processing requests for reasonable accommodation. Contractors that are not required to develop an affirmative action program pursuant to this subpart are encouraged to voluntarily develop and implement written reasonable accommodation procedures to assist the contractor in meeting its nondiscrimination obligations under subpart B of this part.

(1) The contractor's reasonable accommodation procedures shall be included in the contractor's affirmative action program, and shall be developed and implemented in compliance with section 503 and this part.

(2) Minimum required elements that shall be addressed or contained in the reasonable accommodation procedures are described in paragraph (d) of this section. Inclusion of these elements in all reasonable accommodation procedures will ensure that applicants and employees are informed as to how to request a reasonable accommodation and are aware of how such a request will be processed by the contractor. It will also ensure that all of the

contractor's supervisors and managers know what to do should they receive a request for reasonable accommodation, and that all requests for accommodation are processed swiftly and within established timeframes.

(b) *Designation of responsibility.* The contractor shall designate an official to be responsible for the implementation of the reasonable accommodation procedures. The responsible official may be the same official who is responsible for the implementation of the contractor's affirmative action program. The responsible official must have the authority, resources, support, and access to top management that is needed to ensure the effective implementation of the reasonable accommodation procedures.

(c) *Dissemination of procedures.* (1) The contractor shall disseminate its reasonable accommodation procedures to all employees. Notice of the reasonable accommodation procedures may be provided by their inclusion in an employee handbook that is disseminated to all employees and/or by email or electronic posting on a company Web page where work-related notices are ordinarily posted. Notice of the reasonable accommodation procedures shall be provided to employees who work off-site in the same manner that notice of other work-related matters is ordinarily provided to these employees.

(2) The contractor shall inform all applicants of its reasonable accommodation procedures regarding the application process. See paragraph (d)(2)(iii) of this section.

(d) *Required elements of reasonable accommodation procedures.* The specific requirements of a contractor's reasonable accommodation procedures may vary depending upon the size, structure, and resources of the contractor. However, the contractor's reasonable accommodation procedures shall, at a minimum, include the following elements:

(1) *Responsible official contact information.* The name, title/office, and contact information (telephone number and email address) of the official designated as responsible for implementing the reasonable accommodation procedures pursuant to paragraph (b) of this section. This information should be updated when changes occur.

(2) *Requests for reasonable accommodation.* The reasonable accommodation procedures shall specify that a request for reasonable accommodation may be oral or written and shall explain that there are no required words that must be used by the

requester to effectuate a request for accommodation. The procedures shall also state that requests for reasonable accommodation may be made by an applicant, employee, or by a third party on his or her behalf.

(i) *Recurring requests.* The reasonable accommodation procedures shall provide that in instances of a recurring need for an accommodation (e.g., a hearing impaired employee's need for a sign language interpreter) the requester will not be required to repeatedly submit or renew their request for accommodation each time an interpreter is needed. In the absence of a reasonable belief that the individual's recurring need for the accommodation has changed, requiring the repeated submission of a request for the accommodation could be considered harassment on the basis of disability in violation of this part.

(ii) *Submission of request.* The reasonable accommodation procedures shall identify to whom an employee (or a third party acting on his or her behalf) must submit an accommodation request. At a minimum, this shall include any supervisor or management official in the employee's chain of command, and the official responsible for the implementation of the reasonable accommodation procedures.

(iii) *Requests made by applicants.* The reasonable accommodation procedures shall include procedures to ensure that all applicants, including those using the contractor's online or other electronic application system, are made aware of the contractor's reasonable accommodation obligation and are invited to request any reasonable accommodation needed to participate fully in the application process. All applicants shall also be provided with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation. The contractor's procedures shall provide that reasonable accommodation requests by or on behalf of an applicant are processed expeditiously, using timeframes tailored to the application process.

(3) *Written confirmation of receipt.* The reasonable accommodation procedures shall specify that written confirmation of receipt of a request will be provided to the requester, either by letter or email. The written confirmation shall include the date the accommodation request was received, and be signed by the authorized decision maker or his or her designee.

(4) *Timeframe for processing requests.* (i) The reasonable accommodation procedures shall indicate that requests for accommodation will be processed as

expeditiously as possible. Oral requests must be considered received on the date they are initially made, even if a reasonable accommodation request form has not been completed. A contractor may set its own timeframes for completing the processing of requests. However, if supporting medical documentation is not needed, that timeframe shall not be longer than 5 to 10 business days. If supporting medical documentation is needed, or if special equipment must be ordered, that timeframe shall not exceed 30 calendar days, except in the event of extenuating circumstances beyond the control of the contractor. The procedures shall explain what constitutes extenuating circumstances.

(ii) *Delay in responding to request.* If the contractor's processing of an accommodation request will exceed established timeframes, written notice shall be provided to the requester. The notice shall include the reason(s) for the delay and a projected date of response. The notice shall also be dated and signed by the authorized decision maker or his or her designee.

(5) *Description of process.* The contractor's reasonable accommodation procedures shall contain a description of the steps the contractor takes when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request. If specific information must be provided to the contractor in order to obtain a reasonable accommodation, the description shall identify this information. For example, the contractor's reasonable accommodation procedures may state that to obtain a reasonable accommodation, the contractor must be informed of the existence of a disability, the disability-related limitation(s) or workplace barrier(s) that needs to be accommodated, and, if known, the desired reasonable accommodation. The description shall also indicate that, if the need for accommodation is not obvious, or if additional information is needed, the contractor may initiate an interactive process with the requester.

(6) *Supporting medical documentation.* The reasonable accommodation procedures shall explain the circumstances, if any, under which medical documentation may be requested and reviewed by the contractor.

(i) The procedures shall explain that any request for medical documentation may not be open ended and must be limited to documentation of the individual's disability and the

functional limitations for which reasonable accommodation is sought.

(ii) The procedures shall also explain that the submission of medical documentation is not required when the disability for which a reasonable accommodation is sought is known or readily observable and the need for accommodation is known or obvious.

(7) *Denial of reasonable accommodation.* The contractor's reasonable accommodation procedures shall specify that any denial or refusal to provide a requested reasonable accommodation will be provided in writing. The written denial shall include the reason for the denial and must be dated and signed by the authorized decision maker or his or her designee. A statement of the requester's right to file a discrimination complaint with OFCCP shall also accompany or be included in the written denial. If the contractor provides an internal appeal or reconsideration process, the written denial shall inform the requester about this process. The written denial shall also include a clear statement that participation in the internal appeal or reconsideration process does not toll the time for filing a complaint with OFCCP or EEOC.

(8) *Confidentiality.* The contractor's reasonable accommodation procedures shall indicate that all requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor will be treated as a confidential medical record and maintained in a separate medical file, in accordance with section 503 and this part.

(e) *Training.* The contractor shall provide annual training for its supervisors and managers regarding the implementation of the reasonable accommodation procedures. Training shall also be provided whenever significant changes are made to the reasonable accommodation procedures. Training regarding the reasonable accommodation procedures may be provided in conjunction with other required equal employment opportunity or affirmative action training.

§ 60–741.46 Utilization goals.

(a) *Goal.* OFCCP has established a utilization goal of 7% for employment of individuals with disabilities for each job group in the contractor's workforce.

(b) *Purpose.* The purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of

individuals within each job group in its workforce. The utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.

(c) *Periodic review of goal.* The Director of OFCCP shall periodically review and update, as appropriate, the utilization goal established in paragraph (a) of this section.

(d) *Utilization analysis—(1) Purpose.* The utilization analysis is designed to evaluate the representation of individuals with disabilities in each job group within the contractor's workforce with the utilization goal established in paragraph (a) of this section. If individuals with disabilities are employed in a job group at a rate less than the utilization goal, the contractor must take specific measures to address this disparity.

(2) *Grouping jobs for analysis.* The contractor must use the same job groups established for utilization analyses under Executive Order 11246, either in accordance with 41 CFR 60–2.12, or in accordance with 41 CFR part 60–4, as appropriate.

(3) *Annual evaluation.* The contractor shall evaluate its utilization of individuals with disabilities in each job group annually.

(e) *Action-oriented programs.* When the percentage of individuals with disabilities in one or more job groups is less than the utilization goal established in paragraph (a) of this section, the contractor must develop and execute action-oriented programs designed to correct any identified problems areas. These action-oriented programs may include alternative or additional efforts from among those listed in §§ 60–741.44 (f)(1) and (f)(2), and/or other actions designed to correct the identified problem areas and attain the established goal.

(f) A contractor's determination that it has not attained the utilization goal established in paragraph (a) of this section in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part.

(g) The utilization goal established in paragraph (a) of this section shall not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities.

§ 60–741.47 Providing priority consideration in employment.

(a) The contractor is encouraged to voluntarily develop and implement programs that provide priority consideration to individuals with

disabilities in recruitment and/or hiring. Examples of priority consideration programs include, but are not limited to, assigning a weighted value or additional "points" to job applicants who self-identify as being an individual with a disability, and developing a job training program focused on the specific needs of individuals with certain disabilities such as traumatic brain injury (TBI) or developmental disabilities and utilizing linkage agreements to recruit program trainees.

(1) If a contractor elects to implement a priority consideration program for individuals with disabilities, a description of the program and the policies governing the program, including the name and title of the official responsible for the program, shall be included in the contractor's written affirmative action program. An annual report describing the contractor's activities pursuant to the priority consideration program and identifying the outcomes achieved should also be included in the contractor's affirmative action program.

(2) Disability-related information from the applicant and/or employee self-identification request required by § 60-741.42 may be used to identify individuals with disabilities who are eligible to benefit from a priority consideration program.

(b) The contractor shall not use a priority consideration program to segregate individuals with disabilities or to limit or restrict the employment opportunities of any individual with a disability.

(c) The contractor shall not discriminate against an individual with a disability that has received priority consideration with respect to any term, condition, or benefit of employment, including, but not limited to, employment acts such as compensation, promotion, and termination, that are listed in § 60-741.20.

§ 60-741.48 Sheltered workshops.

Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities in the contractor's own work force. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become "qualified individuals with disabilities."

Subpart D—General Enforcement and Complaint Procedures

§ 60-741.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment, and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review is conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) *Off-site review of records.* An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the

contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of section 503 and its regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60-741.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) *Focused review.* A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60-741.62.

(c) *Pre-award compliance evaluations.* Each agency will include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with section 503 within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice, OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award.

§ 60-741.61 Complaint procedures.

(a) *Coordination with other agencies.* Pursuant to section 107(b) of the Americans with Disabilities Act of 1990, as amended (ADA), OFCCP and the Equal Employment Opportunity Commission (EEOC) have promulgated

regulations setting forth procedures governing the processing of complaints falling within the overlapping jurisdiction of both the act and title I of the ADA to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Complaints filed under this part will be processed in accordance with those regulations, which are found at 41 CFR part 60–742, and with this part.

(b) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint with the Director alleging a violation of the act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Complaints may be submitted to the OFCCP, 200 Constitution Avenue NW., Washington, DC 20210, or to any OFCCP regional, district, or area office. Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown.

(c) *Contents of complaints.* (1) *In general.* A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

- (i) Name and address (including telephone number) of the complainant;
- (ii) Name and address of the contractor who committed the alleged violation;
- (iii) The facts showing that the individual has a disability, a record or history of a disability, or was regarded by the contractor as having a disability;
- (iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) *Third party complaints.* When a written complaint is filed by an authorized representative, that complaint need not identify by name the person on whose behalf it is filed. However, the authorized representative must nonetheless provide the name, address and telephone number of the person on whose behalf the complaint is filed to OFCCP, along with the other information specified in paragraph (c)(1)

of this section. OFCCP shall verify the authorization of such complaint with the person on whose behalf the complaint is filed. Any such person may request that OFCCP keep his or her identity confidential during the investigation of the complaint, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(d) *Incomplete information.* Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(e) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint.

(f) *Resolution of matters.* (1) If the complaint investigation finds no violation of the act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–741.65(a)(1), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Director will review all determinations of no violation that involve complaints that are not also cognizable under title I of the Americans with Disabilities Act.

(3) In cases where the Director decides to reconsider the determination of a Notification of Results of Investigation, the Director shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60–741.62.

§ 60–741.62 Conciliation agreements.

(a) If a compliance evaluation, complaint investigation, or other review by OFCCP finds a material violation of the act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a

written conciliation agreement will be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to) such make whole remedies as back pay and retroactive seniority. The agreement shall also specify the time period for completion of the remedial action; the period shall be no longer than the minimum period necessary to complete the action.

(b) *Remedial benchmarks.* The remedial action referenced in paragraph (a) may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

§ 60–741.63 Violations of conciliation agreements.

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

§ 60–741.64 Show cause notices.

When the Director has reasonable cause to believe that the contractor has violated the act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be

instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see § 60–741.65).

§ 60–741.65 Enforcement proceedings.

(a) *General.* (1) If a compliance evaluation, complaint investigation, or other review by OFCCP finds a violation of the act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any combination of these outcomes. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance review. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service (IRS) for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–741.5, including appropriate injunctive relief.

(b) *Hearing practice and procedure.*

(1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60–30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions, and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any) whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights and Labor-Management,

Regional Solicitors and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60–30 to “Executive Order 11246” shall mean section 503 of the Rehabilitation Act of 1973, as amended; references to “equal opportunity clause” shall mean the equal opportunity clause published at § 60–741.5; and references to “regulations” shall mean the regulations contained in this part.

§ 60–741.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Director so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the act or this part.

(b) *Termination.* A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the act or this part.

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the act or this part subject to reinstatement pursuant to § 60–741.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months, but no more than three years.

(d) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

§ 60–741.67 Notification of agencies.

The Director shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

§ 60–741.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among

other factors, the severity of the violation which resulted in the debarment, the contractor’s attitude towards compliance, the contractor’s past compliance history, and whether the contractor’s reinstatement would impede the effective enforcement of the act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

(b) *Petition for review.* Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor’s objections to the Director’s decision. The petition shall be served on the Director and the Associate Solicitor for Civil Rights and Labor-Management and shall include the decision as an appendix. The Director may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–741.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

- (1) Filing a complaint;
- (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the act or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;
- (3) Opposing any act or practice made unlawful by the act or this part or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities; or
- (4) Exercising any other right protected by the act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion, or discrimination. The sanctions and penalties contained in

this part may be exercised by the Director against any contractor who violates this obligation.

§ 60–741.70 Disputed matters related to compliance with the act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E—Ancillary Matters

§ 60–741.80 Recordkeeping.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor must preserve all personnel records relevant to the complaint, compliance evaluation, or action until final disposition of the complaint, compliance evaluation or action. The term "personnel records relevant to the complaint, compliance evaluation, or

action" will include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. Records required by §§ 60–741.44(f)(4) and 60–741.44(k) shall be maintained by all contractors for a period of five years from the date of the making of the record.

(b) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraph (a) of this section constitutes noncompliance with the contractor's obligations under the act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided*, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(c) The requirements of this section shall apply only to records made or kept on or after August 29, 1996.

§ 60–741.81 Access to records.

Each contractor must permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which its records and other information are available. The contractor must provide records and other information in any available format(s) requested by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the act, the Americans with Disabilities Act of 1990, as amended (ADA), and in furtherance of the purposes of the act and the ADA.

§ 60–741.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency, or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the act.

§ 60–741.83 Rulings and interpretations.

Rulings under or interpretations of the act and this part shall be made by the Director.

Appendix A to Part 60–741—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on title I of the Americans with Disabilities Act, as amended (ADA), set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent "free-standing" source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. See § 60–741.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under section 503, like reasonable accommodation required under the ADA, is a part of the nondiscrimination obligation. See EEOC appendix cited in this paragraph. Affirmative action is unique to section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor shall make an inquiry of an employee with a known disability who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability, unless the contractor can demonstrate that the accommodation would impose an undue

hardship on the operation of its business. As stated in § 60–741.2(s), an individual with a disability is qualified if he or she satisfies all the skill, experience, education, and other job-related selection criteria, and can perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the individual with a disability is qualified with respect to that process. One is qualified within the meaning of section 503 if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions. Additionally, as provided in § 60–741.45, the contractor is required to develop, implement and disseminate to applicants and employees procedures for processing requests for reasonable accommodation. This will help ensure consistent and expeditious processing of all accommodation requests.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide reasonable accommodation for applicants and employees whose disabilities the contractor has actual knowledge. As stated in § 60–741.42, as part of the contractor's affirmative action obligation, the contractor is required to invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability both prior to an offer of employment, and after an offer of employment but before he or she begins his/her employment duties. That invitation also informs the applicant of the contractor's reasonable accommodation obligation and invites applicants with disabilities to request any accommodation they might need. Moreover, § 60–741.44(d) provides that if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) Accommodations in the application process; (2) accommodations that enable employees with disabilities to perform the essential

functions of the position held or desired; and (3) accommodations that enable employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term "undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source (e.g., a State vocational rehabilitation agency) or if Federal, State, or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the individual with a disability must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for "reasonable accommodation" in § 60–741.2(t) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are a number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor generally should consult with the individual with a disability in deciding on the appropriate accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate State vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1–(800) 669–4000 (voice) or 1–(800) 669–6820 (TTY)), the Job Accommodation Network (JAN)—a service of the U.S. Department of Labor's Office of Disability Employment Policy (1–(800) 526–7234 (voice) or 1–(877) 781–9403 (TTY)), private disability organizations, and other employers.

6. With respect to accommodations that can permit an employee with a disability to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire

equipment. For those visually-impaired, such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, Braille writers, talking calculators, magnifiers, audio recordings, and Braille or large print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids, and TTY machines. For persons with limited physical dexterity, the obligation may require the provision of telephone headsets, mechanical page turners, and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter, or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by individuals with disabilities—including areas used by employees for purposes other than the performance of essential job functions—such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots, and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in § 60–741.2(t) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified individual with a disability cannot perform to another position. Accordingly, if a clerical employee is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, *i.e.*, those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor that has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind individual with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the individual with a disability. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit individuals with disabilities who cannot work a standard schedule because of the need to obtain medical treatment, or individuals with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider known applicants with

disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A reasonable amount of time should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is

qualified with or without reasonable accommodation. The contractor may maintain the reassigned individual with a disability at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled. It should also be noted that the contractor is not required to promote an individual with a disability as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) Providing information regarding job vacancies in a form accessible to those with vision or hearing impairments (*e.g.*, by making an announcement available in Braille, in large print, or on audio tape, or by responding to job inquiries via TTY); (2) providing readers, interpreters and other similar assistance during the application, testing and interview process; (3)

appropriately adjusting or modifying employment-related examinations (*e.g.*, extending regular time deadlines, allowing a blind person or one with a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her disability to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices); and (4) ensuring an applicant with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

[FR Doc. 2011-31371 Filed 12-8-11; 8:45 am]

BILLING CODE 4510-45-P

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