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Vol. 76, No. 129
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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2011–0031]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/U.S. Coast Guard—008 Courts Martial Case Files System of Records; Correction

AGENCY: Privacy Office, DHS.

ACTION: Final rule; correction.

SUMMARY: The Department of Homeland Security published in the **Federal Register** of May 13, 2011 a final rule that amended its regulations to exempt portions of a Department of Homeland Security/U.S. Coast Guard system of records titled, ''Department of Homeland Security/U.S. Coast Guard—008 Courts Martial Case Files System of Records'' from certain provisions of the Privacy Act. Inadvertently the wrong paragraph number was designated in the regulatory text. This document corrects that error.

DATES: This final rule is effective July 6, 2011.

FOR FURTHER INFORMATION CONTACT: For general questions please contact Marilyn Scott-Perez (202–475–3515), Privacy Officer, U.S. Coast Guard. For privacy issues please contact Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security published a document in the **Federal Register** of May 13, 2011, a final rule that amended its regulations to exempt portions of a Department of Homeland Security/U.S. Coast Guard system of records titled, ''Department of Homeland Security/U.S. Coast Guard -008 Courts Martial Case Files System of Records'' from certain provisions of the Privacy Act. Specifically, the Department amended Appendix C to 6 CFR part 5 to exempt portions of the Department of Homeland Security/U.S. Coast Guard—008 Courts Martial Case Files System of Records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. Inadvertently the paragraph designator ''12'' was used in the regulatory text instead of ''54.'' This document corrects that error.

Accordingly, 6 CFR part 5, appendix C is corrected as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

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

Authority: Pub L. 107–296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301.

Appendix C to Part 5—[Corrected]

■ 2. In appendix C to part 5, the paragraph ''12'' following paragraph 53 is redesignated as ''54.''

Dated: June 21, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–16805 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2011–BT–STD–0011]

RIN 1904–AC06

Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps; Correction

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Direct final rule; correction.

SUMMARY: This document corrects the preamble to a direct final rule (DFR) which was published in the **Federal Register** on June 27, 2011, regarding the Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Residential Central Air Conditioners and Heat Pumps. This correction revises the DFR's discussion of review under the Regulatory Flexibility Act (RFA) in section V, ''Procedural Issues and Regulatory Review.''

DATES: Effective October 25, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Mohammed Khan (furnaces) or Mr. Wesley Anderson (central air conditioners and heat pumps), U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–7892 or (202) 586–7335. E-mail: *Mohammed.Khan@ee.doe.gov* or *Wes.Anderson@ee.doe.gov.*

Mr. Eric Stas or Ms. Jennifer Tiedeman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9507 or (202) 287–6111. E-mail: *Eric.Stas@hq.doe.gov* or *Jennifer.Tiedeman@hq.doe.gov.*

Correction

In direct final rule document FR 2011–14557 appearing on page 37408, in the issue of Monday, June 27, 2011, the following corrections should be made:

1. On page 37540, in the third column, the first two paragraphs under section B, ''Review Under the Regulatory Flexibility Act,'' are corrected to read as follows:

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), U.S. Department of Energy (DOE) published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the

General Counsel's Web site (*http://www.gc.doe.gov*).

DOE reviewed today's direct final rule and corresponding NOPR pursuant to the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. 68 FR 7990. Set forth below is DOE's initial regulatory flexibility analysis for the standards proposed in the NOPR, published elsewhere in today's **Federal Register.** DOE will consider any comments on the analysis or economic impacts of the rule in determining whether to proceed with the direct final rule. DOE will publish its final regulatory flexibility analysis (FRFA), including responses to any comments received, in a separate notice at the conclusion of the 110-day comment period. A description of the reasons why DOE is adopting the standards in this rule and the objectives of and legal basis for the rule are set forth elsewhere in the preamble and not repeated here.

Issued in Washington, DC, on June 29, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–16884 Filed 7–5–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

[Docket ID OCC–2011–0017]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

RIN 3064–ZA01

List of Office of Thrift Supervision Regulations to be Enforced by the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint notice.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), transfers to the OCC the functions of the Office of Thrift Supervision (OTS) relating to Federal savings associations and also transfers to the OCC rulemaking authority of the OTS and the Director of the OTS, respectively, relating to all savings associations. Functions of the OTS relating to State savings associations are transferred to the FDIC. Section 316(c) of the Act requires the OCC and the FDIC, after consultation with one another, to identify those regulations of the OTS that are continued under Section 316(b) of the Act that the OCC, with respect to Federal savings associations, and the FDIC, with respect to State savings associations, will enforce, and to publish a list of those regulations in the **Federal Register**. This joint notice sets out the required lists of both the OCC and the FDIC.

FOR FURTHER INFORMATION CONTACT: OCC: Andra Shuster, Senior Counsel, Heidi Thomas, Special Counsel, or Mary Gottlieb, Regulatory Specialist, Legislative and Regulatory Activities Division, (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

FDIC: Ann Johnson Taylor, Counsel, (202) 898–3573; Rodney D. Ray, Counsel, (202) 898–3556; or Martin P. Thompson, Senior Review Examiner, (202) 898–6767, Federal Deposit Insurance Corporation, 550 17 St. NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION: The Act, signed into law on July 21, 2010,[1] transfers all functions of the OTS and the Director as well as all of the powers, authorities, rights, and duties vested in the OTS and the Director of the OTS relating to the transferred functions to the OCC, FDIC and the Board of Governors of the Federal Reserve System (the Board). All functions, powers, authorities, rights, and duties relating to Federal savings associations are transferred to the OCC and the Comptroller of the Currency; all functions, powers, authorities, rights, and duties relating to State savings associations are transferred to the FDIC; and all functions, powers, authorities, rights, and duties relating to the supervision of savings and loan holding companies (SLHCs) and any subsidiaries of such SLHCs other than depository institutions are transferred to the Board. The Act transfers rulemaking authority of the OTS and the Director of the OTS relating to savings associations to the OCC and the Comptroller of the Currency, and transfers rulemaking authority of the OTS and the Director of the OTS relating to SLHCs to the Board.[2] The transfer of OTS functions will take place on July 21, 2011. The Act abolishes the OTS 90 days after the transfer date.

Section 316(b) of the Act provides for the continuation of OTS regulations and enforcement of such regulations that have been issued in performance of the functions transferred by Title III of the Act. Section 316(c) of the Act requires the OCC and FDIC, after consultation with each other, to identify those regulations of the OTS that are continued under Section 316(b) of the Act that will be enforced by each agency and publish a list of those regulations in the **Federal Register**.[3] This list must be published no later than the transfer date.

This joint notice sets out both the OCC's and the FDIC's lists of OTS regulations that each agency will enforce beginning on the transfer date: The OCC, with respect to Federal savings associations; and the FDIC, with respect to State savings associations.[4] This joint notice is not intended to have any substantive effect on the regulations at issue; rather it provides a reference for Federal savings associations that will be regulated and supervised by the OCC beginning on the transfer date and for State savings associations that will be regulated and supervised by the FDIC beginning on the transfer date.[5] Separately, the OCC also plans to issue an interim final rule with a request for comment, effective on the transfer date, that republishes those OTS regulations the OCC will enforce as of the transfer date. These regulations will be added to Chapter I of Title 12 of the Code of Federal Regulations and renumbered accordingly as OCC rules, with nomenclature and other technical amendments to reflect OCC supervision. The OCC will consider more comprehensive substantive amendments to former OTS regulations, as

[1] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[2] Section 312(c) of the Act designated the FDIC as the ''appropriate Federal banking agency'' for State savings associations. Under those statutes (and others using similar terminology) for which the ''appropriate Federal banking agency'' is authorized to issue regulations, the FDIC will issue regulations for State savings associations.

[3] Separately, the Act requires the Board to identify the OTS regulations continued under Section 316(b) that the Board will enforce after the transfer date and to publish a list in the **Federal Register**.

[4] As set out in the tables below, certain provisions have been excluded because they relate to the supervision of SLHCs, which will be supervised by the Board, or are superseded by the Act.

[5] Further, publication of this list should not be construed to restrict the OCC or the FDIC from enforcing violations of OTS regulations by Federal savings associations or State savings associations, respectively, that occurred prior to the transfer date.

appropriate, with the opportunity for public comment, after the transfer date.[6]

On June 14, 2011, the FDIC's Board of Directors approved an interim rule with request for comment to revise a number of existing FDIC administrative and procedural rules to reflect the FDIC's supervision of State savings associations and to make other clarifying amendments to those rules.[7] This interim rule, which was published in the **Federal Register** on June 21, 2011, will be effective on the transfer date. The FDIC plans to issue a second interim rule with a request for comment, also effective on the transfer date, which will republish certain OTS rules for which the FDIC has rulemaking authority. These regulations will be renumbered and added to Chapter III of Title 12 of the Code of Federal Regulations with nomenclature and other technical amendments. After the transfer date, and with the opportunity for public comment, the FDIC will consider incorporating these rules into its existing rules, amending them in a more substantive manner, or rescinding them, as appropriate.

OTS Regulations That Will Be Enforced by the OCC—Title 12

Part or section	Chapter V—Office of Thrift Supervision, Department of the Treasury
Part 508	Removals, Suspensions and Prohibitions where a Crime is Charged.
Part 509 (except 509.100(b) and Subparts C and D).	Rules of Practice and Procedure in Adjudicatory Proceedings.
Part 512	Rules for Investigative Proceedings and Formal Examination Proceedings.
Part 516	Application Processing Procedure.
Part 528	Nondiscrimination Requirements.
Part 533	Disclosure and Reporting of CRA-related Agreements.
Part 536	Consumer Protection in Sales of Insurance.
Part 541	Definitions for Federal Savings Association Regulations.
Part 543	Federal Mutual Savings Associations—Incorporation, Organization and Conversion.
Part 544	Federal Mutual Savings Associations—Charter and Bylaws.
Part 545 (except 545.2)	Federal Savings Associations—Operations.
Part 546	Federal Mutual Savings Associations—Merger, Dissolution, Reorganization, and Conversion.
Part 550 (except 550.10(b))	Fiduciary Powers of Savings Associations.
Part 551	Recordkeeping for Securities Transactions.
Part 552	Federal Stock Associations—Incorporation, Organization, and Conversion.
Part 555 (except 555.310(b))	Electronic Operations.
Part 557 (except 557.11, 12 and 13)	Deposits.
Part 559	Subordinate Organizations.
Part 560[8] (except 560.2)	Lending and Investment.
Part 561	Definitions for Regulations Affecting All Savings Associations.
Part 562 (except 562.4(b)(2))	Regulatory Reporting Standards.
Part 563[9] (except 563.171, and 563.172(b)(2))	Savings Associations—Operations.
Part 563b	Conversions from Mutual to Stock Form.
Part 563c	Accounting Requirements.
Part 563d	Securities of Savings Associations.
Part 563e	Community Reinvestment.
Part 563f	Management Official Interlocks.
Part 563g	Securities Offerings.
Part 564	Appraisals.
Part 565	Prompt Corrective Action.
Part 567	Capital.
Part 568	Security Procedures.
Part 569	Proxies.
Part 570	Safety and Soundness Guidelines Establishing Standards for Safety and Soundness.
Part 571[10]	Fair Credit Reporting.
Part 572	Loans in Areas Having Special Flood Hazards.
Part 573[11]	Privacy of Consumer Information.
Part 574 (except provisions only applicable to SLHCs).	Acquisition of Control of Savings Associations.
Part 590	Preemption of State Usury Laws.
Part 591	Preemption of Due-on-Sale Laws.

[6] The OCC also has issued a notice of proposed rulemaking to revise a number of OCC regulations to reflect the OCC's supervision of Federal savings associations and other changes necessitated by the Act. 76 FR 30557 (May 26, 2011).

[7] 76 FR 35963 (June 21, 2011).

[8] Pursuant to section 1025 of the Act, with respect to subpart C, the OCC will enforce this rule for Federal savings associations with assets of $10 billion or less. The Consumer Financial Protection Bureau will enforce subpart C of this rule for institutions with assets of more than $10 billion.

[9] Pursuant to section 1025 of the Act, with respect to subpart D, the OCC will enforce this rule for Federal savings associations with assets of $10 billion or less. The Consumer Financial Protection Bureau will enforce subpart D of this rule for institutions with assets of more than $10 billion.

[10] With respect to § 571.83 and subpart J, the OCC will enforce this rule for all Federal savings associations. Pursuant to section 1025 of the Act, with respect to the remaining provisions of part 571, the OCC will enforce this rule for Federal savings associations with assets of $10 billion or less and the Consumer Financial Protection Bureau will enforce this rule for institutions with assets of more than $10 billion.

[11] Pursuant to section 1025 of the Act, the OCC will enforce this rule for Federal savings associations with assets of $10 billion or less. The Consumer Financial Protection Bureau will enforce this rule for institutions with assets of more than $10 billion.

[12] Pursuant to section 1025 of the Dodd-Frank Act, the FDIC will enforce subpart D of this rule for State savings associations with assets of $10 billion or less. The Consumer Financial Protection Bureau will enforce this rule for institutions with assets of more than $10 billion.

[13] With respect to § 571.83 and subpart J, the FDIC will enforce this rule for all State savings associations. Pursuant to section 1025 of the Dodd-Frank Act, with respect to the remaining provisions of part 571, the FDIC will enforce this rule for State savings associations with assets of $10 billion or less, and the Consumer Financial Protection Bureau will enforce this rule for institutions with assets of more than $10 billion.

[14] Pursuant to section 1025 of the Dodd-Frank Act, the FDIC will enforce this rule for State savings associations with assets of $10 billion or less. The Consumer Financial Protection Bureau will enforce this rule for institutions with assets of more than $10 billion.

OTS REGULATIONS THAT WILL BE ENFORCED BY THE FDIC—TITLE 12

Part or section	Chapter V—Office of Thrift Supervision, Department of the Treasury
Part 507 (except 507.3(b))	Restrictions on Post-Employment Activities of Senior Examiners.
Part 508	Removals, Suspensions and Prohibitions where a Crime is Charged.
Part 509 (except 509.1(e)(3), 509.100(b), 509.103(b)(2), and Subparts C and D).	Rules of Practice and Procedure in Adjudicatory Proceedings.
Part 512	Rules for Investigative Proceedings and Formal Examination Proceedings.
Part 513	Practice Before the Office.
Part 516 (except 516.45(a)(3), and 516.290(b))	Application Processing Procedure.
Part 528	Nondiscrimination Requirements.
Part 533 (except 533.1(b)(2) and 533.10)	Disclosure and Reporting of CRA-related Agreements.
Part 536	Consumer Protection in Sales of Insurance.
Part 550 (only 550.10(b))	Fiduciary Powers of Savings Associations.
Part 551	Recordkeeping for Securities Transactions.
Part 555 (only Subpart B, except 555.310(b))	Electronic Operations.
Part 557 (only Subpart C)	Deposits.
Part 558	Possession by Conservators and Receivers for Federal and State Savings Associations.
Part 559 (only Subpart B)	Subordinate Organizations.
Part 560 (only 560.1, 560.3 and Subpart B)	Lending and Investment.
Part 561 (except 561.18(b) and 561.34)	Definitions for Regulations Affecting All Savings Associations.
Part 562 (except 562.4(b)(2))	Regulatory Reporting Standards.
Part 563[12] (except 563.161 as to service corporations, 563.172(b)(1), 563.180(d)(4), 563.555 (definition of "Troubled condition" (2)).	Savings Associations—Operations.
Part 563b	Conversions from Mutual to Stock Form.
Part 563c	Accounting Requirements.
Part 563d (except 563d.2)	Securities of Savings Associations.
Part 563e	Community Reinvestment.
Part 563f (except 563f.2(o)(1))	Management Official Interlocks.
Part 563g	Securities Offerings.
Part 564	Appraisals.
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Part 567	Capital.
Part 568	Security Procedures.
Part 569	Proxies.
Part 570	Safety and Soundness Guidelines Establishing Standards for Safety and Soundness.
Part 571[13] (except 571.30(a)(1)(iii), (iv), and (v))	Fair Credit Reporting.
Part 572	Loans in Areas Having Special Flood Hazards.
Part 573[14]	Privacy of Consumer Information.
Part 574 (except provisions applicable to SLHCs).	Acquisition of Control of Savings Associations.
Part 590	Preemption of State Usury Laws.
Part 591	Preemption of Due-on-Sale Laws.

Dated: June 15, 2011.

John Walsh,

Acting Comptroller of the Currency.

By order of the Board of Directors.

Dated at Washington, DC, this 14th day of June, 2011.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2011–16875 Filed 7–5–11; 8:45 am]

BILLING CODE 4810–33–P; 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1197; Directorate Identifier 2010–NM–044–AD; Amendment 39–16736; AD 2011–14–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B4–600, B4–600R, and F4–600R Series Airplanes, and Model C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes); and Model A310 Series Airplanes

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

ACTION: Final rule.

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

An operator of an A300–600 aeroplane reported finding a cracked pylon fuel drain pipe on engine #1. * * *

* * * The pipe drains the double wall of the wing-to-pylon junction in the event of fuel leakage.

After investigation, it was concluded that the damage of the pylon fuel drain pipe had been caused by chafing of the pipe against over-length screws that had been installed in accordance with the Illustrated Parts Catalogue (IPC) during a maintenance phase of the Lower Aft Pylon Fairing (LAPF).

This condition, if not detected and corrected, could, in combination with fuel leakage in the pylon, lead to an accumulation of fuel in the lowest point of the LAPF. As high temperatures are present within the

LAPF, and without ventilation, this could result in fuel (vapour) ignition and consequent fire.

* * * * *

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

DATES: This AD becomes effective August 10, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 10, 2011.

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

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on December 10, 2010 (75 FR 76926). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> An operator of an A300–600 aeroplane reported finding a cracked pylon fuel drain pipe on engine #1.The pipe, Part Number (P/N) A71715020, had separated and the end was found 5.5 inches from the pylon aft bulkhead. A similar case was also reported on an A300F4–608ST aeroplane.
>
> The affected pylon fuel drain pipe runs from the top of the pylon primary structure to the aft part of the pylon rear secondary structure and is partly attached under the pylon lower spar. The pipe drains the double wall of the wing-to-pylon junction in the event of fuel leakage.
>
> After investigation, it was concluded that the damage of the pylon fuel drain pipe had been caused by chafing of the pipe against over-length screws that had been installed in accordance with the Illustrated Parts Catalogue (IPC) during a maintenance phase of the Lower Aft Pylon Fairing (LAPF).
>
> This condition, if not detected and corrected, could, in combination with fuel leakage in the pylon, lead to an accumulation of fuel in the lowest point of the LAPF. As high temperatures are present within the LAPF, and without ventilation, this could result in fuel (vapour) ignition and consequent fire.
>
> To address and correct this unsafe condition, EASA * * * required an inspection [for missing pipes, or distortions or holes] of the pylon fuel drain pipe and the attachment screws and, depending on findings, the necessary corrective actions. In case over-length screws are found to be installed, depending on location and aeroplane configuration, these must be replaced.
>
> * * * * *

Required actions also include visually inspecting to determine the length and part number of the drain pipe attachment screws on the LAPF on the left- and right-hand pylons. Corrective actions include replacing or repairing the pipe, or replacing screws with incorrect part numbers with new screws. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Extend the Compliance Time

UPS requested that we extend the compliance time from 30 days to 30 months after the effective date of the AD. Per the commenter, the NPRM stated that the over-length screws installed on the affected aircraft were installed in accordance with the illustrated parts catalog (IPC), and that the correct attachment screws are clearly identified in the UPS A300–600 IPC, so there is a minimal probability of installing an over-length screw. The commenter stated that the compliance time of 30 days is too restrictive and believes that extending the threshold to 30 months for those operators whose IPC does not list an over-length fastener would provide an equivalent level of safety and better fit within an operator's routine maintenance program and eliminate any undue burden associated with a restrictive timetable.

We do not agree to extend the compliance time. The FAA received information confirming that over-length screws could have been introduced in production due to some erroneous drawings. Further, before 2007, not all IPCs were correct. Some of the IPCs for aircraft fitted with Pratt & Whitney engines were corrected in 2007. All IPCs were checked in 2010, and remaining erroneous IPCs were corrected. Although UPS may have the correct IPC, since some over-length screws could have been installed during production, a fleet inspection is needed to address the identified unsafe condition. However, under the provisions of paragraph (k) of this AD, we will consider requests for approval of an extension of the compliance time if sufficient data are submitted to substantiate that the new compliance time would provide an acceptable level of safety. We have not changed the AD in this regard.

Request To Use Thicker Washer as Advised in Service Information Letter

UPS requested FAA concurrence that using an alternative washer, P/N NSA5149–3, as recommended by Airbus in Service Information Letter 54–035, Revision 01, dated July 9, 2010, will not have an impact on the AD. This washer would be used in lieu of P/N NSA5149–4 under the head of the attachment screws, to prevent cracking of the LAPF.

We partially agree with the commenter's request. The alternative washer is a recommended improvement, but not a modification addressing an unsafe condition/airworthiness issue. As the Service Information Letter mentions, both washers are fully interchangeable; the last IPC update (2010) also reflects this interchangeability. Therefore, we confirm that use of either washer is adequate. In this regard, and to avoid the need for an alternative method of compliance (AMOC) on this issue in the future, we have added the washer having P/N NSA5149–3 to paragraphs (g)(1) and (g)(2) of this AD.

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 168 products of U.S. registry. We also estimate that it will take about 4 work-

hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $57,120, or $340 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2011–14–01 Airbus: Amendment 39–16736. Docket No. FAA–2010–1197; Directorate Identifier 2010–NM–044–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective August 10, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Model A300 B4–605R and B4–622R airplanes; Model A300 F4–605R and F4–622R airplanes; Model A300 C4–605R Variant F airplanes; and Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; certificated in any category; all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 54: Nacelles/pylons.

Reason

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

An operator of an A300–600 aeroplane reported finding a cracked pylon fuel drain pipe on engine #1. * * *

* * * The pipe drains the double wall of the wing-to-pylon junction in the event of fuel leakage.

After investigation, it was concluded that the damage of the pylon fuel drain pipe had been caused by chafing of the pipe against over-length screws that had been installed in accordance with the Illustrated Parts Catalogue (IPC) during a maintenance phase of the Lower Aft Pylon Fairing (LAPF).

This condition, if not detected and corrected, could, in combination with fuel leakage in the pylon, lead to an accumulation of fuel in the lowest point of the LAPF. As high temperatures are present within the LAPF, and without ventilation, this could result in fuel (vapour) ignition and consequent fire.

* * * * *

Compliance

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

Inspection and Corrective Actions

(g) Within 30 days after the effective date of this AD, do a general visual inspection for missing pipes, or distortions or holes, of the fuel drain pipes of the LAPF, and if no missing pipes, distortions, and holes are found, do a general visual inspection to determine the length and part number of the drain pipe attachment screws on the LAPF on the left-hand and right-hand pylons, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes).

(1) If missing pipes, distortions, or holes of the fuel drain pipes are detected during any inspection required by paragraph (g) of this AD, before further flight, replace the drain pipe, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes); or contact Airbus for repair instructions and do the repair; except where the applicable service bulletin specifies using washers having part number (P/N) NSA5149–4, washers having P/N NSA5149–3 may alternatively be used.

(2) If screw length is outside the measurement specified in the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes); or screws having incorrect part numbers are found during any inspection required by paragraph (g) of this AD, before further flight, replace the screws with screws having P/N NAS1102E3–10, NAS1102E3–12, or NAS560HK3–2, as applicable to location and airplane (engine) configuration, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes); except where the applicable service bulletin specifies using washers having P/N NSA5149–4, washers having P/N NSA5149–3 may alternatively be used.

(h) As of the effective date of this AD, do not install screws on the LAPF, other than screws having P/N NAS1102E3–10, NAS1102E3–12, or NAS560HK3–2, as applicable to location and airplane (engine) configuration, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–54A6039,

Revision 01, dated March 11, 2010 (for Model A300–600 series airplanes); or A310–54A2040, Revision 02, dated June 10, 2010 (for Model A310 series airplanes).

Credit for Actions Accomplished in Accordance With Previous Service Information

(i) Actions accomplished before the effective date of this AD in accordance with the service bulletins identified in table 1 of this AD are considered acceptable for compliance with the corresponding actions specified in this AD.

TABLE 1—CREDIT SERVICE BULLETINS

For model—	Airbus Mandatory Service Bulletin—	Revision—	Dated—
A300–600 series airplanes	A300–54A6039	Original	January 19, 2010.
A310 series airplanes	A310–54A2040	Original	January 19, 2010.
A310 series airplanes	A310–54A2040	01	March 11, 2010.

No Reporting

(j) Although Airbus Mandatory Service Bulletins A300–54A6039, Revision 01, dated March 11, 2010; and A310–54A2040, Revision 02, dated June 10, 2010; specify to submit certain information to the manufacturer, this AD does not include that requirement.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: Although the MCAI or service information tells you to submit information to the manufacturer, paragraph (j) of this AD does not require that information.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(l) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0085, dated May 3, 2010; Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, dated March 11, 2010; and Airbus Mandatory Service Bulletin A310–54A2040, Revision 02, dated June 10, 2010; for related information.

Material Incorporated by Reference

(m) You must use Airbus Mandatory Service Bulletin A300–54A6039, Revision 01, excluding Appendix 01 and including Appendices 02 and 03, dated March 11, 2010; or Airbus Mandatory Service Bulletin A310–54A2040, Revision 02, excluding Appendix 01 and including Appendices 02 and 03, dated June 10, 2010; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; e-mail: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.*

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

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

Issued in Renton, Washington, on June 16, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–15991 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1203; Directorate Identifier 2010–NM–168–AD; Amendment 39–16738; AD 2011–14–03]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD requires repetitive inspections for cracking of the left and right upper center skin panels of the horizontal stabilizer, and corrective action if necessary. This AD was prompted by a report of a crack found in the upper center skin panel at the aft inboard corner of a right horizontal stabilizer. We are issuing this AD to detect and correct cracks in the horizontal stabilizer upper center skin panel. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

DATES: This AD is effective August 10, 2011.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of August 10, 2011.

ADDRESSES: For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; phone: 206–544–5000, extension 2; fax: 206–766–5683; e-mail: *dse.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced

service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Roger Durbin, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: 562–627–5233; fax: 562–627–5210; e-mail: *Roger.Durbin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to the specified products. That NPRM published in the **Federal Register** on December 23, 2010 (75 FR 80744). That NPRM proposed to require repetitive eddy current inspections—either (Option 1) two high frequency eddy current (ETHF) scans and one low frequency eddy current (ETLF) scan; or (Option 2) three ETHF scans—to detect cracking of the right and left upper center skin panels of the horizontal stabilizer, and replacing any cracked horizontal stabilizer upper center skin panel with a serviceable panel.

Comments

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

Request To Clarify the Term ''Serviceable''

Several commenters requested clarification of the term ''serviceable.''

American Airlines stated that the term ''serviceable'' applies to used and new aircraft parts. American commented that if a used skin plank that has been determined to be serviceable has been installed, then the part has accumulated fatigue damage and should be inspected using the repetitive method and the interval used prior to installation.

Aeropostal Hangars stated that the word ''serviceable'' can be associated with ''removed in serviceable condition'' from another aircraft. The commenter stated that although the manufacturing tolerances of fastener holes allow the installation of a removed panel from one aircraft to another, it is not always possible considering oversized fasteners, etc. We infer that this commenter wants us to change paragraph (g)(2) of the NPRM to require replacement with a new, rather than serviceable, skin panel assembly.

We agree to change paragraph (g)(2) in this final rule to require replacement with a new skin panel because it is not generally possible to install a used skin panel assembly due to the difficulty in matching drill holes and because the AD does not include a provision for identifying and tracking the accumulated time on the used part. We revised paragraph (g)(2) of this AD accordingly.

Request To Provide Options for Temporary Repairs

Several commenters requested additional options for temporary repairs of certain crack configurations rather than replacement of skin panel assemblies before further flight.

American Airlines stated that it has accomplished temporary cracking repairs on 21 airplanes based on the manufacturer's instructions and have not had any crack propagation from the repaired parts. American stated that doing a temporary repair results in the operation of a safe airplane, which can then be scheduled for permanent repair at a time that causes the least disruption for the airline and the flying public. This commenter requested that we allow temporary repairs to a cracked skin panel assembly.

Delta Airlines presumed that skin panel cracks likely were caused by contributions from errors in removing or installing the skin panels because of the way the skin panels overlap. Some of Delta's cracked production skin panels were not adequately shimmed where cracks occurred. This commenter cited evidence that trim-out skin panel repairs would provide some reduction in stress concentration and allow skin panels to remain in service until a planned opportunity to change the panels occurs, which would reduce airplane out-of-service time. Delta stated that trim-out repairs should be allowed on skin panels and that the airplane should be allowed to stay in service until at least the next heavy maintenance visit.

Aeropostal Hangars stated that the finding of a crack in an in-service revenue aircraft that is not allowed temporary repairs could lead to a non-scheduled down time for the affected aircraft. We infer that this commenter wants us to allow temporary repairs.

We disagree. We have determined that it will be difficult to evaluate the effect of all temporary repairs on safety, particularly since other temporary repairs allowed on the aft horizontal skin panel by AD 2007–10–04, Amendment 39–15045 (72 FR 25960, May 8, 2007), might already be present. We stated in the NPRM that a crack in the upper center skin panel might transfer the load to the upper aft skin panel, which might result in the upper aft skin panel cracking before reaching the existing inspection interval. Additionally, Aeropostal Hangars provided no data or information that would show that temporary repairs would provide an adequate level of safety.

In this case, we have determined that the alternative method of compliance (AMOC) process is more appropriate for temporary repair approval. Under the provisions of paragraph (h) of this AD, we will consider requests for approval of an AMOC if sufficient data are submitted to substantiate that temporary repairs would provide an acceptable level of safety. Early field data indicate that substantially fewer center panel cracks than aft panel cracks will be detected; therefore, the AMOC process should not represent a substantial burden to operators. We have not changed this AD in this regard.

Request To Replace Horizontal Stabilizer

Several commenters requested the option of replacing the whole horizontal stabilizer instead of replacing a cracked center skin panel because replacing the stabilizer would require only a few days of airplane out-of-service time instead of several weeks.

We disagree. Horizontal stabilizer assemblies do not meet the criteria for serialized, rotable life-limited parts. Further, additional tracking information that is specific to a maintenance facility might be needed to ensure that inspections are occurring at the required times for swapped parts. However, under the provisions of paragraph (h) of this AD, we will consider requests for approval of an AMOC if sufficient data are submitted to substantiate that replacing the whole horizontal stabilizer

instead of replacing a cracked center skin panel would provide an acceptable level of safety. We have not changed this AD in this regard.

Request To Use Later Revisions of the Service Bulletin

American Airlines requested that this proposed AD allow the use of later revisions of the service bulletin. American stated that allowing later versions would eliminate the need for AMOC approval for future service bulletin revisions.

We disagree. We cannot use the phrase, ''or later FAA-approved revisions,'' in an AD when referring to the service document because doing so violates Office of the Federal Register (OFR) policies for approval of materials ''incorporated by reference.'' However, affected operators may request approval to use a later revision as an AMOC with this AD under the provisions of paragraph (h) of this AD. We have not changed this AD in this regard.

Explanation of Change to Applicability

We have revised the applicability of this AD to identify The Boeing Company as the type certificate holder for the affected models.

Conclusion

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

Costs of Compliance

We estimate that this AD will affect 668 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	4 work-hours × $85 per hour = $340 per inspection cycle.	$0	$340 per inspection cycle	$227,120 per inspection cycle.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Group 1: Skin panel replacement	648 work-hours × $85 per hour = $55,080	$36,405	$91,485
Group 2: Skin panel replacement	648 work-hours × $85 per hour = $55,080	54,071	109,151

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2011–14–03 The Boeing Company: Amendment 39–16738; Docket No. FAA–2010–1203; Directorate Identifier 2010–NM–168–AD.

Effective Date

(a) This AD is effective August 10, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all The Boeing Company Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87) and MD–88 airplanes, certificated in any category.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 55: Stabilizers.

Unsafe Condition

(e) This AD was prompted by a report of a crack found in the upper center skin panel at the aft inboard corner of a right horizontal stabilizer. We are issuing this AD to detect and correct cracks in the horizontal stabilizer upper center skin panel. Uncorrected cracks might ultimately lead to the loss of overall structural integrity of the horizontal stabilizer.

Compliance

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

Inspections

(g) Before the accumulation of 20,000 total flight cycles, or within 4,379 flight cycles after the effective date of this AD, whichever occurs later, do eddy current inspections to detect cracking of the left and right upper center skin panels of the horizontal stabilizer, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010.

(1) If no crack is found during any inspection required by paragraph (g) of this AD, repeat the applicable inspections thereafter at the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010.

(2) If any crack is found during any inspection required by paragraph (g) of this AD, before further flight, replace the skin panel with a new skin panel, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010. Within 20,000 flight cycles after the replacement, do eddy current inspections as required by paragraph (g) of this AD.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

Related Information

(i) For more information about this AD, contact Roger Durbin, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Blvd., Lakewood, California 90712–4137; phone: 562–627–5233; fax: 562–627–5210; e-mail: *Roger.Durbin@faa.gov*.

Material Incorporated by Reference

(j) You must use Boeing Alert Service Bulletin MD80–55A068, dated July 16, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; phone: 206–544–5000, extension 2; fax: 206–766–5683; e-mail: *dse.boecom@boeing.com;* Internet: *https://www.myboeingfleet.com*.

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

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

Issued in Renton, Washington, on June 16, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–15990 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0593; Directorate Identifier 2011–SW–002–AD; Amendment 39–16723; AD 2011–12–16]

RIN 2120–AA64

Airworthiness Directives; Schweizer Aircraft Corporation (Schweizer) Model 269A, A–1, B, C, C–1, and TH–55 Series Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing emergency airworthiness directive (EAD) for the specified Schweizer model helicopters that was previously sent to all known U.S. owners and operators. That EAD currently requires removing each locknut and verifying sufficient drag torque and retorquing, or if the locknut does not have sufficient drag torque, replacing the locknut with an airworthy locknut. This AD retains the existing EAD requirements but also requires within a specified time, modifying the expandable bolts and installing a cotter pin. This AD is prompted by a locknut working loose from a bolt attaching the tailboom support strut at the aft cluster fitting because the locknut installed on the expandable bolt did not have the proper threads. We are issuing this AD to modify each expandable bolt to allow adding a cotter pin to prevent the strut and driveshaft separating from the helicopter and subsequent loss of control of the helicopter.

DATES: This AD is effective July 21, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of July 21, 2011.

We must receive any comments on this AD by September 6, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Schweizer Aircraft Corporation, Elmira/Corning Regional Airport, 1250 Schweizer Road, Horseheads, NY 14845, telephone (607) 739–3821, *fax:* (607) 796–2488, e-mail address *schweizer@sacusa.com,* or at *http://www.sacusa.com/support.*

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (*telephone:* 800–647–

5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Stephen Kowalski, Aviation Safety Engineer, FAA, Airframe and Propulsion Branch, ANE–171, 1600 Stewart Ave., Suite 410, Westbury, New York 11590, telephone (516) 228–7327, fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

On December 20, 2010, we issued EAD 2011–01–52, Directorate Identifier 2010–SW–111–AD, for the specified Schweizer model helicopters. That EAD requires, before further flight, removing the locknut and reinstalling the locknut while determining the locknut drag torque. If the drag torque is a minimum of 2 in-lbs, retorquing the locknut to 23 in-lbs is required. If the drag torque is not at least 2 in-lbs, replacing the locknut with an airworthy locknut is required. That AD resulted from a locknut working loose from a bolt attaching the tailboom support strut at the aft cluster fitting. Further investigation revealed that the locknut installed on the expandable bolt did not have the proper threads. We issued that EAD to prevent the strut and driveshaft separating from the helicopter and subsequent loss of control of the helicopter.

Actions Since AD Was Issued

Since we issued AD 2011–01–52, the manufacturer has introduced a modification of the expandable bolts to allow the addition of a cotter pin.

Relevant Service Information

We reviewed Schweizer Service Bulletins No. B–295 for Model 269A, A–1, B, and C helicopters, and No. C1B–032 for Model 269C–1 helicopters, both dated December 21, 2010. The service information specifies verifying sufficient drag torque on each locknut and applying the proper torque to each locknut. The service information also specifies modifying both expandable bolts to allow the addition of a cotter pin.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other helicopters of these same type designs.

AD Requirements

This AD retains the requirements in the existing EAD. This AD also requires, within 10 hours time-in-service (TIS), modifying both expandable bolts by drilling a hole through each bolt to allow the addition of a cotter pin. Thereafter, you may not install an expandable bolt unless that bolt has been modified in accordance with this AD. Modifying both expandable bolts in accordance with this AD is terminating action for the requirements of paragraphs (e)(1) and (e)(2) of this AD.

Differences Between the AD and the Service Information

We refer to flight hours as hours TIS.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because this condition, if not corrected, could result in the strut and driveshaft separating from the helicopter and subsequent loss of control of the helicopter. Therefore, we find that notice and opportunity for prior public comment are impracticable because of the short compliance time and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide notice and an opportunity to comment before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the Docket Number FAA–2011–0593 and Directorate Identifier 2011–SW–002–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD affects 585 helicopters of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per helicopter	Cost on U.S. operators
Inspection	.5 work-hour × $85 per hour = $43	negligible	$43	$25,155
Modification	1.5 work-hours × $85 per hour = $128	negligible	128	74,880

We estimate the total cost impact of this AD to be $100,035.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making any regulatory distinctions, and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends Part 39 of the Federal Aviation Regulations (14 CFR Part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2011–12–16 Schweizer Aircraft Corporation (Schweizer): Amendment 39–16723; Docket No. FAA–2011–0593; Directorate Identifier 2011–SW–002–AD.

Effective Date

(a) This AD is effective July 21, 2011.

Affected ADs

(b) This AD supersedes Emergency AD 2011–01–52, issued December 20, 2010; Directorate Identifier 2010–SW–111–AD.

Applicability

(c) Schweizer Model 269A, A–1, B, C helicopters (serial number (S/N) 1846 and larger); C–1 helicopters (S/N 0156 and larger); and TH–55 series helicopters with an Aft Cluster Fitting Modification Kit, part number (P/N) SA–269K–106, installed; certificated in any category.

Unsafe Condition

(d) This AD was prompted by a locknut working loose on the tailboom aft cluster fitting strut because the locknut installed on one expandable bolt did not have the proper threads. This AD contains terminating action to require modifying each expandable bolt to allow installing a cotter pin to prevent the strut and driveshaft separating from the helicopter and subsequent loss of control of the helicopter.

Compliance

(e) Required as indicated, unless already done.

(1) Before further flight, remove both the left-hand and right-hand locknuts, P/N MS21043–3. Reinstall the locknuts while determining the locknut drag torque. If the drag torque is a minimum of 2 in-lbs., retorque the locknut to 23 in-lbs. If the drag torque is not at least 2 in-lbs, replace the locknut with an airworthy locknut.

(2) Within 10 hours time-in-service, modify each expandable bolt, P/N ADB221–1A, torque locknut, P/N MS21043–3, and install cotter pin, P/N MS24665–132 or MS24665–151, in accordance with the Procedure Section, Part II, of Schweizer Service Bulletin (SB) No. B–295, dated December 21, 2010, for Model 269A, A–1, B, C, and TH–55 series helicopters or SB No. C1B–032, dated December 21, 2010, for Model 269C–1 helicopters.

(3) Before installing an expandable bolt, P/N ADB221–1A, to secure the tailboom support strut to the tailboom aft cluster fitting, modify the expandable bolt in accordance with paragraph (e)(2) of this AD.

(f) Modifying both expandable bolts by torquing the locknuts and installing the cotter pins as required by this AD is terminating action for the requirements of paragraph (e)(1) and (e)(2) of this AD.

Special Flight Permit

(g) Special flight permits will not be issued.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, New York Aircraft Certification Office (NYACO), FAA, has the authority to approve AMOCs for this AD if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the NYACO, send it to the attention of the Program Manager, Continuing Operational Safety.

Note: Before using any approved AMOC, we request that you notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office.

Related Information

(i) For more information about this AD, contact Stephen Kowalski, Aviation Safety Engineer, FAA, Airframe and Propulsion Branch, ANE–171, 1600 Stewart Ave., Suite 410, Westbury, New York 11590, telephone (516) 228–7327, fax (516) 794–5531.

Subject

(j) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 5302: Rotorcraft Tailboom.

Material Incorporated by Reference

(k) You must use the specified portions of the service information contained in Schweizer Service Bulletins B–295 or C1B–032, both dated December 21, 2010, for your model helicopter to do the actions required by this AD.

(2) For service information identified in this AD, contact Schweizer Aircraft Corporation, Elmira/Corning Regional Airport, 1250 Schweizer Road, Horseheads, NY 14845, telephone (607) 739–3821, fax: (607) 796–2488, e-mail address *schweizer@sacusa.com,* or at *http://www.sacusa.com/support.*

(3) You may also review copies of the service information that is incorporated by reference at the FAA, Office of the Regional Counsel, 2601 Meacham Blvd., Room 663, Fort Worth, Texas, or at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Fort Worth, Texas, on June 3, 2011.

Kim Smith,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2011–16571 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0152; Directorate Identifier 2010–NM–079–AD; Amendment 39–16739; AD 2011–14–04]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Model FALCON 7X Airplanes

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

ACTION: Final rule.

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

On some Falcon 7X aeroplanes, it has been determined potential low clearance between electrical wiring or hydraulic pipe and nearby structure.

Although no in service incident has been reported, there is no certainty that the minimum clearances would be maintained over time. In the worst case, interference or contact with structure might occur and lead to electrical short circuits or fluid leakage, potentially resulting in loss of several functions essential for safe flight.

* * * * *

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

DATES: This AD becomes effective August 10, 2011.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 10, 2011.

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

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on March 8, 2011 (76 FR 12624). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> On some Falcon 7X aeroplanes, it has been determined potential low clearance between electrical wiring or hydraulic pipe and nearby structure.
>
> Although no in service incident has been reported, there is no certainty that the minimum clearances would be maintained over time. In the worst case, interference or contact with structure might occur and lead to electrical short circuits or fluid leakage, potentially resulting in loss of several functions essential for safe flight.
>
> Dassault Aviation has developed two Service Bulletins (SB) that provide corrective actions to ensure the minimum required clearance, as well as adequate protection between hydraulic pipe (SB n° 0 92) and electrical wiring (SB n° 006) and the aeroplane structure.
>
> This [European Aviation Safety Agency (EASA)] AD requires the implementation of both SBs on the affected aeroplanes.
>
> Since issuance of EASA AD 2010–0029, Dassault Aviation has developed modifications M1036 and M1037. M1036 is equivalent to M1007 while M1037 is equivalent to M1020. These modifications are embodied during production on new aeroplanes.
>
> This [EASA] AD has been revised to exclude from the AD applicability the aeroplanes on which those modifications are embodied.

Required actions include general visual inspections for damage of wiring bundles and feeders. Damage includes, but is not limited to: Signs of overheat, discoloration, or damaged and cut strands on the cables and insulating sleeves. Corrective actions for damage of wiring bundles and feeders include repairing damage. Other required actions include modifying the applicable wiring and layout, a general visual inspection for absence of marks of the rear tank wall at the contact area, installing a protective plate on the rear tank wall, and installing a hydraulic pipe if necessary. If contact marks are found, required actions include an eddy current inspection or a penetrant inspection for cracks, and repair if necessary. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Editorial Change

We have made a minor editorial change to paragraph (g)(3)(ii)(A) of this AD.

Conclusion

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 21 products of U.S. registry. We also estimate that it will take about 65 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $116,025, or $5,525 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday,

except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2011–14–04 Dassault Aviation: Amendment 39–16739. Docket No. FAA–2011–0152; Directorate Identifier 2010–NM–079–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective August 10, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Dassault Aviation Model FALCON 7X airplanes, certificated in any category; having serial numbers 2 through 22 inclusive, 24 through 26 inclusive, 29, 30, 32 and subsequent; except those on which modifications M964, M937, M976, M1007 or M1036, M1020 or M1037, and M1022 have all been implemented.

Subject

(d) Air Transport Association (ATA) of America Code 20: Air Frame Wiring; and ATA Code 29: Hydraulic Power.

Reason

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

On some Falcon 7X aeroplanes, it has been determined potential low clearance between electrical wiring or hydraulic pipe and nearby structure.

Although no in service incident has been reported, there is no certainty that the minimum clearances would be maintained over time. In the worst case, interference or contact with structure might occur and lead to electrical short circuits or fluid leakage, potentially resulting in loss of several functions essential for safe flight.

* * * * *

Compliance

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

Inspections and Modification of Wiring and Rear Fuel Tank Panel

(g) Within 10 months or 650 flight hours after the effective date of this AD, whichever occurs first, do the actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

(1) Do a general visual inspection for damage of wiring bundles and feeders, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–006, Revision 1, dated March 3, 2010. If any damage is found, before further flight, repair, in accordance with Dassault Mandatory Service Bulletin 7X–006, Revision 1, dated March 3, 2010.

(2) Modify the applicable wiring and layout, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–006, Revision 1, dated March 3, 2010.

(3) Do a general visual inspection for absence of marks on the rear tank wall at the contact area, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–092, Revision 1, dated January 4, 2010.

(i) If no contact marks are found during the inspection required by paragraph (g)(3) of this AD, before further flight, modify the protective plate, and install a hydraulic pipe as applicable, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–092, Revision 1, dated January 4, 2010.

(ii) If any contact marks are found during the inspection required by paragraph (g)(3) of this AD, before further flight, do either an eddy current inspection for cracks or a penetrant inspection for cracks, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–092, Revision 1, dated January 4, 2010.

(A) If no crack is detected during any inspection required by paragraph (g)(3)(ii) of this AD, before further flight, do the actions specified in paragraph (g)(3)(i) of this AD.

(B) If any crack is detected during any inspection required in paragraph (g)(3)(ii) of this AD, before further flight, repair the crack using a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent); and modify the protective plate, and install a hydraulic pipe as applicable, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin 7X–092, Revision 1, dated January 4, 2010.

Credit for Actions Accomplished in Accordance With Previous Service Information

(h) Doing a general visual inspection for damage, repairing wiring bundles and feeders, and modifying the applicable wiring and layout, in accordance with Dassault Mandatory Service Bulletin 7X–006, dated December 18, 2009; and doing a general visual inspection for absence of marks on the rear tank wall at the contact area, modifying the protective plate, installing a hydraulic pipe as applicable, and doing either an eddy current inspection for cracks or a penetrant inspection for cracks, in accordance with Dassault Mandatory Service Bulletin 7X–092, dated July 17, 2009; before the effective date of this AD is acceptable for compliance with the corresponding actions required by paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

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

Related Information

(j) Refer to MCAI EASA Airworthiness Directive 2010–0029R1, dated November 25, 2010; Dassault Mandatory Service Bulletin 7X–006, Revision 1, dated March 3, 2010; and Dassault Mandatory Service Bulletin 7X–092, Revision 1, dated January 4, 2010; for related information.

Material Incorporated by Reference

(k) You must use Dassault Mandatory Service Bulletin 7X–006, Revision 1, dated March 3, 2010; and Dassault Mandatory Service Bulletin 7X–092, Revision 1, dated January 4, 2010; as applicable; to do the actions required by this AD, unless the AD specifies otherwise.

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

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

(3) You may review copies of the service information at the FAA, Transport Airplane

Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

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

Issued in Renton, Washington, on June 17, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–16057 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0116; Airspace Docket No. 11–ANE–1]

Establishment of Class E Airspace; Brunswick, ME

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects the effective date of a final rule that was published in the **Federal Register** on June 22, 2011, that establishes Class E airspace at Brunswick Executive Airport, Brunswick, ME.

DATES: The effective date is moved from 0901 UTC, August 25, 2011, to 0901 UTC, July 28, 2011.

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

History

Federal Register Docket No. FAA–2011–0116, Airspace Docket No. 11–ANE–1, published on June 22, 2011 (76 FR 36285), establishes Class E airspace at Brunswick Executive Airport, Brunswick, ME. This action will move up the effective date of this rulemaking, as the new approach procedures are to be published July 28, 2011. The original August 25, 2011, effective date was an oversight by the FAA. The FAA has determined good cause exists to have an effective date less than 30 days after the publication of this final rule because of the financial hardship the airport and its employees would incur with a delay of this magnitude.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the 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, when promulgated, would 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes Class E airspace at Brunswick Executive Airport, Brunswick, ME.

Correction to Final Rule

In final rule FR Doc 2011–15305, on page 36285 in the Federal Register of June 22, 2011 (76 FR 36285), make the following correction:

On page 36285, in the third column, in the **DATES** section, remove the date August 28, 2011, and replace with the date July 25, 2011.

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 June 28, 2011.

Rebecca B. MacPherson,

Assistant Chief Counsel for Regulations.

[FR Doc. 2011–16783 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2001–11133; Amendment No. 91–323]

Manual Requirements

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical amendment.

SUMMARY: The Federal Aviation Administration (FAA) is making a minor technical change to a final rule published in the **Federal Register** on July 27, 2004. This final rule established new requirements for the certification, operation, and maintenance of light-sport aircraft under several regulations. In the final rule, the FAA inadvertently did not change an affected regulatory reference in one section. The FAA is issuing this technical amendment to correct that oversight.

DATES: *Effective Dates:* This rule becomes effective on August 5, 2011.

FOR FURTHER INFORMATION CONTACT: Kim Barnette, Flight Standards Service, Aircraft Maintenance Division, AFS–300, Federal Aviation Administration, 950 L'Enfant Plaza North, SW., Washington, DC 20024; telephone (202) 385–6403; facsimile (202) 385–6474; e-mail *Kim.A.Barnette@faa.gov.*

SUPPLEMENTARY INFORMATION: The FAA published a final rule entitled ''Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft,'' in the **Federal Register** on July 27, 2004 (69 FR 44772). That final rule established new requirements for the certification, operation, and maintenance of light-sport aircraft. That final rule also redesignated the concluding text of § 43.9(a) as § 43.9(d) but did not revise a cross-reference in § 91.417(a)(2)(vi) to reflect the redesignation of that text. This technical amendment will correct § 91.417(a)(2)(vi) to reference the redesignated text in § 43.9(d).

List of Subjects in 14 CFR Part 91

Reporting and recordkeeping requirements.

Accordingly, Title 14 of the Code of Federal Regulations (CFR) part 91 is amended as follows:

The Amendment

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat.1180).

■ 2. Amend § 91.417 by revising paragraph (a)(2)(vi) to read as follows:

§ 91.417 Maintenance records.

(a) * * *

(2) * * *

(vi) Copies of the forms prescribed by § 43.9(d) of this chapter for each major alteration to the airframe and currently installed engines, rotors, propellers, and appliances.

* * * * *

Issued in Washington, DC, on June 29, 2011.

Dennis R. Pratte,

Acting Director, Office of Rulemaking.

[FR Doc. 2011–16863 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 806

[Docket No. 110321207–1206–01]

RIN 0691–AA78

Direct Investment Surveys: Alignment of Regulations With Current Practices

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends regulations of the Bureau of Economic Analysis (BEA) related to direct investment surveys. Specifically, BEA is eliminating reporting requirements for several direct investment surveys that are no longer necessary because the information is collected on other surveys of direct investment conducted by BEA. The surveys that are eliminated from the regulations are: A survey of foreign direct investment in the U.S. seafood industry, two schedules of expenditures for property, plant, and equipment of U.S. direct investment abroad, and two industry classification questionnaires. In addition, BEA is eliminating the reporting requirements for two surveys of new foreign direct investment in the United States. BEA suspended collection of these surveys in 2009 in order to align its international survey program with available resources. BEA is also making other minor revisions to its regulations to eliminate outdated information.

DATES: This final rule will be effective August 5, 2011.

FOR FURTHER INFORMATION CONTACT: David H. Galler, Chief, Direct Investment Division (BE–50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; e-mail *David.Galler@bea.gov* or phone (202) 606–9835.

SUPPLEMENTARY INFORMATION: On April 7, 2011, BEA published a notice of proposed rulemaking to align its regulations for direct investment surveys with current practices. No comments on the proposed rule were received. Thus the proposed rule is adopted without change. This final rule amends 15 CFR Part 806 by revising §§ 806.14, 806.15, and 806.18 to remove the reporting requirements for several direct investment surveys. The surveys are:

BE–13, Initial Report on a Foreign Person's Direct or Indirect Acquisition, Establishment, or Purchase of the Operating Assets, of a U.S. Business Enterprise, Including Real Estate

BE–14, Report by a U.S. Person Who Assists or Intervenes in the Acquisition of a U.S. Business Enterprise by, or Who Enters into a Joint Venture With, a Foreign Person

BE–21, Survey of Foreign Direct Investment in U.S. Business Enterprises Engaged in the Processing, Packaging, or Wholesale Distribution of Fish or Seafoods

BE–133B, Follow-up Schedule of Expenditures for Property, Plant, and Equipment of U.S. Direct Investment Abroad

BE–133C, Schedule of Expenditures for Property, Plant, and Equipment of U.S. Direct Investment Abroad

BE–507, Industry Classification Questionnaire

BE–607, Industry Classification Questionnaire

BEA is removing the reporting requirements for the BE–13 and the BE–14 surveys which were suspended in 2009 in order to align its international survey program with available resources. The surveys had been used to collect identification information on the U.S. business being established or acquired and on the new foreign owner, information on the cost of the investment and source of funding, and limited financial and operating data for the newly established or acquired entity. The data had been used to measure the amount of new foreign direct investment in the United States and assess its impact on the U.S. economy. BEA continues to identify newly acquired or established U.S. affiliates of foreign investors and bring them into its international survey program through the BE–12, BE–15, and BE–605 surveys, which are the benchmark, annual, and quarterly surveys of foreign direct investment in the United States, respectively, but they are not separately identified in BEA's published statistics.

BEA is eliminating the regulations for the BE–21, BE–133B, BE–133C, BE–507, and BE–607 surveys since they have not been conducted in many years and are no longer necessary because the information is collected on other surveys of direct investment conducted by BEA.

In addition, BEA is making other minor revisions to its regulations to eliminate outdated information. These revisions eliminate references to outdated information regarding BE–10 survey forms and inactive OMB control numbers.

Executive Order 12866

This final rule has been determined to be not significant for purposes of E.O. 12866.

Executive Order 13132

This final rule does not contain policies with Federalism implications as that term is defined in E.O. 13132.

Paperwork Reduction Act

The Office of Management and Budget (OMB) approvals under the Paperwork Reduction Act for the seven surveys that BEA is eliminating have expired. The information collection approval for the BE–13 and BE–14 (under OMB control number 0608–0035) expired on August 31, 2009; the BE–21 approval (OMB control number 0608–0050) expired September 30, 1983; the BE–133B and BE–133C (OMB control number 0608–0024) expired December 31, 1994; the BE–507 approval (OMB control number 0608–0032) expired April 30, 1997; and the BE–607 approval (OMB control number 0608–0030) expired on May 31, 1991.

Regulatory Flexibility Act

The Chief Counsel for Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding the certification or the economic impact of the rule more

generally. No final regulatory flexibility analysis was prepared.

List of Subjects in 15 CFR Part 806

Economic statistics, Foreign investment in the United States, International transactions, Penalties, Reporting and recordkeeping requirements.

Dated: June 7, 2011.

J. Steven Landefeld,

Director, Bureau of Economic Analysis.

For reasons set forth in the preamble, BEA amends 15 CFR part 806 as follows:

PART 806—DIRECT INVESTMENT SURVEYS

■ 1. The authority citation for 15 CFR part 806 continues to read as follows:

Authority: 5 U.S.C. 301; 22 U.S.C. 3101–3108; E.O. 11961 (3 CFR, 1977 Comp., p. 86), as amended by E.O. 12318 (3 CFR, 1981 Comp., p. 173), and E.O. 12518 (3 CFR, 1985 Comp., p. 348).

■ 2. In § 806.14, paragraph (d)(3) is removed and paragraphs (f)(1), (f)(2), (g)(1) are removed and reserved. Paragraph (g)(2) is revised to read as follows:

§ 806.14 U.S. direct investment abroad.

* * * * *

(g) * * *

(2) BE–10–Benchmark Survey of U.S. Direct Investment Abroad: Section 4(b) of the Act (22 U.S.C. 3103) provides that a comprehensive benchmark survey of U.S. direct investment abroad will be conducted in 1982, 1989, and every fifth year thereafter. Exemption levels, specific requirements for, and the year of coverage of, a given BE–10 survey may be found in § 806.16.

* * * * *

§ 806.15 [Amended]

■ 3. In § 806.15, paragraph (j)(1) is removed and reserved and paragraphs (j)(3), (j)(4), and (j)(5) are removed.

■ 4. Section 806.18(b) is revised to read as follows:

§ 806.18 OMB control numbers assigned to the Paperwork Reduction Act.

* * * * *

(b) Display.

15 CFR section where identified and described	Current OMB control No.
806.1 through 806.17	0608–0004 0009 0034 0042 0049 0053

[FR Doc. 2011–16065 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–06–P

TENNESSEE VALLEY AUTHORITY

18 CFR Part 1301

Tennessee Valley Authority Procedures

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Final rule.

SUMMARY: The Tennessee Valley Authority is amending its regulations which currently contain TVA's procedures for the Freedom of Information Act (FOIA), the Privacy Act, and the Government in the Sunshine Act. TVA is adding procedures related to classified national security information.

DATES: *Effective Date:* July 6, 2011.

FOR FURTHER INFORMATION CONTACT: Mark R. Winter, Senior Information Security Specialist, 1101 Market Street (MP 3C), Tennessee Valley Authority, Chattanooga, Tennessee 37402, (423) 751–6004. E-mail: *mrwinter@tva.gov.*

SUPPLEMENTARY INFORMATION: This rule was not published in proposed form since it relates to agency procedure and practice. TVA considers this rule to be a procedural rule which is exempt from notice and comment under 5 U.S.C. 533(b)(3)(A). This rule is not a significant rule for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget. As required by the Regulatory Flexibility Act, TVA certifies that these regulatory amendments will not have a significant impact on small business entities. This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35, as amended.

On December 29, 2009, Executive Order 13526, Classified National Security Information, was published in the **Federal Register.** This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information. On June 28, 2010, the Information Security Oversight Office (ISOO) published its directive, 32 CFR Part 2001, Classified National Security Information, for implementing the Executive Order at 75 **Federal Register** 37254.

Since this rule is non-substantive, it is being made effective July 6, 2011.

List of Subjects in 18 CFR Part 1301

Freedom of information, Government in the sunshine, Privacy.

For the reasons stated in the preamble, TVA amends 18 CFR part 1301 by adding Subpart E, Protection of National Security Classified Information, as follows:

PART 1301—PROCEDURES

Subpart E—Protection of National Security Classified Information

Subpart E—Protection of National Security Classified Information

§ 1301.61 Purpose and scope.

(a) *Purpose.* These regulations, taken together with the Information Security Oversight Office's implementing directive at 32 CFR Part 2001, Classified National Security Information, provide the basis for TVA's security classification program implementing Executive Order 13526, ''Classified National Security Information,'' as amended (''the Executive Order'').

(b) *Scope.* These regulations apply to TVA employees, contractors, and individuals who serve in advisory, consultant, or non-employee affiliate capacities who have been granted access to classified information.

§ 1301.62 Definitions.

The following definitions apply to this part:

(a) ''Original classification'' is the initial determination that certain information requires protection against unauthorized disclosure in the interest of national security (i.e., national defense or foreign relations of the United States), together with a designation of the level of classification.

(b) ''Classified national security information'' or ''classified information'' means information that has been determined pursuant to Executive Order 13526 or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

§ 1301.63 Senior agency official.

(a) The Executive Order requires that each agency that originates or handles classified information designate a senior agency official to direct and administer its information security program. TVA's senior agency official is the Director, Enterprise Information Security & Policy.

(b) Questions with respect to the Information Security Program, particularly those concerning the classification, declassification, downgrading, and safeguarding of classified information, shall be directed to the Senior Agency Official.

§ 1301.64 Original classification authority.

(a) Original classification authority is granted by the Director of the Information Security Oversight Office. TVA does not have original classification authority.

(b) If information is developed that appears to require classification, or is received from any foreign government information as defined in section 6.1(s) of Executive Order 13526, the individual in custody of the information shall immediately notify the Senior Agency Official and appropriately protect the information.

(c) If the Senior Agency Official believes the information warrants classification, it shall be sent to the appropriate agency with original classification authority over the subject matter, or to the Information Security Oversight Office, for review and a classification determination.

(d) If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority. If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a determination by an original classification authority.

§ 1301.65 Derivative classification.

(a) In accordance with Part 2 of Executive Order 13526 and directives of the Information Security Oversight Office, the incorporation, paraphrasing, restating or generation in new form of information that is already classified, and the marking of newly developed material consistent with the classification markings that apply to the source information, is derivative classification.

(1) Derivative classification includes the classification of information based on classification guidance.

(2) The duplication or reproduction of existing classified information is not derivative classification.

(b) Authorized individuals applying derivative classification markings shall:

(1) Observe and respect original classification decisions; and

(2) Carry forward to any newly created documents the pertinent classification markings.

(3) For information derivatively classified based on multiple sources, the authorized individuals shall carry forward:

(i) The date or event for declassification that corresponds to the longest period of classification among the sources; and

(ii) A listing of these sources on or attached to the official file or record copy.

(c) Documents classified derivatively shall bear all markings prescribed by 32 CFR 2001.20 through 2001.23 and shall otherwise conform to the requirements of 32 CFR 2001.20 through 2001.23.

§ 1301.66 General declassification and downgrading policy.

(a) TVA does not have original classification authority.

(b) TVA personnel may not declassify information originally classified by other agencies.

§ 1301.67 Mandatory review for declassification.

(a) Reviews and referrals in response to requests for mandatory declassification shall be conducted in compliance with section 3.5 of Executive Order 13526, 32 CFR 2001.33, and 32 CFR 2001.34.

(b) Any individual may request a review of classified information and material in possession of TVA for declassification. All information classified under Executive Order 13526 or a predecessor Order shall be subject to a review for declassification by TVA, if:

(1) The request describes the documents or material containing the information with sufficient specificity to enable TVA to locate it with a reasonable amount of effort. Requests with insufficient description of the material will be returned to the requester for further information.

(2) The information requested is not the subject of pending litigation.

(c) Requests shall be in writing, and shall be sent to: Director, Enterprise Information Security & Policy, Tennessee Valley Authority, 1101 Market St., Chattanooga, TN 37402.

§ 1301.68 Identification and marking.

(a) Classified information shall be marked pursuant to the standards set forth in section 1.6, Identification and Marking, of the Executive Order; Information Security Oversight Office implementing directives in 32 CFR part 2001, subpart B; and internal TVA procedures.

(b) Foreign government information shall retain its original classification markings or be marked and classified at a U.S. classification level that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(c) Information assigned a level of classification under predecessor executive orders shall be considered as classified at that level of classification.

§ 1301.69 Safeguarding classified information.

(a) All classified information shall be afforded a level of protection against unauthorized disclosure commensurate with its level of classification.

(b) The Executive Order and the Information Security Oversight Office implementing directive provides information on the protection of classified information. Specific controls on the use, processing, storage, reproduction, and transmittal of classified information within TVA to provide protection for such information and to prevent access by unauthorized persons are contained in internal TVA procedures.

(c) Any person who discovers or believes that a classified document is lost or compromised shall immediately report the circumstances to their supervisor and the Senior Agency Official, who shall conduct an immediate inquiry into the matter.

Michael T. Tallent,

Director, Enterprise Information Security & Policy (Acting).

[FR Doc. 2011–16810 Filed 7–5–11; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No.100614263–1331–02]

RIN 0625–AA84

Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (''the Department'') is amending its regulations governing the submission of information to the Department in antidumping duty (''AD'') and countervailing duty (''CVD'') proceedings. These amendments will incorporate changes resulting from the Department's implementation of an electronic filing and documents management program. More detailed procedures for electronic filing are set forth in a document separate from the regulations that is entitled ''IA ACCESS Handbook On Electronic Filing Procedures'' (''IA ACCESS Handbook''), which the Department has published on its Web site at *http://iaaccess.trade.gov.*

DATES: *Effective Date:* The effective date of this final rule is August 5, 2011. This final rule will apply to all AD/CVD proceedings that are active on the effective date and all AD/CVD proceedings initiated on or after the effective date.

FOR FURTHER INFORMATION CONTACT: Evangeline Keenan, Director of APO/Dockets Unit, Import Administration at (202) 482–3354; or Brian Soiset, Attorney, Office of the General Counsel, Office of Chief Counsel for Import Administration at (202) 482–1284.

SUPPLEMENTARY INFORMATION:

Background

On September 28, 2010, the Department published proposed amendments to the rules governing the submission of information to the Department in antidumping duty (''AD'') and countervailing duty (''CVD'') proceedings and requested comments from the public. 75 FR 44163 (September 28, 2010) (''Proposed Rule''). The Proposed Rule included changes resulting from the Department's implementation of an electronic filing and documents management program named Import Administration Antidumping and Countervailing Duty Centralized Electronic Service System, or IA ACCESS. The Department conducted a pilot program to test IA ACCESS from July 1, 2010 through September 30, 2010. 75 FR 32341 (June 8, 2010); *Import Administration IA ACCESS Pilot Program, Public Notice and Request For Comments; Correction,* 75 FR 34960 (June 21, 2010).

The Department received numerous comments on its Proposed Rule and pilot program. The Proposed Rule, the comments received, and this notice can be accessed using the Federal eRulemaking Portal at *http://www.Regulations.gov* under Docket Number ITA–2010–0003. After analyzing and carefully considering all of the comments that the Department received in response to the Proposed Rule and after review of the experience gained during the IA ACCESS Pilot Program and the comments thereto, the Department has amended certain provisions of the Proposed Rule and is publishing its final regulations. In addition, the Department has addressed below the comments received pertaining to the pilot program, implementation, and other technical aspects of IA ACCESS and the procedures for the release of public and business proprietary information using IA ACCESS.

Explanation of Particular Provisions

Sections 351.103(a), 351.103(b), 351.103(c), and 351.103(d). Electronic and Manual Filing of Documents and Service Lists

Sections 351.103(a) and 351.103(b) describe the functions of Import Administration's Central Records Unit (CRU) and Administrative Protective Order and Dockets Unit (APO/Dockets Unit), as well as their location and office hours. The prior regulation stated that one function of the CRU is to maintain the Subsidies Library. The new regulation states that the Subsidies Library is maintained by Import Administration's Subsidies Enforcement Office. The Department also amended § 351.103(a) to reflect that CRU is now located in Room 7046 of the Herbert C. Hoover Building. The Department also amended sections 351.103(a) and 351.103(b) to specify that the office hours pertain to Eastern Time and to clarify that the Department's official address is 14th Street and Constitution Avenue, NW. Additionally, the Department deleted an extraneous period in ''NW'' in the addresses of the CRU and the APO/Dockets Unit.

The prior regulation provided, in § 351.103(c), that although a party is free to provide the Department with a courtesy copy of a document, a document is not considered to be officially received by the Department unless it is submitted to the Import Administration's APO/Dockets Unit in Room 1870 and stamped with the date and, where necessary, the time of the receipt. To implement electronic filing procedures, the Department is amending the regulation so that the Department will consider a document to be officially received by the Department only when it is filed electronically in its entirety using IA ACCESS, in accordance with § 351.303(b)(2)(i), or, where applicable, filed manually in the APO/Dockets Unit in accordance with § 351.303(b)(2)(ii). The Department also deleted the reference to courtesy copies of a document in the final rule. Because the Department will now require that documents be filed electronically, Import Administration staff will have faster access to filed submissions, thus reducing the need for courtesy copies.

With regard to manual filing, the Department had stated in the Proposed Rule that it would provide exceptions to the electronic filing requirement, but if a submitter experiences difficulty in filing a document electronically under circumstances for which ''an'' exception applies, the Department will consider the ability of the submitter and may modify the electronic filing requirement on a case-by-case basis. One commenter stated that this explanatory language in the Proposed Rule stood in contrast with the actual language in proposed § 351.303(b)(2), which stated that ''if a submitter is unable to comply with the electronic filing requirement under certain circumstances for which no exception applies, the submitter must notify the Department promptly of any difficulties encountered in filing the document electronically.'' *Proposed Rule,* 75 FR at 44164 (emphasis added). The commenter stated that the Department should unconditionally allow the relevant exception to apply, rather than make each situation a judgment call regarding the surrounding circumstances. The Department had made an inadvertent error in the explanatory language for § 351.103(c) in the Proposed Rule. The Department had intended to state that if a submitter experiences difficulty in filing a document electronically for which no exception applies, the submitter must notify the Department promptly of any difficulties encountered in filing the document electronically. However, the Department has amended sections 351.103(c) and 351.303(b)(2) so this language was not ultimately included in the final rule.

Section 351.103(d)(1) of the prior regulation required each interested party to file a letter of appearance separately from any other document filed with the Department, with the exception of a petitioner filing a petition in an investigation. The Department is amending the regulation to specify that it is this letter of appearance that triggers the interested party's inclusion in the public service list for the segment of the proceeding. The new regulation also refers to the definition of ''interested party'' under § 351.102(b)(29) to improve and clarify the explanation of how an interested party is placed on the public service list.

One commenter suggested that the notice of appearance should also indicate whether that person prefers to or consents to electronic service (*i.e.,* e-mail) for public documents and/or public versions of business proprietary documents. The Department has not adopted this suggestion because this rulemaking was intended to change the rules with regard to the filing of documents using IA ACCESS. It was not intended to change the rules regarding the method of serving documents. With the exception of the service of APO applications in § 351.305(b)(2) and the requirement that parties serve the complete final business proprietary document when bracketing changes have been made in § 351.303(c)(2)(ii), the Department has not changed the service requirements in the regulations.

Sections 351.104(a), 351.104(b), 351.302(a), 351.302(c), and 351.302(d). Return of Material, Record of Proceedings, Extension of Time Limits, and Return of Untimely Filed or Unsolicited Material

Section 351.104

Section 351.104(a) pertains to the official record of AD and CVD proceedings. The prior regulation stated that the CRU will maintain an official record of each proceeding. The Department is deleting the reference to the CRU because the official record will not be located in the CRU for documents filed after IA ACCESS is implemented. Instead, for those documents, IA ACCESS will comprise the official record. However, the CRU will continue to maintain the official record in paper form for those documents that were filed prior to the implementation of IA ACCESS.

In addition, § 351.104(a) previously stated that the Secretary will not use factual information, written argument, or other material that the Secretary returns to the submitter. The regulation also specifies the circumstances under which the official record will include a copy of a returned document. Sections 351.302(a) and 351.302(d) also previously set forth the procedures for requesting an extension of time limits and procedures for returning untimely filed submissions. The Department is amending these sections by replacing the term ''return'' with ''reject.'' Because the Department will use an electronic filing system, rather than physically returning inadmissible electronic submissions, the Department will reject such submissions and send written notice of the rejection to the submitter.

Section 351.104(b) pertains to the public record of AD and CVD proceedings. The prior regulation specified that the public record of each proceeding will be maintained by the CRU. In the Proposed Rule, the Department proposed adding a statement that the public record will also be accessible online at *http://www.trade.gov/ia.* The Department is removing the reference to CRU in this final rule because, as explained above, IA ACCESS, not CRU, will comprise and contain the public record for documents filed after its implementation. The CRU will continue to maintain the public record in paper form for those documents that were filed prior to implementation of IA ACCESS. During the first phase of implementation (which begins on the effective date of this final rule), the public will be able to access the public record on IA ACCESS from computers in the CRU. After the second phase of implementation of IA ACCESS, the public will be able to access the public record on the Department's Web site from any computer with Internet access. Because the public record will not be accessible from the Web site on the effective date of this final rule, the Department is deleting the reference to the Web site.

Section 351.302

Section 351.302(c) addresses procedures for requesting an extension of a specific time limit. The Department proposed amending the regulation by including a reference to § 351.303 in order to specify that an extension request be made in writing and properly filed using IA ACCESS. One commenter stated that the Department should clarify whether its proposed amendment to require extension requests to be made in writing suggests that telephonic or written requests by e-mail will never be accepted under the new regulations. The commenter stated that the Department must recognize that under certain circumstances, such as a power outage or a service outage on the part of an Internet service provider, it may be impossible to timely and properly file a written extension request with the Department through electronic filing. The Department has not changed the requirement that an extension request must be in writing and properly filed. The only change in the final regulation is a reference to the requirement that the extension request must be filed consistent with § 351.303, which contains the electronic filing requirement as well as provisions for when manual filing may be appropriate. In addition, as discussed below, if a user experiences difficulty in electronically filing an extension request or any other submission, a Help Desk line will be available during business hours to assist the user.

Sections 351.303(a), 351.303(b), 351.303(c), 351.303(d), and 351.303(f). Filing, Document Identification, Format, Specifications and Markings, and Service

The Department is amending § 351.303 to require electronic filing of all documents and to specify when manual filing will be accepted as an alternative. The Department is also clarifying the identification of documents and correcting minor typographical errors in this section.

Section 351.303(a). Introduction

The Department is amending the heading for § 351.303 to add the term ''Document Identification.'' The Department is also amending § 351.303(a) to include ''documentation identification'' in the list of procedural rules covered by this regulation.

Section 351.303(b). Filing

The Department is amending § 351.303(b) to add subparagraphs (1) through (4). Section 351.303(b) previously required all documents to be addressed and submitted to the APO/Dockets Unit, Room 1870 between the hours of 8:30 a.m. and 5 p.m. on business days. The Department is amending this section by designating it as subparagraph (1). The Department is also including in § 351.303(b)(1) the term ''Eastern Time'' to clarify the time a submission is due when the submitter may be filing the submission from a different time zone. The Department is also omitting the period after ''NW'' in the Department's address, which was a typographical error.

In the Proposed Rule, the Department proposed specifying that manually filed submissions must be submitted between the hours of 8:30 a.m. and 5 p.m. Eastern Time on business days, but that electronically filed submissions must be

filed by 5 p.m. Eastern Time on the due date. The reason for the distinction is that manually filed submissions may only be filed during business hours, but electronically filed submissions may be filed at any time, provided that they are filed in their entirety by 5 p.m. Eastern Time on the due date.

Two commenters requested clarification of whether electronically filed submissions will be due by 5 p.m. on the original due date, even if it falls on a weekend, holiday or non-business day. The commenters stated that parties whose deadlines do not fall on a business day will be at a disadvantage to parties whose deadlines fall on a business day and that there is no reason why the Department should grant less time for electronically filed documents on days when the Department is closed. Another commenter stated that electronic filing largely eliminates the rationale for a 5 p.m. deadline and suggested that the Department should require that documents to be filed prior to midnight on that date. The same commenter proposed, alternatively, that if the Department will maintain its requirement that different filing events be used for files that exceed the system's file size limit, then the Department should adopt other procedures to avoid harsh results. For example, the commenter suggested setting the deadline for such large documents at 6 p.m.

In response to the first two comments, the Department is amending the language in § 351.303(b)(1) to clarify that where the due date for either an electronic or manual filing falls on a non-business day, the Secretary will accept documents filed on the next business day. With regard to the proposals to change the filing deadline to midnight or, alternatively, 6 p.m. for submissions requiring multiple filing events, the Department has not adopted either proposal. The APO/Dockets Unit, which will continue to process manually filed documents, will maintain its current hours of operation, 8:30 a.m. through 5 p.m. Eastern Time, in order to provide equal treatment for both electronic and manual submissions. In addition, the Department's technical support for electronic filing will not be available after 5 p.m., so the Department believes that a 5 p.m. deadline is appropriate.

Electronic Filing Requirement and Exceptions Thereto

The Department is adding § 351.303(b)(2), which sets forth the electronic filing requirement using IA ACCESS and the exemptions to that requirement. This regulation also refers to the IA ACCESS Handbook, which contains detailed filing procedures that a submitter must follow. The IA ACCESS Handbook is available on the Department's Web site at *http://www.trade.gov/ia*.

In the Proposed Rule, the Department stated that exceptions to the electronic filing requirement will be set forth in the IA ACCESS Handbook. Proposed § 351.303(b)(2)(i) stated that if a submitter were unable to comply with the electronic filing requirement under certain circumstances for which no exception in the IA ACCESS Handbook applies, in accordance with section 782(c) of the Tariff Act, as amended, the Department will consider the ability of the submitter and may modify the electronic filing requirements on a case-by-case basis.

The Department received numerous comments with regard to this regulation. Several commenters expressed the need for the Department to disclose the specific exceptions to or exemptions from the electronic filing requirement. One commenter stated that exceptions to the electronic filing requirement should be set forth in the regulations themselves, despite the commenter's agreement with the Department's rationale that the exceptions may evolve over time. The commenter stated that at a minimum, the initial list of exceptions should be inserted in the regulations with a notice that the list be amended as changes are made and that, until such time as the regulations can be updated, unpublished changes may be temporarily found on the Department's Web site. Another commenter requested that the Department establish a standard set of exemptions which do not require a case-by-case decision. In addition, the commenter proposed the development of a bulky document standard, whereby documents over a certain size would be routinely filed manually, without the need to request prior authorization on a case-by-case basis.

After considering these comments, the Department is including in § 351.303(b)(2)(ii)(A) two exemptions from the electronic filing requirement. First, as proposed by one commenter, the Department has adopted a bulky document standard, whereby documents exceeding 500 pages may be filed manually, with the inclusion of a cover sheet and separator sheets generated using IA ACCESS. The Department finds that giving parties the option of manually filing bulky documents will facilitate the processing and review of such documents as parties make the transition to an electronic filing system. Manual filing is optional for such documents, and the Department anticipates that parties will prefer to electronically file bulky documents as they become more accustomed to electronic filing.

In determining whether a document qualifies as bulky, a submitter must not include database printouts in the page count, and as stated in § 351.303(c)(3), and further discussed below, database printouts need not be submitted to the Department. The Department has included detailed instructions regarding such manual filings in the IA ACCESS Handbook, and parties must follow those instructions.

The Department has also exempted large database files from the electronic filing requirement in § 351.303(b)(2)(ii)(A). As explained in detail in the IA ACCESS Handbook, the Department requires database files exceeding the maximum file size (currently 20 MB) to be filed manually in the APO/Dockets Unit on a CD or DVD as a separate submission accompanied with a cover sheet generated in IA ACCESS. Detailed instructions regarding the filing of database files are included in the IA ACCESS Handbook and parties must follow those instructions. Unlike the bulky document exemption, the large data file exemption is mandatory.

One commenter stated that the IA ACCESS system should have flexibility to allow exceptions to mandatory electronic filing and that the Department should make accommodations for technical difficulties.

In response to these comments, in § 351.303(b)(2)(ii)(B), the Department has specified that if the IA ACCESS system is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour between 12 noon and 4:30 p.m. Eastern Time, or for any duration of time between 4:31 p.m. and 5 p.m. Eastern Time, then a person may manually file the document in the APO/Dockets Unit. The Department will provide notice of such technical failures on its Help Desk line. Procedures for manual filing in this situation are provided in the IA ACCESS Handbook.

Apart from the two exemptions specified in § 351.303(b)(2)(ii)(A) and the IA ACCESS technical failures described in § 351.303(b)(2)(ii)(B), the Department has also specified in § 351.303(b)(2)(ii)(C) that if a submitter is unable to comply with the electronic filing requirement, as provided in § 351.103(c) and in accordance with section 782(c) of the Act, the submitter must notify the Department promptly of the reasons the submitter is unable to file the document electronically, and

provide a full explanation and suggested alternative forms in which to submit the information. The Department will consider the ability of the submitter and modify the electronic filing requirement on a case-by-case basis. As such, if an exception is made, it will apply to the submitter requesting it for the document on which the modification is being requested. An exception made under this provision will not serve as a blanket exemption for all submitters for future submissions.

One commenter stated that prior to finalizing any regulations applicable to the electronic filing process, the Department should disclose its entire list of exceptions and allow the public to comment on them. This commenter stated that doing so would allow parties to work with the Department in reducing or expanding the list of exceptions based on parties' experiences with other electronic filing systems.

Although the Department indicated in the Proposed Rule that it wanted the flexibility to amend the list of exceptions on an ongoing basis, the Department has determined that it is more appropriate to explicitly include the above exemptions in the regulations, subject to amendment through the notice and comment rulemaking process. Should the Department determine that additional exemptions are appropriate, it will amend the regulations as needed and solicit comments at that time.

One commenter suggested that the Department should create exceptions for petitions for the initiation of an AD or CVD investigation, *pro se* respondents, small businesses, and documents not readily susceptible to scanning such as physical exhibits. We have not adopted these proposals. The Department has decided not to create standard exceptions based on the document type being filed, such as a petition. Doing so would result in the imposition of different rules for counsel to petitioners and counsel to respondents. The commenter has not explained why *pro se* respondents and small businesses should automatically be exempt from the electronic filing requirement. Indeed, the Department believes that electronic filing will ultimately reduce the cost and burden on outside parties and thus be beneficial to *pro se* respondents and small businesses. The Department will also continue its practice of working closely with *pro se* respondents and small businesses in assisting them through the filing process. With regard to this commenter's request for an exception for physical exhibits, we have never required the submission of physical exhibits: Therefore we will not make an electronic filing exception for them. The Department prefers that rather than submit a physical exhibit, which may be large, cumbersome, or even perishable, a submitter should include in its submission a narrative description and/or photograph or video format so that the characteristics of the physical exhibit may be included on the record of the proceeding. If the submitter wishes to submit a physical exhibit, the submitter will need to obtain prior written permission from the Department for an exception to file the physical exhibit manually in accordance with § 351.303(b)(2)(ii)(C).

File Size Limitations

One commenter recommended the Department consider a larger file size limitation, citing examples to the file size limits of the U.S. International Trade Commission and the Court of International Trade. Another commenter stated that if file size limits are imposed, they should be no less restrictive than the U.S. International Trade Commission's limits: 50 separate attachments of 25 MB each in a single filing event. Another commenter noted that because documentation is often submitted to a legal representative in its original form and needs to be submitted to the Department in Adobe portable document format (''PDF'') or JPEG format, the memory size of such files is much larger than those prepared in Microsoft Word or Excel. This could result in possibly dozens of electronic submissions, requiring the Department to piece together multiple sets of files. Thus, the commenter recommended increasing the memory limitation of the size of files to the largest possible under the electronic filing system being proposed, including both for the overall memory threshold and the individual attachment threshold. Another commenter stated that to avoid the need for separate filing events, the Department should impose limits only on the size of the individual attachments, without limits on the total file size. The commenter further stated that repetitive entry of identical information is burdensome and may lead to error. Finally, two commenters recommended including the ability to link documents, so that the Department can more easily piece together submissions where the individual sections exceed the size limitation.

With respect to the comment on setting limits on file size, the Department has set the individual document file (*i.e.,* case briefs, general comments, *etc.*) size limit to 4 MB per file. A document can be separated into numerous files, which can be uploaded in batches of five, provided each individual file is no larger than 4 MB and the total combined file size of the grouping does not exceed 20 MB. The user may upload up to a total of 99 additional files, grouped in combinations of five, with the same individual and combined file size as mentioned, and these individual files will be linked together, as suggested by one commenter. In addition, the Department has set the individual data file (*i.e.,* SAS files, databases, *etc.*) size limit to 20 MB per file. Thus, the Department expects that IA ACCESS will be able to accommodate large documents which will be filed as linked, smaller files. The Department added this feature during the last month of the Release 1 pilot program.

The Department has determined 4 MB to be the appropriate individual document file size limit and 20 MB to be the appropriate individual data file size limit based on numerous factors, each of which have been considered and balanced. Such factors include the ability of the IA ACCESS system to accommodate the high volume of anticipated submissions based on current server resources, the difficulty for Department personnel to work with larger files, and the available Internet bandwidth to users throughout the world, which may limit their ability to upload larger documents. The Department has also determined that because data files are submitted less frequently than document submissions, the IA ACCESS system is capable of accepting individual data files of 20 MB in size. In addition, the larger individual file size for data meets the important need of keeping databases intact.

Although the Department has determined 4 MB and 20 MB to be the appropriate individual file sizes for documents and data files, respectively, at this time, the Department anticipates that the attachment and overall file size requirement may change over time as Internet resources expand throughout the world and the Department gains experience in administering the IA ACCESS system and using larger files.

As for the commenter's statement that documentation must be submitted in JPEG format, IA ACCESS does not currently accept files in JPEG format.

The Department acknowledges that the U.S. International Trade Commission and Court of International Trade have different file size limitations for electronic filing. However, the Department must base the individual file size limitation for IA ACCESS upon the specific needs of the Department's AD/CVD proceedings, such as the

factors noted above as well as the type, size, frequency, and security classification of documents. Thus, the Department has not chosen to align its file size limitations to those of the U.S. International Trade Commission and the Court of International Trade.

Section 782(c) of the Act

One commenter noted that the Department did not propose to require submitters who notify the Department promptly of any difficulties encountered in submitting information to the Department to also provide a suggested alternative method for submitting the information, which seems to be required under section 782(c) of the Act. The commenter suggested that the Department specifically reference this obligation in its new regulation, particularly when the failure to comply with the requirement could substantially harm the submitter in relation to its respective proceeding and the ''burden'' on the Department of including notification of the requirement in its regulation is minimal.

In its explanation of § 351.303(b)(2), which addresses these requirements of section 782(c) of the Act, the Department noted that it did not discuss the requirement to propose an alternative method of submission in the regulations because it anticipates that the alternative suggestion would be for the submitter to file the submission manually. However, the Department stated that this omission does not affect a submitter's obligation to satisfy such a requirement. The Department agrees with the commenter that the language in section 782(c) of the Act should be included in § 351.303(b)(2)(ii)(C) of the new regulations to put the public on notice of the requirement. Accordingly, the Department has amended § 351.303(b)(2)(ii)(C) to include the statutory requirement under section 782(c) of the Act that the submitter suggest alternative forms in which it is able to submit the requested information.

The Department is adding § 351.303(b)(2)(ii)(D) to provide the number of hardcopies required if a document is filed manually. Specifically, a submitter must manually file in the APO/Dockets Unit one hardcopy of each document, with the exception of a business proprietary document filed under the bulky document exemption, which requires two copies. This regulation also specifies that a manual filing requires submission of a cover sheet generated in IA ACCESS in accordance with § 351.303(b)(3).

The Department is adding § 351.303(b)(3) to specify that a cover sheet is required for manual submissions. A submitter must generate the cover sheet online at *http://iaaccess.trade.gov,* and print it for submission to the APO/Dockets Unit along with the hardcopy manual submission. The purpose of the cover sheet is to provide the Department with information indicating, among other things, the party filing the submission, the segment of the proceeding, and the type of submission being filed. The cover sheet will contain a barcode that will be used to identify and track the submission. The Department has removed the proposed requirement that a person complete a coversheet for a document that is filed electronically. Although IA ACCESS requests the same information for an electronic filing as it requires on the cover sheet for a manual filing, in the electronic filing mode, that information is referred to as ''IA ACCESS Document Information,'' not a cover sheet. Therefore, the Department has deleted this reference from the final rule. The Department had previously proposed including a statement that the person submitting the cover sheet is responsible for the accuracy of all information contained in the cover sheet. The Department has also removed that statement from the final rule because the information appearing on the cover sheet already appears on the submission itself, the accuracy of which is already subject to certifications of factual accuracy that accompany the submission.

The Department is adding § 351.303(b)(4) to identify and distinguish among the five document classifications that may be submitted to the Department. The Department has observed confusion among interested parties with regard to the identification and labeling of documents, especially with regard to documents containing double-bracketed information. Thus, the Department finds it necessary to standardize the identification and labeling of all documents. In addition, a submitter will need to identify the document properly when inputting the document information in IA ACCESS before filing the document. The document identification will determine who will have access to the document. Misidentification of a document may result in the unauthorized disclosure of business proprietary information. The Department is also moving the definition of ''business proprietary version'' from § 351.303(c)(2)(i) to § 351.303(b)(4). In addition, the Department is using the phrase ''business proprietary document or business proprietary/APO version, as applicable'' rather than only ''business proprietary version'' to make the terminology consistent with that in proposed § 351.303(b)(4)(i), (ii), and (iii).

Accordingly, the Department is adding sections 351.303(b)(4)(i), (ii), and (iii) to identify and define the three types of business proprietary submissions. The document described in § 351.303(b)(4)(i) is called ''Business Proprietary Document—May Be Released Under APO.'' This business proprietary document contains only single-bracketed business proprietary information which a party agrees to release under administrative protective order (''APO'').

The document classifications described in § 351.303(b)(4)(ii) and (iii) are business proprietary documents that use double-bracketing. The document described in § 351.303(b)(4)(ii) is called ''Business Proprietary Document–May Not Be Released Under APO.'' This document may contain both single and double-bracketed business proprietary information, but the submitter does not agree to the release of the double-bracketed information under APO. In this document, the information inside the double brackets is included.

The third document classification described in § 351.303(b)(4)(iii) is called ''Business Proprietary/APO Version—May Be Released Under APO.'' It must contain only single-bracketed business proprietary information. The submitter must omit the double-bracketed business proprietary information from this version because this version will be released under APO. This is why the term ''APO Version'' is included in the name of the document.

The Department is adding § 351.303(b)(4)(iv) and (v), which identify the two types of public submissions. The first is the ''Public Version,'' which corresponds to a business proprietary document, except it omits all business proprietary information, whether single or double-bracketed. This section also refers to the specific filing requirements for filing the public version, which is found in § 351.304(c). The second is the ''Public Document,'' which contains only public information. In the Proposed Rule, the Department had stated that there is no corresponding business proprietary version for a public document. For the final rule, the Department is amending § 351.303(b)(4)(v) to change the term ''business proprietary version'' to ''business proprietary document'' in order to make the terminology

consistent with § 351.303(b)(4)(i) and (ii).

One commenter disagreed with the renaming of ''business proprietary version'' to ''business proprietary document.'' The commenter stated that the term ''business proprietary version'' implies that a public version will be filed on the next business day, while ''business proprietary document'' implies that no public version will be filed. The commenter also stated that the change will generate more confusion for a term that has become standard at both the Department and the U.S. International Trade Commission and that the existing confusion will be rectified by the inclusion of the definition of ''APO version'' in the amended regulations. Finally, the commenter stated that differing terminology may create unintended confusion regarding documents that must be filed at both agencies.

The Department does not agree that the proposed amendment will generate confusion. A public version of a business proprietary document must always be filed in accordance with § 351.304(c), and it therefore must correspond to the business proprietary document. It is possible that the commenter meant that when a business proprietary document is filed on the first day, in accordance with the one-day lag rule, it is in fact filed without the public version. However, the Department is not basing the document classifications on when the documents/versions are filed relative to one another. The Department's reasoning stems from the content of the submissions. When compared to the other document classifications, the business proprietary document is the complete document and contains all business proprietary information enclosed in brackets. Thus, it should be referred to as a ''document'' and not a ''version.'' The public version and APO version are versions of that document and are therefore named as such.

Section 351.303(c). Filing of Business Proprietary Documents and Public Versions Under the One-Day Lag Rule; Information in Double Brackets

In § 351.303(c)(1), 351.303(c)(2)(ii), and 351.303(c)(2)(iii), the Department is deleting the requirement that a person must file multiple copies of each submission with the Department (*i.e.,* six copies of public documents, or the combination of: (A) six copies of the business proprietary version and (B) three copies of the public version of a document). The Department has replaced these sections with § 351.303(b)(2)(ii)(D), which specifies the number of hard copies required if a document is filed manually. The original reason for these requirements concerning copies of a document was to make a copy available to each person in the Import Administration team administering the proceeding. However, with implementation of electronic filing and the uploading of manually filed submissions by CRU onto IA ACCESS, the Import Administration team will be able to access all submissions electronically and print them from IA ACCESS, making additional copies unnecessary. In § 351.303(c)(2)(i), the Department is deleting the sentence defining ''business proprietary version'' because it has been included in proposed § 351.303(b)(4).

Section 351.303(c)(2)(i) of the prior regulation stated that a person must file one copy of the business proprietary version of any document with the Department within the applicable time limit. The Department is deleting the reference to the copy and changing ''business proprietary version'' to ''business proprietary document'' to make the terminology consistent with that in 351.303(b)(4)(i) and (ii). The Department is also clarifying that the one-day lag rule does not apply to a petition, amendments to a petition, or any other submission filed prior to the initiation of an investigation. This amendment reflects the Department's practice not to apply the one-day lag rule during the 20-day pre-initiation period. This practice ensures that a business proprietary document and public version are filed simultaneously in their final form. When the Department has only 20 days to initiate an investigation, waiting one business day for the final version of a document further shortens an already short deadline, especially when petitioners may be required to file responses to requests for additional information. In addition, because of the Department's obligation to provide a copy of the public version of the petition and all amendments to the petition to embassies of exporting countries named in a petition under § 351.202(f), the Department does not allow submissions under the one-day lag rule so that the embassies may obtain their copies as expeditiously as possible.

Section 351.303(c)(2)(ii) of the prior regulation stated that, although a person must file the final business proprietary version of a document with the Department, the person may serve only those pages containing bracketing corrections on other persons. The Department is amending this regulation to replace ''business proprietary version of a document'' with ''business proprietary document'' to make the terminology consistent with that in § 351.303(b)(4)(i) and (ii). This amendment will not change the requirement that a person must file a complete, final business proprietary document on the first business day after the business proprietary document is filed. The Department is also amending this regulation to specify that the final business proprietary document must be identical in all respects to the business proprietary document filed on the previous day, except for any bracketing corrections and the omission of the warning ''Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing,'' in accordance with § 351.303(d)(2)(v). We believe emphasizing that the two documents must be identical with the exception of bracketing corrections and the requisite warning pertaining to bracketing is necessary because, in our experience, there appears to be some confusion about whether the dates or the content of the cover letters of the two documents should remain unchanged. With this amendment, the Department hopes to clarify that, except as discussed above, the two documents must be identical.

The Department is also amending this regulation to require persons to serve the complete final business proprietary document on other persons only if there are bracketing corrections. One commenter expressed agreement with this proposed change in its comments on the Proposed Rule. The new regulation also makes explicit that if there are no bracketing corrections, a person need not serve a copy of the final business proprietary document on persons on the APO service list. The reason service is not required in the absence of bracketing corrections is that in accordance with § 351.303(f), a person will have already served the business proprietary document filed on the due date. If there are no bracketing corrections, then there is no need to serve the business proprietary document again.

Section 351.303(c)(2)(iv) of the prior regulation stated that if a person serves authorized applicants with a business proprietary version of a document that excludes information in double brackets pursuant to § 351.304(b)(2), the person must simultaneously file with the Department one copy of those pages in which information in double brackets has been excluded. The Department is amending this section by adding a reference to § 351.303(b)(4)(iii) and correctly identifying the document type as the ''Business Proprietary/APO Version.'' The Department now requires

a person to file the complete Business Proprietary/APO Version of the document, as opposed to only those pages in which the double-bracketed information has been excluded, so that it has the complete document for the official record. The original purpose of requiring a copy of only the pages where the double-bracketed information has been omitted was to conserve the amount of paper filed by the submitter. However, because the document will be filed electronically, the submitter will be able to reduce the amount of paper used while simultaneously ensuring that the Department receives the same submission that is served on the APO authorized applicants.

In addition to the foregoing amendments to § 351.303(c)(1) and 351.303(c)(2)(i)–(iv), the Department replaced the term ''business proprietary version'' with ''business proprietary document'' in these sections, as well as in the title of § 351.303(c). These amendments make the terminology consistent with that in § 351.303(b)(4)(i), (ii), and (iii).

Section 351.303(c)(3) previously required that if factual information is submitted on computer media at the request of the Secretary, it must be accompanied by the number of copies of any computer printout specified by the Secretary. This regulation also required that information on computer media must be releasable under APO, consistent with § 351.305. The Department is deleting the statement that the Secretary may require submission of factual information on computer media because it implies that the Secretary may make such requests only occasionally. Over time, the Department has requested with increasing frequency the submission of sales and cost databases to accompany questionnaire responses. This practice has become the norm rather than the exception. In order to clarify how such electronic databases should be submitted in conjunction with the electronic filing requirement, the Department is amending this section to require that all sales files, cost files, or other electronic databases submitted to the Department be filed electronically in the format specified by the Department. For the final rule, the Department has revised this language to clarify the situation in which a submitter would file a database manually, citing to § 351.303(b)(2)(ii)(A), which requires large data files to be filed manually. The Department is also amending § 351.303(c)(3) to remind submitters that all electronic database information must be releasable under APO regardless of whether it is filed electronically or manually.

The Department wants to emphasize that the complete databases submitted by the parties will now be maintained in an electronic format in the official and public files. Previously, parties submitted only one electronic copy of the database, which became the working copy used by the Department in performing its calculations. The official and public records only contained hardcopy printouts of the databases, and oftentimes, the printouts reflected only a portion of the databases if they were voluminous. Because the Department will have the capability to accept the databases in an electronic format, the Department has had to consider how parties can bracket or seek business proprietary treatment for information on the databases when the format in which the data is presented does not allow for the use of brackets to indicate the information for which the submitter is requesting business proprietary treatment. Thus, the Department has determined that it will deem all databases containing business proprietary information that are submitted in electronic format as business proprietary submissions. Brackets will not be required on the electronic databases. However, the Department urges submitters to include, where possible, headers or footers requesting business proprietary treatment of the information on the databases. For public versions of databases, the Department requires submitters to submit the public version in a PDF format. The public version of the database must still be publicly summarized and ranged in accordance with § 351.304(c). The public version of the database, together with the narrative portion of a questionnaire response, will indicate the fields and values for which the submitter requests business proprietary treatment. Deeming the entire electronic database as business proprietary will not render each and every field and value submitted in the database as eligible for business proprietary treatment.

One commenter stated that the Department already envisions that databases may be filed electronically, where possible, therefore IA ACCESS should accommodate the filing of electronic files other than PDF files, where appropriate. The Department has selected PDF as the appropriate file format for documents because the Department seeks a uniform format that is widely available, acceptable by users, and compatible with most computer systems. Furthermore, as a PDF, the content of the submissions cannot be altered and the PDF format ensures that the Department will be able to open the submissions in the future. With regard to databases, submitters should refer to the questionnaire or specific request for information by the Department to determine the acceptable formats for the requested databases. The Department has also made available in the IA ACCESS Handbook additional information as to file types accepted in IA ACCESS and specific instructions which parties must follow when filing databases.

Section 351.303(d). Format of Submissions

The Department is amending § 351.303(d) to make references to the filing terminology consistent with the other terminology used in the rest of this section. Specifically, the Department has replaced the term ''copies'' with ''submissions'' because, as stated above, the Department will no longer require a person to file multiple copies of a submission.

Section 351.303(d)(2) provides the specifications and markings required for filing documents with the Department. Paragraph (d)(2) specifies that a person must submit documents on letter-size paper, single-sided, and double-spaced, and that the first page of each document must contain information in the formats described in subparagraphs (i) through (vi). The Department amended paragraph (d)(2) to specify the dimensions of letter-size paper (8½ × 11 inches). Because CRU staff will need to insert all manually filed submissions into a scanner, the Department requires that manually filed documents be bound only with a paper clip, butterfly/binder clip, or rubber band. The omission of binding will ensure that the paper in the submission is not damaged, thereby facilitating the scanning process. Thus, the Department has prohibited the use of stapled, spiral, velo, or other type of solid binding in manual submissions. The Department has also amended paragraph (d)(2) to require the placement of the cover sheet described in paragraph (b)(3) before the first page of the document being manually filed. With regard to electronically filed documents, the new regulation specifies that the document be formatted to print on letter-size (8½ × 11 inch) paper and double-spaced. The new regulation also specifies that spreadsheets, unusually sized exhibits, and databases are best utilized in their original printing format and should not be reformatted for submission.

Section 351.303(d)(2)(iii) of our prior regulation required submitters to indicate on the third line of the upper

right-hand corner the segment of a proceeding for which a document is being filed and, if for a review, the inclusive dates of the review, the type of review, and section number of the Act corresponding to the type of review. The Department is amending § 351.303(d)(2)(iii) to replace the current list of types of segments with a non-exhaustive list. The new regulation also provides a specific date format for use in indicating the period of review, if relevant. The Department has eliminated the requirement that the submitter indicate the relevant section of the Act that corresponds to the type of review for which the document is submitted. The Department has observed that this marking requirement is often overlooked by submitters, and when it is included, submitters often refer only to section 751 of the Act without referring to the specific subsection. Because the new regulation requires a submitter to indicate the specific segment of a proceeding in which a document is being filed, the Department has determined it would be redundant to also require the submitter to specify the particular subsection of the Act corresponding to the type of review.

The Department is also amending § 351.303(d)(2)(v) to make it consistent with the terminology in § 351.303(b)(4). Specifically, the prior regulation required that, on the fifth and subsequent lines of each submission, a submitter must indicate whether any portion of the document contains business proprietary information and, if so, to list the applicable page numbers and state either ''Document May Be Released Under APO'' or ''Document May Not Be Released Under APO.'' The Department is changing the terminology so that the term ''Document'' is replaced with either ''Business Proprietary Document –'' or ''Business Proprietary/APO Version,'' as applicable, so that it is consistent with the terminology in § 351.303(b)(4). The Department is also capitalizing the first letter in the words ''is'' and ''be'' to correct typographical errors. The prior version of 351.303(d)(2)(v) also stated that the warning ''Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing'' must not be included in ''the copies of the final business proprietary version filed on the next business day.'' The Department is deleting the term ''the copies of'' because a submitter will no longer be filing multiple copies of a submission, in accordance with proposed § 351.303(b)(2)(v). The Department is also replacing the term ''business proprietary version'' with ''business proprietary document'' to make the terminology consistent with that in § 351.303(b)(4).

Section 351.303(d)(2)(vi) of the prior regulation required that public versions of business proprietary documents contain the marking requirements in paragraphs (d)(2)(i)–(v) of this section and that the first page is conspicuously marked ''Public Version.'' The Department is amending this section to refer to both the public version and the business proprietary document in the singular. This amendment clarifies that there is only one public version of a business proprietary document. The Department is also adding subparagraph 351.303(d)(2)(vii) to this section to require the same markings for a ''Public Document'' as for a ''Public Version,'' with the exception being use of the word ''Document'' instead of ''Version.'' These amendments bring the language in this section into conformity with the document classifications in paragraph (b)(4).

Section 351.303(f). Service of Copies on Other Persons

Section 351.303(f) of the prior regulation stated that except as provided in sections 351.202(c), 351.207(f)(1), and paragraph (f)(3) of this section, a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail. The Department is changing the reference to § 351.207(f)(1) to § 351.208(f)(1) to correct a typographical error.

Section 351.303(f)(1)(ii) of the prior regulation stated that a party may serve a public version or a business proprietary version of a document containing only the server's own business proprietary information on persons on the service list by facsimile or other electronic transmission process, with the consent of the person to be served. The Department is changing the reference to ''business proprietary version of a document'' to ''business proprietary document'' to make the terminology consistent with that used in § 351.303(b)(4). The Department is also specifying that the business proprietary document may be served on persons on the APO service list and that the public version of such a document may be served on persons on the public service list by facsimile transmission or other electronic transmission process, with the consent of the person to be served.

One commenter asked the Department to clarify in § 351.303(f) that public documents may also be served electronically. The Department has amended this regulation to include public documents in the types of documents that may be served by facsimile or other electronic transmission with the consent of the party being served.

One commenter stated that changes affecting service of business proprietary information should be introduced gradually, subject to extensive comment. Another commenter stated that the Department should mandate electronic service to parties on the respective service list (where allowed under the Department's regulations). That commenter noted that electronic service is consistent with the Department's stated goal of creating efficiencies in both the process and costs associated with filing and maintaining documents, and that electronic service would be consistent with the Court of International Trade's filing system currently in place. The commenter stated that the Department could expressly state that electronic service will not be mandatory where a document is filed manually.

The Department agrees that changes affecting service of business proprietary information should be introduced gradually and be subject to comment. With the exception of service of APO applications, which were previously required to be served by the same means as they were filed with the Department (§ 351.305(b)(2)), and the requirement that parties serve the complete final business proprietary document when bracketing corrections are made under the one-day lag rule (§ 351.303(c)(2)(ii)), the Department has not changed any of the service requirements in the regulations. The Department has decided to focus on electronic filing, rather than electronic service, at this time. However, parties may continue to consent to electronic service in accordance with § 351.303(f)(1)(ii).

Although the Department had proposed correcting a typographical error in § 351.303(g), that regulation is currently the subject of another rulemaking. *See* 76 FR 7491 (February 10, 2011). Therefore, the Department has not made any changes to § 351.303(g) in this final rule.

Sections 351.304(b), 351.304(c), and 351.304(d). Identification of Business Proprietary Information, Public Version, and Returning Submissions That Do Not Conform With Section 777(b) of the Act

Section 351.304(b)(2)(iii) of the prior regulation stated that ''the submitting person may exclude the information in double brackets from the business proprietary information version of the submission served on authorized

applicants.'' The Department is amending this sentence to replace ''business proprietary information version'' with ''Business Proprietary/APO Version'' to make the terminology consistent with that in § 351.303(b)(4)(iii).

In addition, the Department is amending § 351.304(b)(1) by creating two subsections. Subsection 351.304(b)(1)(i) addresses the identification of business proprietary information in general, and subsection 351.304(b)(1)(ii) addresses the identification of business proprietary information with regard to electronic databases. The Department is specifying in the latter subsection that in accordance with § 351.303(c)(3), an electronic database containing business proprietary information need not contain brackets for the submitter to request proprietary treatment for its information. Instead, the submitter must select the security classification ''Business Proprietary Document—May Be Released Under APO'' at the time of filing to request business proprietary treatment of the information contained in the database.

Section 351.304(c) of the prior regulation provided requirements for filing the public version of a business proprietary document. Section 351.304(c)(1) specified, among other things, that the public version must be filed on the first business day after the filing deadline for the ''business proprietary version of the submission.'' The Department is amending this section to replace ''business proprietary version of the submission'' with ''business proprietary document'' to make the terminology consistent with that in § 351.303(b)(4)(i) and (ii).

Section 351.304(c)(2) of the prior regulation specified, among other things, that if a submitting party discovers that it failed to bracket information correctly, the submitter may file a complete, corrected ''business proprietary version of the submission'' along with the public version. The Department is amending this section to replace ''business proprietary version of the submission'' with ''business proprietary document'' to make the terminology consistent with that in § 351.303(b)(4)(i) and (ii).

One commenter asked the Department to amend § 351.304(c), which currently states that if an individual portion of the numerical data is voluminous, at least one percent representative of that portion must be summarized. The commenter proposed limiting the amount of information to be summarized from one percent of the portion of the data to one percent of the entire submission because the ranging of data takes a considerable amount of time and increases the cost of compliance with the regulation. The Department did not propose any changes to this section of the regulations in the Proposed Rule. Further, the Department continues to find that requiring public summarization of one percent of each portion of data best implements section 777(b)(1)(B) of the Act, which requires public summaries of information submitted to the Department, and best serves the ability of the public to participate in the Department's proceedings. Thus, the Department has not made the requested change in the final rule.

Section 351.304(d)(1) of the prior regulation stated that the Secretary will return a submission that does not meet the requirements of section 777(b) of the Act, which governs the Department's APO rules of practice and procedure. Section 351.304(d)(1) of the prior regulation further specified that the submitting person may take any of four enumerated actions within two business days of the Secretary's explanation of its reasons for returning the submission. Prior § 351.304(d)(1)(iv) also specified that one of those enumerated actions is the submission of other material concerning the subject matter of the returned information and that, if the submitting person takes none of the enumerated actions, the Secretary will not consider the returned submission. As discussed above, because the Department will be using an electronic filing system, rather than physically return an electronic submission, the Department will instead reject the submission. The Department will follow the same procedure for manually filed submissions. Thus, the Department is amending the regulations to change the term ''return'' with ''reject'' in sections 351.304(d)(1) and 351.304(d)(1)(iv).

Section 351.305(b). Application for Access Under Administrative Protective Order

Section 351.305(b)(2) of the prior regulation required the applicant for access to business proprietary information under APO to serve the APO application in the same manner and at the same time as it serves the application on the Department. The Department is amending this regulation because an applicant cannot currently serve other parties electronically using IA ACCESS. Although an applicant may serve other parties electronically with the consent of the parties being served, the Department will not require electronic service. The Department recognizes that a party being served an APO application has a limited time period in which to serve its previously-filed business proprietary submissions on a newly-approved applicant; therefore, the Department is requiring that the applicant serve the other parties in the most expeditious manner possible, simultaneously with the filing of the APO application with the Department.

Comments Pertaining to Pilot Program, Implementation, and Technical Aspects of IA ACCESS

1. Future Pilot Programs, Additional Focus Groups, Training, and Staggered Implementation

One commenter stated that it supports the Department's plans to conduct additional pilot programs and strongly suggests that the Department consider a mechanism by which the experiences gained in the first pilot program can be shared with the larger user public. The commenter stated that the Department should conduct additional focus groups and public meetings for Release 2 and 3 Pilots and that the Department should consider holding larger scale public meetings. With regard to implementation of IA ACCESS, one commenter proposed a staggered implementation process, such that the Department would first require electronic filing of only public documents for a period of time before requiring electronic filing of business proprietary documents. The commenter stated that users may not have experience with the electronic filing of business proprietary documents, and the staggered implementation would allow users time to implement new internal procedures, including security measures, or seek guidance from the Department on particular matters, based on practical prior experience with public filings. In addition, the commenter stated that the Department should consider providing training sessions prior to the start of Release 1, noting that the training sessions conducted by the Court of International Trade for its electronic filing system were helpful. The commenter also stated that the Department should consider a ''recall'' procedure to enable users to promptly remove electronically filed documents if business proprietary information has been inadvertently disclosed or other problems are discovered after filing.

Response: As discussed in the notice regarding the IA ACCESS pilot program, IA ACCESS will be implemented in three separate phases, or releases, with each release implementing an additional feature of IA ACCESS. 75 FR 32341

(June 8, 2010). Release 1 will allow for the electronic submission of documents, Release 2 will allow for the electronic release of public documents and public versions, and Release 3 will allow for the electronic release of business proprietary documents to authorized applicants. Each phase will be preceded by a pilot program designed to test and evaluate the functionality of that release. The Department completed the pilot program for Release 1 on September 30, 2010. The Department received comments from pilot participants at the conclusion of the pilot and a summary of those comments is available to the public at *http://iaaccess.trade.gov* under the ''Help'' link. Comments on the second and third pilot programs will also be made available to the public in the same manner. The Department will hold additional focus groups and public meetings in conjunction with the Release 2 and 3 pilot programs. The Department will consider a large public meeting as the need arises.

The Department disagrees with the proposal to stagger the implementation of the electronic filing requirement such that only public filings will first be required for a period of time before requiring the filing of business proprietary documents. Staggering the implementation for public and business proprietary submissions is not practicable because it would require the Department to operate under two filing systems, one for public documents and one for proprietary documents, and such a bifurcated process would create the potential for confusion and inconsistency. Furthermore, requiring parties to manually file business proprietary submissions while electronically filing public versions of the corresponding submission will create additional work for parties and reduce the efficiencies inherent in electronic filing.

To alleviate the concerns associated with learning to use IA ACCESS, the Department will provide an IA ACCESS online training site one month prior to implementing Release 1. On the training site, users will be able to familiarize themselves with IA ACCESS by filing test documents and navigating the system. The Department has already provided and will continue to provide training prior to implementing Release 1, including online demonstrations, webinars and classes. Such training will provide users opportunities to confer with the Department regarding any questions pertaining to the system, including the implementation of any necessary procedures for the user, such as security measures.

With regard to a ''recall'' procedure, the Department did not adopt this proposal. The Department believes that the continuation of its current practice of providing assistance to those parties wishing to correct errors discovered after filing is the most effective way to address inadvertent disclosures. Where problems are discovered after filing, the user should contact the Department for assistance. Detailed procedures are included in the IA ACCESS Handbook. Where business proprietary information is inadvertently disclosed and only discovered after filing, the user should contact the APO/Dockets Unit as soon as possible.

2. Grace Period

One commenter proposed a three-month grace period whereby the Department allows users to file submissions manually, at the option of the user.

Response: The Department will not provide such a three-month grace period. Allowing a grace period would be extremely disruptive for the Department because it would require the Department to operate and synchronize two different filing, document management, and recordkeeping systems. As discussed above, however, the Department will provide an online training site one month prior to implementation of Release 1, so that users may have an opportunity to try out the system, practice filing test documents and familiarize themselves with IA ACCESS.

3. Opportunities for Further Comment

One commenter requested that the Department provide an opportunity to submit additional comments prior to publication of the final rule, including comments on other parties' comments on the proposed rule and on the views of the participants to the Release 1 pilot program. In addition, the commenter stated that the Department should make the IA ACCESS Handbook available prior to the start of Release 1 to allow users to become familiar with the new electronic filing rules and procedures before introduction of mandatory electronic filing. Two commenters requested that the Department provide an opportunity to submit comments on the upcoming IA ACCESS Handbook.

Response: The IA ACCESS Handbook is currently available. Parties will be given the opportunity to submit comments on the handbook on the IA ACCESS Web site at *http://iaaccess.trade.gov*. The Department will post a summary of the comments online and take them into consideration. The Department will not provide a formal opportunity for parties to comment on the Release 1 pilot participants' comments nor on the other parties' comments to the Proposed Rule. There is no such requirement in the rulemaking process. See 5 U.S.C. 553(c). As the Department continues to add enhancements and features to IA ACCESS, it will welcome parties' input on an ongoing basis.

4. Comments on Pilot Experience

The Department received the following technical comments based on the commenters' experiences during the pilot program: (1) The case name should be automatically populated by case number; segments should show up in drop-down menu; (2) the Department should expand the number of characters for document title and file name; (3) ''document type'' and ''subject'' options have not been appropriate to the filings, so ''Other'' was often selected; (4) the Department should refine the ''document type'' and ''subject'' options and provide the ability to customize by typing in words prior to or after the standard types/subjects; (5) the Department should provide an ''approval'' or confirmation screen prior to submission; and (6) one commenter wished to confirm that the Department personnel have the ability to review and print documents in color.

Response: The Department is considering these comments as it develops the IA ACCESS system. A summary of these comments in addition to others received at the conclusion of the Release 1 pilot program is available on the Department's IA ACCESS Web site at *http://iaaccess.trade.gov* under the ''Help'' link.

5. After-Hours Help Line

One commenter recommended the Department to establish a help line that has relevant personnel available after 5 p.m. Eastern Time to assist with electronic submissions.

Response: A help line will be available and staffed with relevant personnel between 8:30 a.m. and 5 p.m. on business days to assist submitters with any technical issues. We encourage parties to give themselves ample time prior to 5 p.m. on the due date to successfully complete submissions using IA ACCESS. Further, parties who cannot meet the 5 p.m. filing deadline should request an extension from the relevant personnel in the Office of Operations. Because personnel at the Help Line cannot grant such extensions, after-hours assistance should not be necessary.

6. Destruction of Files

One commenter stated that it understood that IA ACCESS will host only documents received after the launch of the electronic document system, and that the Department currently does not envision scanning older documents already in the Official File. Currently, the Department is destroying or in the process of destroying files from proceedings that have been terminated for five years or more. This destruction practice would appear inconsistent with the goal of expanding public access to information. If older documents are destroyed as a matter of course, then parties are at a disadvantage in preparing for ongoing proceedings because some documentation relied upon is only available in paper form. The commenter recommended that the Department reconsider its destruction practice and work towards making all existing paper documentation and submissions from prior proceedings available to the public as part of a docket for that proceeding.

Response: The Department's current document retention policy requires it to keep the Public File for five years after an order has closed. The Department plans to continue following this retention policy, which the Department believes makes the information sufficiently accessible to the public. The Department will not scan older documents into IA ACCESS that are already in the Official File. Doing so would be costly and an inefficient use of the Department's resources. Older files will continue to be available in the Public Reading Room in accordance with the Department's retention policy.

Comments Pertaining to Procedures for Release of Public and Business Proprietary Information Under APO Using IA ACCESS

In the Proposed Rule, the Department stated that it was considering providing for the implementation of electronic APO release as part of the overall transition to IA ACCESS. The Department requested comments on the APO release process, the adequacy of providing for electronic release in the APO, and the necessity of additional security requirements in the APO application.

In response to the Department's request for comments, one commenter expressed its support for the Department's approach. Another commenter recommended a system whereby the lead attorney for service and any other designated authorized individuals will be notified via e-mail that a new document has been posted to a particular record and that the authorized user would be able to access the document by logging into the secure database to upload the document on the authorized user's secure server. The commenter also requested that the same release process apply to documents filed by parties or placed on the record by Department personnel, thereby effecting service via electronic notification. Another commenter stated that the Proposed Rule did not specify whether, in addition to APO release, the Department also plans public electronic release to authorized representatives of interested parties who have entered an appearance. The commenter encouraged the Department to adopt this practice, either as part of formal rulemaking or under its IA ACCESS procedures.

In addition to the electronic APO release process through IA ACCESS, the Department plans to release public Department-generated documents and public versions of Department-generated business proprietary documents using IA ACCESS. The Department plans to notify the lead attorney for service and any other designated authorized individuals via e-mail that a new document has been posted to a particular segment. The authorized individual would then be able to securely access the document.

The Department has not implemented a similar release process to effect service of documents filed by interested parties on one another. As discussed above, with the exception of service of APO applications in § 351.305(b)(2) and the requirement that parties serve the complete final business proprietary document when bracketing changes have been made in § 351.303(c)(2)(ii), the Department has not changed the service requirements in the regulations. However, parties may continue to consent to electronic service in accordance with 19 CFR 351.303(f)(1)(ii) and continue to serve one another in accordance with this provision.

One commenter stated that it supports the Department's approach to electronic release under APO using the IA ACCESS system, but it urges the Department to impose conditions on such document releases, such as prohibiting access to another party's business proprietary information using file servers, networks and other electronic data storage and transmission devices located overseas or accessible to the public (such as computers in libraries and Internet cafes). The commenter stated that use of such systems would greatly increase the likelihood of unauthorized interception of and access to the business proprietary information of another party.

The commenter also encouraged the Department to retain the requirement that authorized applicants certify that they will ''ensure that business proprietary information in an electronic format will not be accessible to parties not authorized to receive business proprietary information'' in all future APOs. The commenter proposed requiring, as an additional safeguard, that all applicants for access to business proprietary information under an APO further specify (as part of their APO applications) each location from which they will access electronic documents containing business proprietary information of another interested party. According to the commenter, other interested parties should be permitted to comment on such applications and have their comments considered by the Department as part of its review of the APO application.

The Department is committed to securing the business proprietary information of parties participating in its proceedings. The Department has determined that it is not necessary for applicants for APO access to specify the location from which they will access electronic documents containing business proprietary information of another interested party. The Department already requires parties to use diligence in protecting other interested parties' business proprietary information and will continue to allow the firms to develop their own internal procedures to ensure that business proprietary information is downloaded in a secure manner. In addition, the Department will continue to address the improper release of business proprietary information through its sanctions proceedings at 19 CFR part 354.

Classification

E.O. 12866

This rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'') under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule, if promulgated, would not have a significant economic impact on a substantial number of small business entities. The factual basis for the certification was published in the Proposed Rule and is not repeated here. The Department received no comments questioning or regarding this certification.

Paperwork Reduction Act

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: June 22, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.;* and 19 U.S.C. 3538.

■ 2. Section 351.103 is revised to read as follows:

§ 351.103 Central Records Unit and Administrative Protective Order and Dockets Unit.

(a) Import Administration's Central Records Unit maintains a Public File Room in Room 7046, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The office hours of the Public File Room are between 8:30 a.m. and 5 p.m. Eastern Time on business days. Among other things, the Central Records Unit is responsible for maintaining an official and public record for each antidumping and countervailing duty proceeding (see § 351.104).

(b) Import Administration's Administrative Protective Order and Dockets Unit (APO/Dockets Unit) is located in Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The office hours of the APO/Dockets Unit are between 8:30 a.m. and 5 p.m. Eastern Time on business days. Among other things, the APO/Dockets Unit is responsible for receiving submissions from interested parties, issuing administrative protective orders (APOs), maintaining the APO service list and the public service list as provided for in paragraph (d) of this section, releasing business proprietary information under APO, and conducting APO violation investigations. The APO/Dockets Unit also is the contact point for questions and concerns regarding claims for business proprietary treatment of information and proper public versions of submissions under § 351.105 and § 351.304.

(c) *Filing of documents with the Department.* No document will be considered as having been received by the Secretary unless it is electronically filed in accordance with § 351.303(b)(2)(i) or, where applicable, in accordance with § 351.303(b)(2)(ii), it is manually submitted to the Import Administration's APO/Dockets Unit in Room 1870 and is stamped with the date, and, where necessary, the time, of receipt. A manually filed document must be submitted with a cover sheet, in accordance with § 351.303(b)(3).

(d) *Service list.* The APO/Dockets Unit will maintain and make available a public service list for each segment of a proceeding. The service list for an application for a scope ruling is described in § 351.225(n).

(1) With the exception of a petitioner filing a petition in an investigation, all persons wishing to participate in a segment of a proceeding must file a letter of appearance. The letter of appearance must identify the name of the interested party, how that party qualifies as an interested party under § 351.102(b)(29) and section 771(9) of the Act, and the name of the firm, if any, representing the interested party in that particular segment of the proceeding. All persons who file a letter of appearance and qualify as an interested party will be included in the public service list for the segment of the proceeding in which the letter of appearance is submitted. The letter of appearance may be filed as a cover letter to an application for APO access. If the representative of the party is not requesting access to business proprietary information under APO, the letter of appearance must be filed separately from any other document filed with the Department. If the interested party is a coalition or association as defined in subparagraph (A), (E), (F) or (G) of section 771(9) of the Act, the letter of appearance must identify all of the members of the coalition or association.

(2) Each interested party that asks to be included on the public service list for a segment of a proceeding must designate a person to receive service of documents filed in that segment.

■ 3. Section 351.104 is amended by revising paragraphs (a)(1), (a)(2), and (b) to read as follows:

§ 351.104 Record of proceedings.

(a) *Official record*—(1) *In general.* The Secretary will maintain an official record of each antidumping and countervailing duty proceeding. The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. The official record will include government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the **Federal Register**, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified. For purposes of section 516A(b)(2) of the Act, the record is the official record of each segment of the proceeding.

(2) *Material rejected.* (i) The Secretary, in making any determination under this part, will not use factual information, written argument, or other material that the Secretary rejects.

(ii) The official record will include a copy of a rejected document, solely for purposes of establishing and documenting the basis for rejecting the document, if the document was rejected because:

(A) The document, although otherwise timely, contains untimely filed new factual information (see § 351.301(b));

(B) The submitter made a nonconforming request for business proprietary treatment of factual information (see § 351.304);

(C) The Secretary denied a request for business proprietary treatment of factual information (see § 351.304);

(D) The submitter is unwilling to permit the disclosure of business proprietary information under APO (see § 351.304).

(iii) In no case will the official record include any document that the Secretary rejects as untimely filed, or any unsolicited questionnaire response unless the response is a voluntary response accepted under § 351.204(d) (see § 351.302(d)).

(b) *Public record.* The Secretary will maintain a public record of each proceeding. The record will consist of all material contained in the official record (see paragraph (a) of this section) that the Secretary decides is public information under § 351.105(b), government memoranda or portions of memoranda that the Secretary decides may be disclosed to the general public, and public versions of all determinations, notices, and transcripts. The public record will be available to the public for inspection and copying in the Central Records Unit (see § 351.103). The Secretary will charge an

appropriate fee for providing copies of documents.

* * * * *

■ 4. Section 351.302 is amended by revising paragraphs (a), (c) and (d) to read as follows:

§ 351.302 Extension of time limits; rejection of untimely filed or unsolicited material.

(a) *Introduction.* This section sets forth the procedures for requesting an extension of a time limit. In addition, this section explains that certain untimely filed or unsolicited material will be rejected together with an explanation of the reasons for the rejection of such material.

* * * * *

(c) *Requests for extension of specific time limit.* Before the applicable time limit specified under § 351.301 expires, a party may request an extension pursuant to paragraph (b) of this section. The request must be in writing, filed consistent with § 351.303, and state the reasons for the request. An extension granted to a party must be approved in writing.

(d) *Rejection of untimely filed or unsolicited material.* (1) Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding:

(i) Untimely filed factual information, written argument, or other material that the Secretary rejects, except as provided under § 351.104(a)(2); or

(ii) Unsolicited questionnaire responses, except as provided under § 351.204(d)(2).

(2) The Secretary will reject such information, argument, or other material, or unsolicited questionnaire response with, to the extent practicable, written notice stating the reasons for rejection.

■ 5. Section 351.303 is amended by revising the section heading and paragraphs (a), (b), (c), (d), and (f)(1) to read as follows:

§ 351.303 Filing, document identification, format, translation, service, and certification of documents.

(a) *Introduction.* This section contains the procedural rules regarding filing, document identification, format, service, translation, and certification of documents and applies to all persons submitting documents to the Department for consideration in an antidumping or countervailing duty proceeding.

(b) *Filing*—(1) *In general.* Persons must address all documents to the Secretary of Commerce, Attention: Import Administration, APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Time on the due date. Where applicable, a submitter must manually file a document between the hours of 8:30 a.m. and 5 p.m. Eastern Time on business days (see § 351.103(b)). For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day. A manually filed document must be accompanied by a cover sheet generated in IA ACCESS, in accordance with § 351.303(b)(3).

(2) *Filing of documents and databases*—(i) *Electronic filing.* A person must file all documents and databases electronically using IA ACCESS at *http://iaaccess.trade.gov.* A person making a filing must comply with the procedures set forth in the IA ACCESS Handbook on Electronic Filing Procedures, which is available on the Department's Web site at *http://www.trade.gov/ia.*

(ii) *Manual filing.* (A) Notwithstanding § 351.303(b)(2)(i), a person must manually file a data file that exceeds the file size limit specified in the IA ACCESS Handbook on Electronic Filing Procedures and as referenced in § 351.303(c)(3), and the data file must be accompanied by a cover sheet described in § 351.303(b)(3). A person may manually file a bulky document. If a person elects to manually file a bulky document, it must be accompanied by a cover sheet described in § 351.303(b)(3). The Department both provides specifications for large data files and defines bulky document standards in the IA ACCESS Handbook on Electronic Filing Procedures, which is available on the Department's Web site at *http://www.trade.gov/ia.*

(B) If the IA ACCESS system is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour between 12 noon and 4:30 p.m. Eastern Time or for any duration of time between 4:31 p.m. and 5 p.m. Eastern Time, then a person may manually file the document in the APO/Dockets Unit. The Department will provide notice of such technical failures on its Help Desk line. Procedures for manual filing in this situation are provided in the IA ACCESS Handbook on Electronic Filing Procedures.

(C) Apart from the documents and database files described in § 351.303(b)(2)(ii)(A), if a submitter is unable to comply with the electronic filing requirement, as provided in § 351.103(c), and in accordance with section 782(c) of the Act, the submitter must notify the Department promptly of the reasons the submitter is unable to file the document electronically, provide a full explanation, and suggest alternative forms in which to submit the information. The Department will consider the ability of the submitter and may modify the electronic filing requirement on a case-by-case basis.

(D) *Number of hardcopies for manual filing.* If a document is filed manually, the submitter must file one hardcopy of the document in the APO/Dockets Unit, along with a cover sheet generated in IA ACCESS. If the document contains business proprietary information, the submitter must file one hardcopy of the business proprietary document and one hardcopy of the public version, along with the requisite IA ACCESS-generated cover sheets. If applicable, the submitter must also file one hardcopy of the business proprietary/APO version, along with the requisite IA ACCESS-generated cover sheet. For a bulky document, in addition to the foregoing, the submitter must also provide one additional hardcopy of the business proprietary document or public document, as applicable.

(3) *Cover sheet.* When manually filing a document, parties must complete the cover sheet (as described in the IA ACCESS Handbook on Electronic Filing Procedures) online at *http://iaaccess.trade.gov* and print the cover sheet for submission to the APO/Dockets Unit.

(4) *Document identification.* Each document must be clearly identified as one of the following five document classifications and must conform with the requirements under paragraph (d)(2) of this section. Business proprietary document or business proprietary/APO version, as applicable, means a document or a version of a document containing information for which a person claims business proprietary treatment under § 351.304.

(i) Business Proprietary Document—May be Released Under APO. This business proprietary document contains single-bracketed business proprietary information that the submitter agrees to release under APO. It must contain the statement ''May be Released Under APO'' in accordance with the requirements under paragraph (d)(2)(v) of this section.

(ii) Business Proprietary Document—May Not be Released Under APO. This business proprietary document contains double-bracketed business proprietary

information that the submitter does not agree to release under APO. This document must contain the statement ''May Not be Released Under APO'' in accordance with the requirements under paragraph (d)(2)(v) of this section. This type of document may contain single-bracketed business proprietary information in addition to double-bracketed business proprietary information.

(iii) Business Proprietary/APO Version—May be Released Under APO. In the event that a business proprietary document contains both single- and double-bracketed business proprietary information, the submitting person must submit a version of the document with the double-bracketed business proprietary information omitted. This version must contain the single-bracketed business proprietary information that the submitter agrees to release under APO. This version must be identified as ''Business Proprietary/APO Version'' and must contain the statement ''May be Released Under APO'' in accordance with the requirements under paragraph (d)(2)(v) of this section.

(iv) Public Version. The public version excludes all business proprietary information, whether single- or double-bracketed. Specific filing requirements for public version submissions are discussed in § 351.304(c).

(v) Public Document. The public document contains only public information. There is no corresponding business proprietary document for a public document.

(c) Filing of business proprietary documents and public versions under the one-day lag rule; information in double brackets.

(1) *In general.* If a submission contains information for which the submitter claims business proprietary treatment, the submitter may elect to file the submission under the one-day lag rule described in paragraph (c)(2) of this section. A petition, an amendment to a petition, and any other submission filed prior to the initiation of an investigation shall not be filed under the one-day lag rule. The business proprietary document and public version of such pre-initiation submissions must be filed simultaneously on the same day.

(2) *Application of the one-day lag rule*—(i) *Filing the business proprietary document.* A person must file a business proprietary document with the Department within the applicable time limit.

(ii) Filing of final business proprietary document; bracketing corrections. By the close of business one business day after the date the business proprietary document is filed under paragraph (c)(2)(i) of this section, a person must file the complete final business proprietary document with the Department. The final business proprietary document must be identical in all respects to the business proprietary document filed on the previous day except for any bracketing corrections and the omission of the warning ''Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing'' in accordance with paragraph (d)(2)(v) of this section. A person must serve other persons with the complete final business proprietary document if there are bracketing corrections. If there are no bracketing corrections, a person need not serve a copy of the final business proprietary document.

(iii) *Filing the public version.* Simultaneously with the filing of the final business proprietary document under paragraph (c)(2)(ii) of this section, a person also must file the public version of such document (see § 351.304(c)) with the Department.

(iv) *Information in double brackets.* If a person serves authorized applicants with a business proprietary/APO version of a document that excludes information in double brackets pursuant to §§ 351.303(b)(4)(iii) and 351.304(b)(2), the person simultaneously must file with the Department the complete business proprietary/APO version of the document from which information in double brackets has been excluded.

(3) *Sales files, cost of production files and other electronic databases.* When a submission includes sales files, cost of production files or other electronic databases, such electronic databases must be filed electronically in accordance with paragraph (b)(2) of this section. If a submitter must file the database manually pursuant to § 351.303(b)(2)(ii)(A), the submitter must file such information on the computer medium specified by the Department's request for such information. The submitter need not accompany the computer medium with a paper printout. All electronic database information must be releasable under APO (see § 351.305). A submitter need not include brackets in an electronic database containing business proprietary information. The submitter's selection of the security classification ''Business Proprietary Document—May Be Released Under APO'' at the time of filing indicates the submitter's request for business proprietary treatment of the information contained in the database. Where possible, the submitter must insert headers or footers requesting business proprietary treatment of the information on the databases for printing purposes. A submitter must submit a public version of a database in pdf format. The public version of the database must be publicly summarized and ranged in accordance with § 351.304(c).

(d) *Format of submissions*—(1) *In general.* Unless the Secretary alters the requirements of this section, a document filed with the Department must conform to the specification and marking requirements under paragraph (d)(2) of this section or the Secretary may reject such document in accordance with § 351.104(a).

(2) *Specifications and markings.* If a document is filed manually, it must be on letter-size (8½ × 11 inch) paper, single-sided and double-spaced, bound with a paper clip, butterfly/binder clip, or rubber band. The filing of stapled, spiral, velo, or other type of solid binding is not permitted. In accordance with paragraph (b)(3) of this section, a cover sheet must be placed before the first page of the document. Electronically filed documents must be formatted to print on letter-size (8½ × 11 inch) paper and double-spaced. Spreadsheets, unusually sized exhibits, and databases are best utilized in their original printing format and should not be reformatted for submission. A submitter must mark the first page of each document in the upper right-hand corner with the following information in the following format:

(i) On the first line, except for a petition, indicate the Department case number;

(ii) On the second line, indicate the total number of pages in the document including cover pages, appendices, and any unnumbered pages;

(iii) On the third line, indicate the specific segment of the proceeding, (*e.g.,* investigation, administrative review, scope inquiry, suspension agreement, *etc.*) and, if applicable, indicate the complete period of review (MM/DD/YY–MM/DD/YY);

(iv) On the fourth line, except for a petition, indicate the Department office conducting the proceeding;

(v) On the fifth and subsequent lines, indicate whether any portion of the document contains business proprietary information and, if so, list the applicable page numbers and state either: ''Business Proprietary Document—May Be Released Under APO,'' ''Business Proprietary Document—May Not Be Released Under APO,'' or ''Business Proprietary/APO Version—May Be Released Under APO,'' as applicable, and consistent

with § 351.303(b)(4). Indicate ''Business Proprietary Treatment Requested'' on the top of each page containing business proprietary information. In addition, include the warning ''Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing'' on the top of each page containing business proprietary information in the business proprietary document filed under paragraph (c)(2)(i) of this section (one-day lag rule). Do not include this warning in the final business proprietary document filed on the next business day under paragraph (c)(2)(ii) of this section (see § 351.303(c)(2) and § 351.304(c)); and

(vi) For the public version of a business proprietary document required under § 351.304(c), complete the marking as required in paragraphs (d)(2)(i)–(v) of this section for the business proprietary document, but conspicuously mark the first page ''Public Version.''

(vii) For a public document, complete the marking as required in paragraphs (d)(2)(i)–(v) of this section for the business proprietary document or version, as applicable, but conspicuously mark the first page ''Public Document.''

* * * * *

(f) * * *

(1)(i) *In general.* Except as provided in § 351.202(c) (filing of petition), § 351.208(f)(1) (submission of proposed suspension agreement), and paragraph (f)(3) of this section, a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail.

(ii) *Service of public versions, public documents, or a party's own business proprietary information.* Notwithstanding paragraphs (f)(1)(i) and (f)(3) of this section, service of a business proprietary document containing only the server's own business proprietary information, on persons on the APO service list, or the public version of such a document, or a public document on persons on the public service list, may be made by facsimile transmission or other electronic transmission process, with the consent of the person to be served.

* * * * *

■ 6. Section 351.304 is amended by revising paragraphs (b)(1), (b)(2(iii), (c), (d)(1) introductory text and (d)(1)(iv) to read as follows:

§ 351.304 Establishing business proprietary treatment of information.

* * * * *

(b) *Identification of business proprietary information*—(1) *Information releasable under administrative protective order*—(i) *In general.* A person submitting information must identify the information for which it claims business proprietary treatment by enclosing the information within single brackets. The submitting person must provide with the information an explanation of why each item of bracketed information is entitled to business proprietary treatment. A person submitting a request for business proprietary treatment also must include an agreement to permit disclosure under an administrative protective order, unless the submitting party claims that there is a clear and compelling need to withhold the information from disclosure under an administrative protective order.

(ii) *Electronic databases.* In accordance with § 351.303(c)(3), an electronic database need not contain brackets. The submitter must select the security classification ''Business Proprietary Document—May Be Released Under APO'' at the time of filing to request business proprietary treatment of the information contained in the database. The public version of the database must be publicly summarized and ranged in accordance with § 351.304(c).

(2) * * *

(iii) The submitting person may exclude the information in double brackets from the business proprietary/APO version of the submission served on authorized applicants. See § 351.303 for filing and service requirements.

(c) *Public version.* (1) A person filing a submission that contains information for which business proprietary treatment is claimed must file a public version of the submission. The public version must be filed on the first business day after the filing deadline for the business proprietary document (see § 351.303(b)). The public version must contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information. If the submitting person claims that summarization is not possible, the claim must be accompanied by a full explanation of the reasons supporting that claim. Generally, numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within 10 percent of the actual figure. If an individual portion of the numerical data is voluminous, at least one percent representative of that portion must be summarized. A submitter should not create a public summary of business proprietary information of another person.

(2) If a submitting party discovers that it has failed to bracket information correctly, the submitter may file a complete, corrected business proprietary document along with the public version (see § 351.303(b)). At the close of business on the day on which the public version of a submission is due under paragraph (c)(2) of this section, however, the bracketing of business proprietary information in the original business proprietary document or, if a corrected version is timely filed, the corrected business proprietary document will become final. Once bracketing has become final, the Secretary will not accept any further corrections to the bracketing of information in a submission, and the Secretary will treat non-bracketed information as public information.

(d) * * *

(1) *In general.* The Secretary will reject a submission that does not meet the requirements of section 777(b) of the Act and this section with a written explanation. The submitting person may take any of the following actions within two business days after receiving the Secretary's explanation:

* * *

(iv) Submit other material concerning the subject matter of the rejected information. If the submitting person does not take any of these actions, the Secretary will not consider the rejected submission.

* * *

■ 7. Section 351.305 is amended by revising paragraph (b)(2) to read as follows:

§ 351.305 Access to business proprietary information.

* * *

(b) * * *

(2) A representative of a party to the proceeding may apply for access to business proprietary information under the administrative protective order by submitting Form ITA–367 to the Secretary. Form ITA–367 must identify the applicant and the segment of the proceeding involved, state the basis for eligibility of the applicant for access to business proprietary information, and state the agreement of the applicant to be bound by the administrative protective order. Form ITA–367 may be prepared on the applicant's own wordprocessing system, and must be accompanied by a certification that the application is consistent with Form ITA–367 and an acknowledgment that any discrepancies will be interpreted in a manner consistent with Form ITA–

367. An applicant must apply to receive all business proprietary information on the record of the segment of a proceeding in question, but may waive service of business proprietary information it does not wish to receive from other parties to the proceeding. An applicant must serve an APO application on the other parties by the most expeditious manner possible at the same time that it files the application with the Department.

* * * * *

[FR Doc. 2011–16352 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

[Docket No. FDA–2011–N–0003]

New Animal Drugs; Change of Sponsor's Address

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of address for Huvepharma AD, a sponsor of approved new animal drug applications.

DATES: This rule is effective July 6, 2011.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8300, e-mail: *steven.vaughn@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Huvepharma AD, 33 James Boucher Blvd., Sophia 1407, Bulgaria, has informed FDA that it has changed its address to 5th Floor, 3A Nikolay Haitov Str., 1113 Sofia, Bulgaria. Accordingly, the Agency is amending the regulations in 21 CFR 510.600 to reflect this change.

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 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

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 510 is amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1), revise the entry for ''Huvepharma AD''; and in the table in paragraph (c)(2), revise the entry for ''016592'' to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Huvepharma AD, 5th Floor, 3A Nikolay Haitov Str., 1113 Sofia, Bulgaria	016592
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
016592	Huvepharma AD, 5th Floor, 3A Nikolay Haitov Str., 1113 Sofia, Bulgaria.
* * * * *	

Dated: June 24, 2011.

Elizabeth Rettie,

Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 2011–16845 Filed 7–5–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 48

[TD 9533]

RIN 1545–BK28

Modification of Treasury Regulations Pursuant to Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations that remove any reference to, or requirement of reliance on, ''credit ratings'' in regulations under the Internal Revenue Code (Code) and provides substitute standards of credit-worthiness where appropriate. This action is required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires Federal agencies to remove any reference to, or requirement of reliance on, credit ratings from their regulations and to substitute such standard of credit-worthiness as the agency deems appropriate for such regulations. These regulations affect persons subject to various provisions of the Code. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on July 6, 2011.

Applicability Dates: For dates of applicability, see §§ 1.150–1T(a)(4), 1.171–1T(f), 1.197–2T(b)(7), 1.249–1T(f)(3), 1.475(a)–4T(d)(4), 1.860G–2T(g)(3), 1.1001–3T(d), (e), and (g), and 48.4101–1T(l)(5).

FOR FURTHER INFORMATION CONTACT: Arturo Estrada, (202) 622–3900 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 939A(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (124 Stat. 1376 (2010)), (the ''Dodd-Frank Act''), requires each Federal agency to review its regulations that require the use of an assessment of credit-worthiness of a security or money market instrument, and to review any references or requirements in those regulations regarding credit ratings. Section 939A(b) directs each agency to

modify any regulation identified in the review required under section 939A(a) by removing any reference to, or requirement of reliance on, credit ratings and substituting a standard of credit-worthiness that the agency deems appropriate. Numerous provisions under the Code are affected.

These temporary regulations amend the Income Tax Regulations (26 CFR part 1) under sections 150, 171, 197, 249, 475, 860G, and 1001 of the Code. These sections were added to the Code during different years to serve different purposes. These temporary regulations also amend the Manufacturers and Retailers Excise Tax Regulations (26 CFR part 48) under section 4101 that provides registration requirements related to Federal fuel taxes.

Explanation of Provisions

These temporary regulations remove references to ''credit ratings'' and ''credit agencies'' or functionally similar terms in the existing regulations. Some changes involve simple word deletions or substitutions. Others reflect the revision of a sentence to remove the credit rating references. In some cases, multiple sentences have been modified. Where appropriate, substitute standards of credit-worthiness replace the prior references to credit ratings, credit agencies or functionally similar terms. Language revisions serve solely to remove the references prohibited by section 939A of the Dodd-Frank Act and no additional changes are intended.

Section 1.150–1. Section 1.150–1 provides definitions for purposes of sections 103 and 141 through 150. Section 1.150–1(b) defines *issuance costs* to mean costs to the extent incurred in connection with, and allocable to, the issuance of an issue within the meaning of section 147(g). Section 1.150–1(b) lists as non-exclusive examples of issuance costs: Underwriters' spread; counsel fees; financial advisory fees; rating agency fees; trustee fees; paying agent fees; bond registrar, certification, and authentication fees; accounting fees; printing costs for bonds and offering documents; public approval process costs; engineering and feasibility study costs; guarantee fees, other than for qualified guarantees (as defined in § 1.148–4(f)); and similar costs. These temporary regulations replace the § 1.150–1(b) reference to rating agency fees with ''fees paid to an organization to evaluate the credit quality of the issue.'' No substantive change is intended.

Section 1.171–1. The temporary regulations change *credit rating* in § 1.171–1(f) *Example 2* (i) to *credit quality.* The change does not affect the analysis in the example. In addition, the temporary regulations make other nonsubstantive changes to the example (for example, the dates in the example are updated).

Section 1.197–2(b)(7). The temporary regulations remove ''the existence of a favorable credit rating'' from the examples of supplier-based intangibles in the third sentence of § 1.197–2(b)(7). No substantive change in the treatment of a favorable credit rating as a supplier-based intangible under section 197 is intended.

Section 1.249–1. The temporary regulations change *credit rating* and *ratings of credit rating services* in § 1.249–1(e)(2)(ii) to *credit quality* and *widely published financial information.* In the existing regulations, a change in the credit rating of an issuer or obligation is one of the facts and circumstances used to determine how much of a repurchase premium is attributable to the cost of borrowing and not to the conversion feature of a convertible bond. *Credit rating services* is used as a means to determine the credit rating of an issuer or obligation. None of these changes affect the substantive rules in the existing regulations.

Section 1.475(a)–4(d)(4). Example 1, Example 2, and *Example 3* in § 1.475(a)–4(d)(4) are revised to remove references to credit ratings or credit rating agencies. In these three examples in the existing regulations, *credit rating* or specific references to certain ratings by certain credit ratings agencies (such as AA/aa or AAA/aaa) were used to set up the factual scenario that illustrates the factors that go into the determination of whether it is appropriate for a dealer to take a credit risk adjustment. These terms were also used to describe the credit risk adjustment implicit in the yield curve used to discount the present value of the cash flows. This adjustment affects whether any additional credit risk adjustments are warranted. These examples also used *credit rating agency* to set up the factual scenario that a counterparty's credit-worthiness was based upon an industry standard of a certain credit quality and illustrates the factors that go into the determination of whether it is appropriate for a dealer to take a credit risk adjustment. The changes that have been made to the language of the examples do not alter the purpose of the illustrations and present the factual issues in a more generalized way.

Section 1.860G–2. Section 1.860G–2(g)(2) defines *qualified reserve fund* as an amount that is reasonably required to fund expenses of the REMIC or amounts due on regular or residual interests in the event of defaults on the underlying pool of mortgages. In defining the amount reasonably required, § 1.860G–2(g)(3)(ii) refers to the amount required by a nationally recognized independent rating agency as a condition of providing the rating for the REMIC interest desired by the sponsor. Because an alternative and fully adequate standard of reference is already set forth in these regulations, these temporary regulations remove the rating agency alternative standard.

Section 1.1001–3. Section 1.1001–3 provides rules for determining whether a modification of a debt instrument results in an exchange for purposes of § 1.1001–1(a). These temporary regulations remove the terms *rating* and *credit rating* from § 1.1001–3 and generally replace those terms with *credit quality.* Section 1.1001–3(d) *Example 9* is revised so that the event that triggers an option to increase a note's rate of interest is a breach of certain covenants in the note, rather than a specific decline in the corporation's credit rating. The temporary regulations also revise § 1.1001–3(g) *Example 5* so that the debt instrument described in the example allows a party to be substituted for the instrument's original obligor on the basis of the party's credit-worthiness, rather than the party's credit rating. The temporary regulations also revise § 1.1001–3(g) *Example 8* to explain that a bank's letter of credit supporting a debt instrument is substituted for another bank's letter of credit when the first bank encounters financial difficulty, thus removing references to *rating agencies* and either bank's *credit rating.*

Section 48.4101–1(f)(4). Section 4101 requires certain persons to be registered by the IRS for purposes of several fuel tax provisions of the Code. Under § 48.4101–1, the IRS will register an applicant for registration only if, among other conditions, the applicant has adequate financial resources to pay its expected fuel tax liability. To make this determination, § 48.4101–1(f)(4)(ii)(B) instructs the IRS to look to the applicant's financial information. These temporary regulations remove the examples of the types of documents the IRS should review and instructs the IRS to look at all information relevant to the applicant's financial status.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as

supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analysis section in the preamble to the cross-referenced notice of proposed rulemaking in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

These regulations were drafted by personnel in the Office of Associate Chief Counsel (Financial Institutions and Products), the Office of Associate Chief Counsel (Income Tax and Accounting), the Office of the Associate Chief Counsel (International) and the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 48 are 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 1.150–1 is amended as follows:

■ 1. Paragraph (a)(4) is added.

■ 2. In paragraph (b), the definition of *Issuance costs* is revised.

The additions and revisions read as follows:

§ 1.150–1 Definitions.

(a) * * *

(4) [Reserved] For further guidance, see § 1.150–1T(a)(4).

(b) * * *

Issuance costs [Reserved]. For further guidance, see § 1.150–1T(b), *Issuance costs.*

* * * * *

■ **Par. 3.** Section 1.150–1T is added to read as follows:

§ 1.150–1T Definitions (temporary).

(a) through (a)(3) [Reserved]. For further guidance, see § 1.150–1(a) through (a)(3).

(4) *Additional exception to the general applicability date.* Section 1.150–1T(b), *Issuance costs,* applies on and after July 6, 2011.

(5) *Expiration date.* The applicability of § 1.150–1T(b), *Issuance costs*, expires on or before July 1, 2014.

(b) *Bond* through the definition of *Governmental bond* [Reserved]. For further guidance, see § 1.150–1(b) *Bond* through the definition of *Governmental bond.*

Issuance costs means costs to the extent incurred in connection with, and allocable to, the issuance of an issue within the meaning of section 147(g). For example, issuance costs include the following costs but only to the extent incurred in connection with, and allocable to, the borrowing: Underwriters' spread; counsel fees; financial advisory fees; fees paid to an organization to evaluate the credit quality of an issue; trustee fees; paying agent fees; bond registrar, certification, and authentication fees; accounting fees; printing costs for bonds and offering documents; public approval process costs; engineering and feasibility study costs; guarantee fees, other than for qualified guarantees (as defined in § 1.148–4(f)); and similar costs.

(c) *Issue date* through paragraph (e) [Reserved]. For further guidance, see § 1.150–1(b) *Issue date* through paragraph (e).

■ **Par. 4.** Section 1.171–1(f) *Example 2* is revised to read as follows:

§ 1.171–1 Bond premium.

* * * * *

(f) * * *

Example 2. [Reserved]. For further guidance, see § 1.171–1T(f) *Example 2.*

* * * * *

■ **Par. 5.** Section 1.171–1T is added to read as follows:

§ 1.171–1T Bond premium (temporary).

(a) through (f) *Example 1* [Reserved]. For further guidance, see § 1.171–1(a) through (f) *Example 1.*

Example 2. Convertible bond—(i) *Facts.* On January 1, 2012, A purchases for $1,100 B corporation's bond maturing on January 1, 2015, with a stated principal amount of $1,000, payable at maturity. The bond provides for unconditional payments of interest of $30 on January 1 and July 1 of each year. In addition, the bond is convertible into 15 shares of B corporation stock at the option of the holder. On January 1, 2012, B corporation's nonconvertible, publicly-traded, three-year debt of comparable credit quality trades at a price that reflects a yield of 6.75 percent, compounded semiannually.

(ii) *Determination of basis.* A's basis for determining loss on the sale or exchange of the bond is $1,100. As of January 1, 2012, discounting the remaining payments on the bond at the yield at which B's similar nonconvertible bonds trade (6.75 percent, compounded semiannually) results in a present value of $980. Thus, the value of the conversion option is $120. Under § 1.171–1(e)(1)(iii)(A), A's basis is $980 ($1,100 − $120) for purposes of §§ 1.171–1 through 1.171–5. The sum of all amounts payable on the bond other than qualified stated interest is $1,000. Because A's basis (as determined under § 1.171–1(e)(1)(iii)(A)) does not exceed $1,000, A does not acquire the bond at a premium.

(iii) *Effective/applicability date.* This *Example 2* applies to bonds acquired on or after July 6, 2011.

(g) *Expiration date.* The applicability of this section expires on or before July 1, 2014.

■ **Par. 6.** Section 1.197–2 is amended by revising paragraph (b)(7) to read as follows:

§ 1.197–2 Amortization of goodwill and certain other intangibles.

* * * * *

(b) * * *

(7) [Reserved]. For further guidance, see § 1.197–2T(b)(7).

* * * * *

■ **Par. 7.** Section 1.197–2T is added to read as follows:

§ 1.197–2T Amortization of goodwill and certain other intangibles (temporary).

(a) through (b)(6) [Reserved]. For further guidance, see § 1.197–2(a) through (b)(6).

(7) *Supplier-based intangibles*—(i) *In general.* Section 197 intangibles include any supplier-based intangible. A *supplier-based intangible* is the value resulting from the future acquisition, pursuant to contractual or other relationships with suppliers in the ordinary course of business, of goods or services that will be sold or used by the taxpayer. Thus, the amount paid or incurred for supplier-based intangibles includes, for example, any portion of the purchase price of an acquired trade or business attributable to the existence of a favorable relationship with persons providing distribution services (such as favorable shelf or display space at a retail outlet), or the existence of favorable supply contracts. The amount

paid or incurred for supplier-based intangibles does not include any amount required to be paid for the goods or services themselves pursuant to the terms of the agreement or other relationship. In addition, see the exceptions in § 1.197–2(c), including the exception in § 1.197–2(c)(6) for certain rights to receive tangible property or services from another person.

(ii) *Effective/applicability date.* This section applies to supplier-based intangibles acquired after July 6, 2011.

(iii) *Expiration date.* The applicability of this section expires on or before July 1, 2014.

(b)(8) through (l) [Reserved]. For further guidance, see § 1.197–2(b)(8) through (l).

■ **Par. 8.** Section 1.249–1 is amended as follows:

■ 1. Paragraph (e)(2)(ii) is revised.

■ 2. The paragraph heading for paragraph (f) is revised.

■ 3. Paragraph (f)(3) is added.

The revisions and addition read as follows:

§ 1.249–1 Limitation on deduction of bond premium on repurchase.

* * * * *

(e) * * *

(2) * * *

(ii) [Reserved]. For further guidance, see § 1.249–1T(e)(2)(ii).

* * * * *

(f) *Effective/applicability dates.* * * *

(3) [Reserved]. For further guidance, see § 1.249–1T(f)(3).

* * * * *

■ **Par. 9.** Section 1.249–1T is added to read as follows:

§ 1.249–1T Limitation on deduction of bond premium on repurchase (temporary).

(a) through (e)(2)(i) [Reserved]. For further guidance, see § 1.249–1(a) through (e)(2)(i).

(ii) In determining the amount under § 1.249–1(e)(2)(i), appropriate consideration shall be given to all factors affecting the selling price or yields of comparable nonconvertible obligations. Such factors include general changes in prevailing yields of comparable obligations between the dates the convertible obligation was issued and repurchased and the amount (if any) by which the selling price of the nonconvertible obligation was affected by reason of any change in the issuing corporation's credit quality or the credit quality of the obligation during such period (determined on the basis of widely published financial information or on the basis of other relevant facts and circumstances which reflect the relative credit quality of the corporation or the comparable obligation).

(e)(2)(iii) through (f)(2) [Reserved]. For further guidance, see § 1.249–1(e)(2)(iii) through (f)(2).

(3) *Portion of repurchase premium attributable to cost of borrowing.* Paragraph (e)(2)(ii) of this section applies to any repurchase of a convertible obligation occurring on or after July 6, 2011.

(g) [Reserved]. For further guidance, see § 1.249–1(g).

(h) *Expiration date.* The applicability of this section expires on or before July 1, 2014.

■ **Par. 10.** Section 1.475(a)–4 is amended by revising paragraph (d)(4) *Example 1, Example 2,* and *Example 3* to read as follows:

§ 1.475(a)–4 Valuation safe harbor.

* * * * *

(d) * * *

(4) * * *

Example 1. [Reserved]. For further guidance, see § 1.475(a)–4T(d)(4) *Example 1.*

Example 2. [Reserved]. For further guidance, see § 1.475(a)–4T(d)(4) *Example 2.*

Example 3. [Reserved]. For further guidance, see § 1.475(a)–4T(d)(4) *Example 3.*

* * * * *

■ **Par. 11.** Section 1.475(a)–4T is added to read as follows:

§ 1.475(a)–4T Valuation safe harbor (temporary).

(a) through (d)(4) introductory text [Reserved]. For further guidance, see § 1.475(a)–4(a) through (d)(4) introductory text.

Example 1. (i) X, a calendar year taxpayer, is a dealer in securities within the meaning of section 475(c)(1). X generally maintains a balanced portfolio of interest rate swaps and other interest rate derivatives, capturing bid-ask spreads and keeping its market exposure within desired limits (using, if necessary, additional derivatives for this purpose). X uses a mark-to-market method on a statement that it is required to file with the United States Securities and Exchange Commission and that satisfies § 1.475(a)–4(d)(2) with respect to both the contracts with customers and the additional derivatives. When determining the amount of any gain or loss realized on a sale, exchange, or termination of a position, X makes a proper adjustment for amounts taken into account respecting payments or receipts. X and all of its counterparties on the derivatives have the same general credit quality as each other.

(ii) Under X's valuation method, as of each valuation date, X determines a mid-market probability distribution of future cash flows under the derivatives and computes the present values of these cash flows. In computing these present values, X uses an industry standard yield curve that is appropriate for obligations by persons with this same general credit quality. In addition, based on information that includes its own knowledge about the counterparties, X adjusts some of these present values either upward or downward to reflect X's reasonable judgment about the extent to which the true credit status of each counterparty's obligation, taking credit enhancements into account, differs from the general credit quality used in the yield curve to present value the derivatives.

(iii) X's methodology does not violate the requirement in § 1.475(a)–4(d)(3)(iii) that the same cost or risk not be taken into account, directly or indirectly, more than once.

(iv) This *Example 1* applies to valuations of securities on or after July 6, 2011.

Example 2. (i) The facts are the same as in *Example 1,* except that X uses a better credit quality in determining the yield curve to discount the payments to be received under the derivatives. Based on information that includes its own knowledge about the counterparties, X adjusts these present values to reflect X's reasonable judgment about the extent to which the true credit status of each counterparty's obligation, taking credit enhancements into account, differs from this better credit quality obligation.

(ii) X's methodology does not violate the requirement in § 1.475(a)–4(d)(3)(iii) that the same cost or risk not be taken into account, directly or indirectly, more than once.

(iii) This *Example 2* applies to valuations of securities on or after July 6, 2011.

Example 3. (i) The facts are the same as in *Example 1,* except that, after computing present values using the discount rates that are appropriate for obligors with the same general credit quality, and based on information that includes X's own knowledge about the counterparties, X adjusts some of these present values either upward or downward to reflect X's reasonable judgment about the extent to which the true credit status of each counterparty's obligation, taking credit enhancements into account, differs from a better credit quality.

(ii) X's methodology violates the requirement in § 1.475(a)–4(d)(3)(iii) that the same cost or risk not be taken into account, directly or indirectly, more than once. By using the same general credit quality discount rate, X's method takes into account the difference between risk-free obligations and obligations with that lower credit quality. By adjusting values for the difference between a higher credit quality and that lower credit quality, X takes into account risks that it had already accounted for through the discount rates that it used. The same result would occur if X judged some of its counterparties' obligations to be of a higher credit quality but X failed to adjust the values of those obligations to reflect the difference between a higher credit quality and the lower credit quality.

(iii) This *Example 3* applies to valuations of securities on or after July 6, 2011.

Example 4 and *Example 5* and paragraphs (e) through (m). [Reserved]. For further guidance, see § 1.475(a)–4(d)(4) *Example 4* and *Example 5* and paragraphs (e) through (m).

(n) *Expiration date.* The applicability of this section expires on or before July 1, 2014.

■ **Par. 12.** Section 1.860G–2 is amended by revising paragraphs (g)(3)(ii)(B) and (C) and adding paragraph (D) to read as follows:

§ 1.860G–2 Other rules.

* * * * *

(g) * * *

(3) * * *

(ii) * * *

(B) [Reserved]. For further guidance, see § 1.860G–2T(g)(3)(ii)(B).

(C) [Reserved]. For further guidance, see § 1.860G–2T(g)(3)(ii)(C).

(D) [Reserved]. For further guidance, see § 1.860G–2T(g)(3)(ii)(D).

* * * * *

■ **Par. 13.** Section 1.860G–2T is added to read as follows:

§ 1.860G–2T Other rules (temporary).

(a) through (g)(3)(ii)(A) [Reserved]. For further guidance, see § 1.860G–2(a) through (g)(3)(ii)(A).

(B) *Presumption that a reserve is reasonably required.* The amount of a reserve fund is presumed to be reasonable (and an excessive reserve is presumed to have been promptly and appropriately reduced) if it does not exceed the amount required by a third party insurer or guarantor, who does not own directly or indirectly (within the meaning of section 267(c)) an interest in the REMIC (as defined in section 1.860D–1(b)(1)), as a condition of providing credit enhancement.

(C) *Presumption may be rebutted.* The presumption in § 1.860G–2(g)(3)(ii)(B) may be rebutted if the amounts required by the third party insurer are not commercially reasonable considering the factors described in § 1.860G–2(g)(3)(ii)(A).

(D) *Effective/applicability date.* Paragraphs (g)(3)(ii)(B) and (C) of this section apply on and after July 6, 2011.

(E) *Expiration date.* The applicability of paragraphs (g)(3)(ii)(B) and (C) of this section expires on or before July 1, 2014.

(h) through (k) [Reserved]. For further guidance, see § 1.860G–2(h) through (k).

■ **Par. 14.** Section 1.1001–3 is amended as follows:

■ 1. Paragraph (d) *Example 9* is revised.

■ 2. Paragraph (e)(4)(iv)(B) is revised.

■ 3. Paragraph (e)(5)(ii)(B)(*2*) is revised.

■ 4. Paragraph (g) *Examples 1, 5* and *8* are revised.

The revisions read as follows:

§ 1.1001–3 Modifications of debt instruments.

* * * * *

(d) * * *

Example 9. [Reserved]. For further guidance, see § 1.1001–3T(d) *Example 9.*

* * * * *

(e) * * *

(4) * * *

(iv) * * *

(B) [Reserved]. For further guidance, see § 1.1001–3T(e)(4)(iv)(B).

* * * * *

(5) * * *

(ii) * * *

(B) * * *

(*2*) [Reserved]. For further guidance, see § 1.1001–3T(e)(5)(ii)(B)(*2*).

* * * * *

(g) * * *

Example 1. [Reserved]. For further guidance, see § 1.1001–3T(g) *Example 1.*

* * * * *

Example 5. [Reserved]. For further guidance, see § 1.1001–3T(g) *Example 5.*

* * * * *

Example 8. [Reserved]. For further guidance, see § 1.1001–3T(g) *Example 8.*

* * * * *

■ **Par. 15.** Section 1.1001–3T is added to read as follows:

§ 1.1001–3T Modifications of debt instruments (temporary).

(a) through (d) *Example 8* [Reserved]. For further guidance, see § 1.1001–3(a) through (d) *Example 8.*

Example 9. Holder's option to increase interest rate. (i) A corporation issues an 8-year note to a bank in exchange for cash. Under the terms of the note, the bank has the option to increase the rate of interest by a specified amount if certain covenants in the note are breached. The bank's right to increase the interest rate is a unilateral option as described in § 1.1001–3(c)(3).

(ii) A covenant in the note is breached. The bank exercises its option to increase the rate of interest. The increase in the rate of interest occurs by operation of the terms of the note and does not result in a deferral or a reduction in the scheduled payments or any other alteration described in § 1.1001–3(c)(2). Thus, the change in interest rate is not a modification.

(iii) *Effective/applicability date.* This *Example 9* applies to modifications occurring on or after July 6, 2011.

(d) *Example 10* through (e)(4)(iv)(A) [Reserved]. For further guidance, see § 1.1001–3(d) *Example 10* through (e)(4)(iv)(A).

(B) *Nonrecourse debt instruments.* (*1*) A modification that releases, substitutes, adds or otherwise alters a substantial amount of the collateral for, a guarantee on, or other form of credit enhancement for a nonrecourse debt instrument is a significant modification. A substitution of collateral is not a significant modification, however, if the collateral is fungible or otherwise of a type where the particular units pledged are unimportant (for example, government securities or financial instruments of a particular type and credit quality). In addition, the substitution of a similar commercially available credit enhancement contract is not a significant modification, and an improvement to the property securing a nonrecourse debt instrument does not result in a significant modification.

(*2*) *Effective/applicability date.* This paragraph (e)(4)(iv)(B) applies to modifications occurring on or after July 6, 2011.

(e)(4)(v) through (e)(5)(ii)(B)(*1*) [Reserved]. For further guidance, see § 1.1001–3(e)(4)(v) through (e)(5)(ii)(B)(*1*).

(*2*) *Original collateral.* (*i*) A modification that changes a recourse debt instrument to a nonrecourse debt instrument is not a significant modification if the instrument continues to be secured only by the original collateral and the modification does not result in a change in payment expectations. For this purpose, if the original collateral is fungible or otherwise of a type where the particular units pledged are unimportant (for example, government securities or financial instruments of a particular type and credit quality), replacement of some or all units of the original collateral with other units of the same or similar type and aggregate value is not considered a change in the original collateral.

(*ii*) *Effective/applicability date.* This paragraph (e)(5)(ii)(B)(*2*) applies to modifications occurring on or after July 6, 2011.

(e)(6) through (g) introductory text [Reserved]. For further guidance, see § 1.1001–3(e)(6) through (g) introductory text.

Example 1. Modification of call right. (i) Under the terms of a 30-year, fixed-rate bond, the issuer can call the bond for 102 percent of par at the end of ten years or for 101 percent of par at the end of 20 years. At the end of the eighth year, the holder of the bond pays the issuer to waive the issuer's right to call the bond at the end of the tenth year. On the date of the modification, the issuer's credit quality is approximately the same as when the bond was issued, but market rates of interest have declined from that date.

(ii) The holder's payment to the issuer changes the yield on the bond. Whether the change in yield is a significant modification depends on whether the yield on the modified bond varies from the yield on the original bond by more than the change in yield as described in § 1.1001–3(e)(2)(ii).

(iii) If the change in yield is not a significant modification, the elimination of the issuer's call right must also be tested for significance. Because the specific rules of § 1.1001–3(e)(2) through (e)(6) do not address

this modification, the significance of the modification must be determined under the general rule of § 1.1001–3(e)(1).

(iv) *Effective/applicability date.* This *Example 1* applies to modifications occurring on or after July 6, 2011.

Example 2 through *Example 4* [Reserved]. For further guidance, see § 1.1001–3(g) *Example 2* through *Example 4.*

Example 5. Assumption of mortgage with increase in interest rate. (i) A recourse debt instrument with a 9 percent annual yield is secured by an office building. Under the terms of the instrument, a purchaser of the building may assume the debt and be substituted for the original obligor if the purchaser is equally or more creditworthy than the original obligor and if the interest rate on the instrument is increased by one-half percent (50 basis points). The building is sold, the purchaser assumes the debt, and the interest rate increases by 50 basis points.

(ii) If the purchaser's acquisition of the building does not satisfy the requirements of § 1.1001–3(e)(4)(i)(B) or (C), the substitution of the purchaser as the obligor is a significant modification under § 1.1001–3(e)(4)(i)(A).

(iii) If the purchaser acquires substantially all of the assets of the original obligor, the assumption of the debt instrument will not result in a significant modification if there is not a change in payment expectations and the assumption does not result in a significant alteration.

(iv) The change in the interest rate, if tested under the rules of § 1.1001–3(e)(2), would result in a significant modification. The change in interest rate that results from the transaction is a significant alteration. Thus, the transaction does not meet the requirements of § 1.1001–3(e)(4)(i)(C) and is a significant modification under § 1.1001–3 (e)(4)(i)(A).

(v) *Effective/applicability date.* Notwithstanding § 1.1001–3(h), this *Example 5* applies to modifications occurring on or after July 6, 2011.

Example 6 through *Example 7* [Reserved]. For further guidance, see § 1.1001–3(g) *Example 6* through *Example 7.*

Example 8. Substitution of credit enhancement contract. (i) Under the terms of a recourse debt instrument, the issuer's obligations are secured by a letter of credit from a specified bank. The debt instrument does not contain any provision allowing a substitution of a letter of credit from a different bank. The specified bank, however, encounters financial difficulty. The issuer and holder agree that the issuer will substitute a letter of credit from another bank.

(ii) Under § 1.1001–3(e)(4)(iv)(A), the substitution of a different credit enhancement contract is not a significant modification of a recourse debt instrument unless the substitution results in a change in payment expectations. While the substitution of a new letter of credit by a different bank does not itself result in a change in payment expectations, such a substitution may result in a change in payment expectations under certain circumstances (for example, if the obligor's capacity to meet payment obligations is dependent on the letter of credit and the substitution substantially enhances that capacity from primarily speculative to adequate).

(iii) *Effective/applicability date.* This *Example 8* applies to modifications occurring on or after July 6, 2011.

Example 9 through (h) [Reserved]. For further guidance, see § 1.1001–3(g) *Example 9* through (h).

(i) *Expiration date.* The applicability of this section expires on or before July 1, 2014.

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

■ **Par. 16.** The authority citation for part 48 continues to read in part as follows:

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

■ **Par. 17.** Section 48.4101–1 is amended as follows:

■ 1. Paragraph (f)(4)(ii)(B) is removed and reserved.

■ 2. Paragraph (l)(5) is added and reserved.

The additions read as follows:

§ 48.4101–1 Taxable fuel; registration.

* * * * *

(f) * * *

(4) * * *

(ii) * * *

(B) [Reserved]. For further guidance, see § 48.4101–1T(f)(4)(ii)(B).

* * * * *

(l) * * *

(5) [Reserved]. For further guidance, see § 48.4101–1T(l)(5).

■ **Par. 18.** Section 48.4101–1T is amended as follows:

■ 1. Paragraphs (a) through (f)(4)(ii)(A) are reserved.

■ 2. Paragraph (f)(4)(ii)(B) is revised.

■ 3. Paragraphs (f)(4)(iii) through (h)(3)(iii) are reserved.

■ 4. Paragraphs (h)(3)(v) through (l)(4) are reserved.

■ 5. Paragraphs (l)(5) and (l)(6) are added.

The additions and revisions read as follows:

§ 48.4101–1T Taxable fuel; registration (temporary).

(a) through (f)(4)(ii)(A) [Reserved]. For further guidance see § 48.4104–1(a) through (f)(4)(ii)(A).

(B) *Basis for determination.* The determination under § 48.4101–1(f)(4)(ii) must be based on all information relevant to the applicant's financial status.

(f)(4)(iii) through (h)(3)(iii) [Reserved]. For further guidance, see § 48.4101–1(f)(4)(iii) through (h)(3)(iii).

* * * * *

(h)(3)(v) through (l)(4) [Reserved]. For further guidance, see § 48.4101–1(h)(3)(v) through (l)(4).

(l)(5) *Effective/applicability date.* Paragraph (f)(4)(ii)(B) of this section applies on July 6, 2011.

(l)(6) *Expiration date.* The applicability of paragraph (f)(4)(ii)(B) of this section expires on or before July 1, 2014.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: June 29, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–16856 Filed 7–1–11; 11:15 am]

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2205

Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Occupational Safety and Health Review Commission

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Review Commission (''OSHRC'') is revising part 2205, which it promulgated to implement section 504 of the Rehabilitation Act of 1973, as amended. These revisions account for statutory and regulatory changes, and incorporate procedures for filing complaints under section 508 of the Rehabilitation Act of 1973, as amended. OSHRC is also making various corrections and technical amendments to this part.

DATES: Effective July 6, 2011.

FOR FURTHER INFORMATION CONTACT: Ron Bailey, Attorney-Advisor, Office of the General Counsel, by telephone at (202) 606–5410, by e-mail at *rbailey@oshrc.gov,* or by mail at: 1120–20th Street, NW., Ninth Floor, Washington, DC 20036–3457.

SUPPLEMENTARY INFORMATION: OSHRC published a notice of proposed rulemaking on May 24, 2011, 76 FR 30064, which would revise 29 CFR part 2205. Interested persons were afforded an opportunity to participate in the rulemaking process through submission of written comments on the proposed rule. OSHRC received no public comments. We have reviewed the

proposed rule and now adopt it as the agency's final rule.

I. Background

Section 508 of the Rehabilitation Act requires Federal agencies that develop, procure, maintain, or use electronic and information technology to ''ensure, unless undue burden would be imposed on the department or agency,'' that this technology allows (1) Federal employees who are individuals with disabilities ''to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities,'' and (2) members of the public who are individuals with disabilities and are ''seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.'' 29 U.S.C. 794d(a)(1)(A). In the event that this requirement imposes an undue burden, Federal agencies must provide the relevant information and data using an ''alternative means.'' 29 U.S.C. 794(a)(1)(B). An administrative complaint filed for an alleged violation of section 508 of the Rehabilitation Act must be filed with the agency ''alleged to be in noncompliance,'' and must be processed by the agency using ''the complaint procedures established to implement'' section 504 of the Rehabilitation Act. 29 U.S.C. 794d(f)(2). Therefore, OSHRC is amending its procedures in part 2205, which effectuates section 504, to also incorporate the requirements set forth in section 508.

Exercising its statutory authority under section 508 of the Rehabilitation Act, 29 U.S.C. 794(a)(2), the Architectural and Transportation Barriers Compliance Board (''Access Board'') has issued standards for electronic and information technology, 36 CFR part 1194. These standards define electronic and information technology for purposes of section 508 and provide the technical and functional performance criteria necessary to implement the accessibility requirements specified above. As detailed below, in amending part 2205, OSHRC relies on the definitions and requirements set forth in the Access Board's standards.

Turning to the specific amendments, OSHRC is adding a sentence to § 2205.101 (''Purpose'') indicating that part 2205 effectuates section 508 and summarizing the purpose of that section. OSHRC also is adding a clause to § 2205.102 (''Application'') indicating that part 2205 applies to the agency's ''development, procurement, maintenance, and use of electronic and information technology,'' and a new section at § 2205.135 (''Electronic and information technology requirements'') that thoroughly explains the agency's responsibilities under section 508. The additions are consistent with language used by the Access Board. 36 CFR 1194.1, .2. Additionally, in § 2205.103 (''Definitions''), OSHRC is (1) adding a definition describing the source material for section 508—a similar sentence already exists describing the source material for section 504; (2) adding the definitions of ''Electronic and Information technology'' and ''Information technology'' set forth by the Access Board, 39 CFR 1194.4; and (3) revising the definition of ''Complete complaint'' to indicate its coverage of violations alleged under section 508, as well as section 504. Further, OSHRC is adding language to § 2205.111 (''Notice'') to extend the notice requirements to section 508.

OSHRC also is revising the procedures in § 2205.170 (''Compliance procedures'') to provide more detailed instructions for filing and processing complaints and appeals alleging violations of section 504, and to incorporate instructions for those who allege violations of section 508. As noted, section 508 directs agencies to use the same procedures for processing section 508 complaints as they use for section 504 complaints. The EEOC, however, recently explained in its own notice of rulemaking that ''[t]he part 1614 process is reserved for complaints alleging employment discrimination,'' and that an allegation under section 508 of ''discrimination in access to electronic and information technology * * * is outside the scope of part 1614.'' Therefore, the revisions to § 2205.170(a) and (b) make clear that part 1614 is not applicable to section 508 complaints, but that OSHRC's procedures specifically set forth in its regulations are applicable to both section 504 and 508 complaints.

In addition to amendments resulting from section 508, OSHRC is making the following deletions, and corrections and amendments to part 2205. As to the deletions, several provisions include compliance deadlines that have already expired. Section 2205.110 requires that OSHRC complete, by August 24, 1987, a self-evaluation of policies and practices that do not or may not meet the requirements of the regulation. It further requires that a description of areas examined, problems identified, and modifications made be kept on file for at least three years. Also, paragraph (c) of § 2205.150 requires OSHRC to ''comply with the obligations established under [paragraphs (a) and (b)] by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible''; and paragraph (d) of that provision requires OSHRC to ''develop, by February 23, 1987, a transition plan setting forth the steps necessary to complete [structural changes to facilities]'' in the event that such changes are required. Because the latest of these given time frames has long passed, § 2205.110 and paragraphs (c) and (d) of § 2205.150 are deleted.

Also, the cross-references in several provisions are outdated. The fourth definition of ''qualified handicapped person,'' found at § 2205.103, cross-references 29 CFR 1613.702(f), and two other provisions—§§ 2205.140 and .170(b)—cross-reference 29 CFR part 1613. Part 1613, however, was superseded by part 1614 in 1992. Federal Sector Equal Employment Opportunity, 57 FR 12634 (Apr. 10, 1992) (final rule). The current version of § 1614.203(b) cross-references and adopts all definitions in part 1630, and the definition of ''qualified individual with a disability'' is at 29 CFR 1630.2(m). Therefore, the cross-reference in § 2202.103 is changed to 29 CFR 1630.2(m), and the cross-reference to part 1613 in §§ 2205.140 and .170(b) is changed to part 1614. Further, § 2205.151 cross-references 41 CFR 101–19.600 to 101–19.607, which previously set forth the standard for the Architectural Barriers Act, 42 U.S.C. 4151–4157. In 2002, the regulatory provisions pertaining to the standard were re-designated as 41 CFR 102–76.60 to 102–76.95. Real Property Policies, 67 FR 76882 (Dec. 13, 2002) (final rule). Section 2205.151 is therefore amended to reflect this re-designation.

Additionally, only the acronym for ''telecommunication devices for deaf persons'' is now used in § 2205.160, as both the phrase and acronym already appear in § 2205.103; the head of the agency is now referred to as the ''Chairman'' throughout the part, as this term is used in the OSH Act itself, 29 U.S.C. 661(a); and, in § 2205.103, additional legislative history is added to the definition of ''Section 504.'' Finally, the 1992 amendments to the Rehabilitation Act, Public Law 102–569, 106 Stat. 4344, which replaced the term ''handicap'' with the term ''disability,'' has resulted in the amendment of all such references in part 2205.

II. Statutory and Executive Order Reviews

Executive Orders 12866 and 13132, and the Unfunded Mandates Reform Act of 1995: OSHRC is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

Regulatory Flexibility Act: OSHRC certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that these rules will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to a Federal agency and individuals accessing the services of a Federal agency. For this reason, a regulatory flexibility analysis is not required.

Paperwork Reduction Act of 1995: OSHRC has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* does not apply because these rules do not contain any information collection requirements that require the approval of OMB.

Congressional Notification: These rules do not constitute a major rule under the Congressional Review Act, 5 U.S.C. 804(2).

List of Subjects in 29 CFR Part 2205

Administrative practice and procedure, Civil rights, Equal employment opportunity, Federal buildings and facilities, Individuals with disabilities, Access to electronic and information technology.

Signed at Washington, DC, on the 28th day of June 2011.

Thomasina V. Rogers,

Chairman.

For the reasons set forth in the preamble, Chapter XX, Part 2205 of Title 29, Code of Federal Regulations, is revised to read as follows:

PART 2205—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND IN ACCESSIBILITY OF COMMISSION ELECTRONIC AND INFORMATION TECHNOLOGY

Sec.

Authority: 29 U.S.C. 794; 29 U.S.C. 794d.

§ 2205.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service. This part also effectuates section 508 of the Rehabilitation Act of 1973, as amended, with respect to the accessibility of electronic and information technology developed, procured, maintained, or used by the agency.

§ 2205.102 Application.

This part applies to all programs or activities conducted by the agency and to its development, procurement, maintenance, and use of electronic and information technology.

§ 2205.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504 or section 508. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Electronic and Information technology includes information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term electronic and information technology includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation are not information technology.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with a disability means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of

the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an 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.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Information technology means any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. The term information technology includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

Qualified individual with a disability means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) *Qualified individual with a disability* is defined for purposes of employment in 29 CFR 1630.2(m), which is made applicable to this part by § 2205.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Section 508 means section 508 of the Rehabilitation Act of 1973, Pub. L. 93–112, Title V, section 508, as added by Pub. L. 99–506, Title VI, section 603(a), Oct. 21, 1986, 100 Stat. 1830, and amended Pub. L. 100–630, Title II, section 206(f), Nov. 7, 1988, 102 Stat. 3312; Pub. L. 102–569, Title V, section 509(a), Oct. 29, 1992, 106 Stat. 4430; Pub. L. 105–220, Title IV, section 408(b), Aug. 7, 1998, 112 Stat. 1203.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 2205.104–2205.110 [Reserved]

§ 2205.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the Chairman finds necessary to apprise such persons of the protections against discrimination assured them by section 504 or the access to technology provided under section 508 and this regulation.

§§ 2205.112–2205.129 [Reserved]

§ 2205.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with disabilities to discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of individuals without disabilities from the benefits of a program limited by Federal statute or Executive order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive order to a different class of individuals with disabilities is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

§§ 2205.131–2205.134 [Reserved]

§ 2205.135 Electronic and information technology requirements.

(a) In accordance with section 508 and the standards published by the Architectural and Transportation Barriers Compliance Board at 36 CFR part 1194, the agency shall ensure, absent an undue burden, that the electronic and information technology developed, procured, maintained, or used by the agency allows:

(1) Individuals with disabilities who are agency employees or applicants to have access to and use of information and data that is comparable to the access to and use of information and data by agency employees who are individuals without disabilities; and

(2) Individuals with disabilities who are members of the public seeking information or services from the agency to have access to and use of information and data that is comparable to the access to and use of information and data by such members of the public who are not individuals with disabilities.

(b) When development, procurement, maintenance, or use of electronic and information technology that meets the standards at 36 CFR part 1194 would impose an undue burden, the agency shall provide individuals with disabilities covered by this section with the information and data involved by an alternative means of access that allows the individuals to use the information and data.

§§ 2205.136–2205.139 [Reserved]

§ 2205.140 Employment.

No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1614, shall apply to employment in federally conducted programs or activities.

§§ 2205.141–2205.148 [Reserved]

§ 2205.149 Program accessibility: discrimination prohibited.

Except as otherwise provided in § 2205.150, no qualified individual with a disability shall, because the agency's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 2205.150 Program accessibility: existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph (a) does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with this paragraph (a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

(b) *Methods—(1) General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of paragraph (a) of this section in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical

alteration to an historic property is not required because of paragraph (a)(2) or (3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

§ 2205.151 Program accessibility: new construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 102–76.60 to 102–76.95, apply to buildings covered by this section.

§§ 2205.152–2205.159 [Reserved]

§ 2205.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with a disability.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

§§ 2205.161–2205.169 [Reserved]

§ 2205.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of disability in programs or activities conducted by the agency in violation of section 504. Paragraphs (c) through (j) of this section also apply to all complaints alleging a violation of the agency's responsibility to procure electronic and information technology under section 508, whether filed by members of the public or agency employees or applicants.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c)(1) Any person who believes that he or she has been subjected to discrimination prohibited by this part or that the agency's procurement of electronic and information technology has violated section 508, or an authorized representative of such person, may file a complaint with the Executive Director.

(2) The Executive Director shall be responsible for coordinating implementation of this section. Complaints shall be sent to Executive Director, Occupational Safety and Health Review Commission, One Lafayette Centre, 1120–20th Street NW., 9th Floor, Washington, DC 20036–3457. Complaints shall be filed with the Executive Director within 180 days of the alleged act of discrimination. A complaint shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the agency. The agency may extend this time period for good cause.

(d)(1) The agency shall accept a complete complaint that is filed in accordance with paragraph (c) of this section and over which it has jurisdiction. The Executive Director shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the agency receives a complaint that is not complete, the Executive Director shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Executive Director shall dismiss the complaint without prejudice and shall so inform the complainant.

(3) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(e) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by individuals with disabilities.

(f) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(g) Appeals of the findings of fact and conclusions of law or remedies must be

filed with the Chairman by the complainant within 90 days of receipt from the agency of the letter required by paragraph (f) of this section. The agency may extend this time for good cause. Appeals shall be sent to the Chairman, Occupational Safety and Health Review Commission, One Lafayette Centre, 1120–20th Street, NW., 9th Floor, Washington, DC 20036–3457. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the agency. It should be clearly marked ''Appeal of Section 504 decision'' or ''Appeal of Section 508 decision'' and should contain specific objections explaining why the complainant believes the initial decision was factually or legally wrong. Attached to the appeal letter should be a copy of the initial decision being appealed.

(h) Timely appeals shall be accepted and decided by the Chairman. The Chairman shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Chairman determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(i) The time limits cited in paragraphs (f) and (h) of this section may be extended with the permission of the Assistant Attorney General.

(j) The agency may delegate its authority for conducting complaint investigations to other Federal agencies or may contract with non-Federal entities to conduct such investigations, except that the authority for making the final determination may not be delegated.

§§ 2205.171–2205.999 [Reserved]

[FR Doc. 2011–16808 Filed 7–5–11; 8:45 am]

BILLING CODE 7600–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0614]

Regattas and Marine Parades; Great Lakes Annual Marine Events

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a local regulation for the APBA Gold Cup, Detroit, MI annual high speed boat race in the Captain of the Port Detroit zone from 7 a.m. on July 7, 2011 through 7 p.m. on July 10, 2011. This action is necessary and intended to ensure safety of life on the navigable waters immediately prior to, during, and immediately after regattas or marine parades. This rule will establish restrictions upon, and control movement of, vessels in specified areas immediately prior to, during, and immediately after regattas or marine parades. During the enforcement periods, no person or vessel may enter the regulated areas without permission of the Captain of the Port.

DATES: The regulations in 33 CFR 100.918 will be enforced on July 7, 2011 through July 10, 2011 from 7 a.m. to 7 p.m. daily.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail LT Katie Stanko, Prevention Department, Sector Detroit, Coast Guard; telephone (313)568–9508, e-mail *Katie.R.Stanko@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the following special local regulations at the following times:

§ 100.918 Detroit APBA Gold Cup, Detroit, MI

This special local regulation will be enforced daily from 7 a.m. to 7 p.m. on July 7, 8, 9 and 10, 2011.

Regulations: (1) In accordance with the general regulations in 33 CFR 100.901, entry into, transiting, or anchoring within this regulated areas is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This regulated area is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The ''designated on-scene representative'' of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The designated on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the regulated area shall contact the Captain of the Port Detroit or his designated on-scene representative to obtain permission.

(5) Vessel operators given permission to enter or operate in the regulated area must comply with all directions given to them by the Captain of the Port or his designated on-scene representative.

Dated: June 27, 2011.

J. E. Ogden,

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

[FR Doc. 2011–16924 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0614]

RIN 1625–AA08

Special Local Regulation; Detroit APBA Gold Cup, Detroit River, Detroit, MI

AGENCY: Coast Guard, DHS.

ACTION: Interim rule with request for comments.

SUMMARY: The Coast Guard proposes to amend the enforcement period of the permanent Special Local Regulation established in 33 CFR 100.918. This action is necessary and intended to ensure safety of life on the navigable waters immediately prior to, during, and immediately after the Detroit APBA Gold Cup boat race. This special local regulation will establish restrictions upon, and control movement of vessels in a portion of the Detroit River. During the enforcement period, no person or vessel may enter the regulated areas without permission of the Captain of the Port.

DATES: This interim rule is effective July 6, 2011. Comments and related material must reach the Coast Guard on or before August 5, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0614 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 interim rule, call or e-mail LT Katie Stanko, Prevention Department, Sector Detroit, Coast Guard; telephone (313) 568–9508, e-mail *Katie.R.Stanko@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0614), 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 (via *http://www.regulations.gov*) or by fax, mail or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand delivery, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2011–0614'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change this rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0614'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Regulatory Information

The Coast Guard is issuing this interim rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because waiting for a notice and comment period to be completed would be impracticable and contrary to the public interest as it would inhibit the Coast Guard's ability to protect the public from the hazards associated with a high speed boat race. In addition, rescheduling the race for the purpose of accommodating a comment period would mean that the race could not happen this summer. Not having this annual summer spectator event is contrary to the public interest of the people of Detroit. Furthermore, delaying this event to accommodate a comment period is unnecessary because of the non-controversial history of the regulation: When the Final Rule for this event was published in 2008 (Docket number USCG–2008–0220), no comments were received at all.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to public interest because it would inhibit the Coast Guard from ensuring the safety of vessels and the public during a high speed boat race. In addition, rescheduling the race for the purpose of delaying the effective date would mean that the race could not happen this summer. Not having this annual summer spectator event is contrary to the public interest of the people of Detroit. Furthermore, delaying the effective date of this this Special Local Regulation is unnecessary because of the non-controversial history of the regulation: When the Final Rule for this event was published in 2008 (Docket number USCG–2008–0220), no comments were received at all.

Basis and Purpose

This interim rule will amend the entry found in 33 CFR 100.918, Detroit APBA Gold Cup, Detroit, MI. Currently, the regulations located at 33 CFR 100.918 state that the respective enforcement period will occur each year in the first or second week of June. However, the annual occurrence of this marine event has been pushed back from June to July.

Discussion of Rule

Because of the aforementioned rescheduling of the annual Detroit APBA Gold Cup, the Captain of the Port Detroit finds it necessary to amend the respective enforcement period. Accordingly, this interim rule will amend the special local regulation found in 33 CFR 100.918 so that the new enforcement period will take place during the first or second week of July.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. The Coast Guard's use of this special local regulation will be periodic in nature, of short duration, and designed to minimize the impact on navigable waters. The Coast Guard expects insignificant adverse impact to mariners from the amendment of the enforcement period of this special local regulation.

Small Entities

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

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

This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in this portion of the Detroit River, Detroit, MI during an enforcement period in the first or second week in July each year.

The new enforcement period for this special local regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: The enforcement period will be short in duration and will only occur once per year; the special local regulation has been designed to allow traffic to pass safely around its bounds whenever possible; and vessels will be allowed to pass through the regulated area with the permission of the Captain of the Port Detroit.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves a special local regulation issued in conjunction with a regatta or marine parade, therefore (34)(h) of the Instruction applies. An environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Amend § 100.918 to revise paragraph (c) to read as follows:

§ 100.918 Detroit APBA Gold Cup, Detroit, MI.

* * * * *

(c) Enforcement Period. The first or second week in July. The exact dates and times for this event will be determined annually.

Dated: June 27, 2011.

J. E. Ogden,

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

[FR Doc. 2011–16914 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket No. USCG–2011–0550]

RIN 1625–AA08; 1625–AA00

Special Local Regulations & Safety Zones; Marine Events in Captain of the Port Long Island Sound Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing fourteen temporary special local regulations and safety zones for marine events and fireworks displays within the Captain of the Port (COTP) Long Island Sound Zone. This action is necessary to provide for the safety of life on navigable waters during the events. Entry into, transit through, mooring or anchoring within these zones is prohibited unless authorized by the COTP Sector Long Island Sound.

DATES: This rule is effective in the CFR on July 6, 2011 through 6 p.m. on October 2, 2011. This rule is effective with actual notice for purposes of enforcement beginning at 8:30 p.m. on June 25, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0550 and are available online by going to *http://www.regulations.gov*, inserting USCG–2011–0550 in the ''Keyword'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Petty Officer Joseph Graun, Prevention Department, Coast Guard Sector Long Island Sound, (203) 468–4544, *joseph.l.graun@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing an NPRM would be contrary to public interest since immediate action is needed to protect both spectators and participants from the safety hazards created by these events including powerboats traveling at high speeds, unexpected pyrotechnics detonation and burning debris. We spoke with each event sponsor and each indicated they were unable and unwilling to move their event date to a later time for the following reasons.

The sponsor for Salute to Veterans fireworks display (the Town of Hempstead) stated they are unwilling to reschedule their event to a later date because the town expended funds on advertising the current event date. Changing the date would require the town to spend more of their limited funds on advertising. The town was not aware of the requirements for submitting a recurring marine event application 60 days in advance resulting in a late notification to the Coast Guard. The town is now aware of this reporting requirement.

The sponsors for the town of Islip and Port Jefferson fireworks displays stated they are unwilling to reschedule their events because they are held in conjunction with the Fourth of July holiday and holiday festivities. Since announced, community members have made holiday plans based on these fireworks displays. Rescheduling these events would not be a viable option because most event venues, entertainers and venders have fully booked summer schedules making rescheduling nearly impossible. This year's fireworks displays were originally canceled due to lack of funding; however, funding became available late in May allowing the fireworks displays to take place.

This unique funding situation which was unpredictable caused the late notification to the Coast Guard. The sponsors are aware of the requirements for submitting a recurring marine event application 60 days in advance.

The Sponsor for Battle on the Bay Powerboat Race is unwilling to reschedule the event because the powerboats that will be racing in the event are part of a traveling circuit with a schedule established more than a year ahead of time, the earliest opportunity to reschedule the event is 2012. In spring the event's host town for the past several years unexpectedly decided not to host this year's event. The event sponsor was surprised and rushed to find a new host town. After a month of meetings with towns and filing permits the sponsors made an agreement with a new town. When that agreement was reached the Coast Guard was provided less than 90 days notice an insufficient amount of time to publish an NPRM for a new event. This unique host town situation which was unpredictable caused the late notification to the Coast Guard. The sponsor is aware of the requirements for submitting a new marine event application 135 days in advance.

The sponsors for Xirinachs Family Foundation Fireworks; Icim's 40th Birthday Party Fireworks and Berman Wedding Fireworks are unwilling to move their events to a later date because they are held in conjunction with other events that cannot be moved. The sponsors were not aware of the requirements for submitting a marine event application 135 days in advance resulting in a late notification to the Coast Guard. The sponsors are now aware of the reporting requirements.

The sponsors for Riverfront US title Series Powerboat Race; Head of the Riverfront Regatta; Fairfield Aerial Fireworks; Town of Babylon Fireworks; East Hampton Fire Department Fireworks; Village of Island Park Fireworks and Ports Washington Sons of Italy Fireworks all submitted marine event applications with sufficient notice to the Coast Guard. These fireworks displays and marine events are all recurring with a proposed permanent rule currently in a public comment period under docket number USCG–2008–0384, titled: Special Local Regulations; Safety and Security Zones; Recurring Events in Captain of the Port Long Island Sound Zone. The Coast Guard is establishing these temporary special local regulations and safety zones to provide for safety of life during this year's events. Additionally, the Coast Guard has ordered special local regulations or safety zones for all of these areas during past events and has received no public comments or concerns regarding the impact to waterway traffic from those events. For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date by first publishing a NPRM would be contrary to the rule's objectives of ensuring safety of life on the navigable waters during these scheduled events as immediate action is needed to protect both spectators and participants from the safety hazards created by these events including powerboats traveling at high speeds, unexpected pyrotechnics detonation and burning debris.

Basis and Purpose

The legal basis for this rule is 33 U.S.C. 1225, 1226, 1231, 1233; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define regulatory special local regulations and safety zones. This regulation carries out two related actions: (1) Establishing special local regulations, and (2) establishing safety zones. Marine events are frequently held on the navigable waters within the COTP Long Island Sound Zone. Based on accidents that have occurred in the past and the explosive hazards of fireworks, the COTP Long Island has determined that regattas and fireworks launches proximate to watercrafts pose significant risk to public safety and property.

To protect the safety of all waterway users including event participants and spectators, this rule establishes temporary special local regulations or safety zones for the time and location of each marine event.

This rule prevents vessels from entering, transiting, mooring or anchoring within areas specifically designated as regulated areas during the periods of enforcement unless authorized by the COTP, or designated representative.

Discussion of Rule

This temporary rule establishes special local regulations for all navigable waters around each powerboat race and regatta and safety zones for all navigable waters within a 1000 foot zone around each fireworks display.

These events are listed below in the text of the regulation.

Because large numbers of spectator vessels are expected to congregate around the location of these events, these regulated areas are needed to protect both spectators and participants from the safety hazards created by them including powerboats traveling at high speeds, unexpected pyrotechnics detonation, and burning debris. During the enforcement periods, persons and vessels are prohibited from entering, transiting through, remaining, anchoring or mooring within the regulated areas unless stipulated otherwise or specifically authorized by the COTP or the designated representative. The Coast Guard may be assisted by other Federal, state and local agencies in the enforcement of these regulated areas.

The Coast Guard determined that these regulated areas will not have a significant impact on vessel traffic due to their temporary nature, limited size, and the fact that vessels are allowed to transit the navigable waters outside of the regulated areas.

The Coast Guard has published an NPRM proposing permanent regulated areas for each of these events. The NPRM can be viewed and comments can be submitted by following the procedure under **ADDRESSES** and typing in docket number USCG–2008–0384. Thus far we have received no comments or requests for a public meeting on the NPRM. Additionally, the Coast Guard has ordered special local regulations or safety zones for all of these areas during past events and has received no public comments or concerns regarding the impact to waterway traffic from those events.

Advanced public notifications will also be made to the local maritime community by the Local Notice to Mariners as well as Broadcast Notice to Mariners.

Regulatory Analyses

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

Executive Order 12866 and Executive Order 13563

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

The Coast Guard determined that these regulated areas will not have a significant impact on vessel traffic due to their temporary nature, limited size, and the fact that vessels are allowed to transit the navigable waters outside of the regulated areas. Additionally, The Coast Guard has ordered special local regulations or safety zones for all fourteen areas during past events and has received no public comments or concerns regarding impact to waterway traffic from events.

Advanced public notifications will also be made to the local maritime community by the Local Notice to Mariners as well as Broadcast Notice to Mariners.

Regulatory Analyses

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

Executive Order 12866 and Executive Order 13563

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

The Coast Guard determined that this rule is not a significant regulatory action for the following reasons: the regulated areas will be of limited duration, they cover only a small portion of the navigable waterways, and the events are designed to avoid, to the extent possible, deep draft, fishing, and recreational boating traffic routes.

The Coast Guard has previously promulgated safety zones or special local regulations, in accordance with 33 CFR Parts 165 and 100, for all event areas contained within this proposed regulation and has not received notice of any negative impact caused by any of the safety zones or special local regulations.

No new or additional restrictions will be imposed on vessel traffic.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the designated regulated area during the enforcement periods stated for each event list below in the regulatory text.

The temporary special local regulations and safety zones will not have a significant economic impact on a substantial number of small entities for the following reasons: the regulated areas will be of limited size and of short duration, and vessels that can safely do so may navigate in all other portions of the waterways except for the areas designated as regulated areas. Additionally, before the effective period, notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because

it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

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

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

List of Subjects

33 CFR Part 100

Marine safety, Navigation (water), Reporting and recording requirements, Waterways.

33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add Sec. 100.T01–0550 to read as follows:

§ 100.T01–0550 Special Local Regulations; Regattas and Boat Races in the Coast Guard Sector Long Island Sound Captain of the Port Zone.

(a) *Regulations.*

The following regulations apply to the marine events listed in the Table to § 100.T01–0550. These regulations will be enforced for the duration of each event, on or about the dates indicated.

These regulations will be enforced for the duration of each event. Notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners in advance of the events. First Coast Guard District Local Notice to Mariners can be found at *http://www.navcen.uscg.gov/.*

(b) *Definitions.* The following definitions apply to this section:

(1) Designated Representative. A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port, Sector Long Island Sound (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) Official Patrol Vessels. Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) Spectators. All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the designated representative via VHF channel 16 or by telephone at (203) 468–4404 to obtain permission to do so.

(d) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or designated representative.

(e) The COTP or designated representative may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The COTP or designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(g) For all events listed, vessels not participating in this event, swimmers, and personal watercraft of any nature are prohibited from entering or moving within the regulated area unless stipulated otherwise or authorized by the COTP or a designated representative. Vessels within the regulated area must be at anchor within a designated spectator area or moored to a waterfront facility in a way that will not interfere with the progress of the event.

TABLE TO § 100.T01–0550

1. Battle on the Bay Powerboat Race	• Event type: Boat race. • Date & time: August 27 and 28, 2011 7 a.m. until 7 p.m. • Locations: All waters of the Great South Bay, Islip, NY within the following zones:

TABLE TO § 100.T01–0550—Continued

	(1) The Race Course Zone forms a quadrilateral shape The eastern boundary begins at the tip of the Brown Creek western jetty approximate position 40°43′18″ N, 073°04′10″ W continues south to 40°42′38″ N, 073°04′05″ W, The southern boundary begins at 40°42′38″ N, 073°04′05″ W continues west to 40°42′07″ N, 073°07′50″ W, the western boundary begins at 40°42′07″ N, 073°07′50″ W continues north to 40°43′12″ N, 073°06′38″ W the northern boundary begins at 40°43′12″ N, 073°06′38″ W continues east to land at 40°43′12″ N, 073°06′38″ W and continues along the shore to tip of the Brown Creek western jetty 40°43′18″ N, 073°04′10″ W (NAD 83). (2) Spectator anchorage zone, all waters within 100 yards of the Race Course Zones southern boundary. (3) Transit Only zone, all waters within 100 yards of the Race Course Zones eastern, western and northern boundaries. • Additional stipulations: (1) Vessel within the spectator anchorage zone must operate at a no wake speed not to exceed 5 knots and must proceed as directly as possible to and from an anchorage location. (2) Vessels within the transit only zone must maintain a steady course and speed anchoring, stopping, mooring and other activities are prohibited within this zone.
2. Riverfront U.S. Title series Powerboat Race, Hartford, CT	• Event type: Boat race. Date & time: September 2 and 3, 2011, 10 a.m. until 6 p.m. and September 4, 2011, 12:01 p.m. until 6 p.m. • Location: All water of the Connecticut River, Hartford, CT, between the Founders Bridge on the North approximate position 41° 45′53.47″ N, 072° 39′55.77″ W and 41° 45′37.39″ N, 072° 39′47.49″ W (NAD 83) to the South.
3. Head of the Riverfront Regatta	• Event Type: Rowing regatta. • Date & time: October 2, 2011 6 a.m. until 6 p.m. • Location: All water of the Connecticut River, Hartford, CT, between the Putnum Bridge 41°42.87′ N 072°38.43′ W and the Riverside Boat House 41°46.42′ N 072°39.83′ W (NAD 83).

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 3. The authority citation for Part 165 continues to read as follows:

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

■ 4. Add § 165.T01–0550 to read as follows:

§ 165.T01–0550 Safety Zones; Fireworks Displays in Captain of the Port Long Island Sound Zone

(a) *Regulations.*

The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the fireworks displays listed in Table 1 of T01–0550.

These regulations will be enforced for the duration of each event. Notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners in advance of the events. First Coast Guard District Local Notice to Mariners can be found at *http://www.navcen.uscg.gov/*.

(b) *Definitions.* The following definitions apply to this section:

(1) Designated Representative. A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port, Sector Long Island Sound (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) Official Patrol Vessels. Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) Spectators. All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(c) Vessel operators desiring to enter or operate within the regulated areas should contact the COTP or the designated representative via VHF channel 16 or by telephone at (203) 468–4404 to obtain permission to do so.

(d) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or designated representative.

(e) The COTP or the designated representative may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The COTP or designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(g) The regulated area for all fireworks displays listed in Table 1 of T01–0550 is that area of navigable waters within a 1000 foot radius of the launch platform or launch site for each fireworks display.

(h) Fireworks barges used in these locations will also have a sign on their port and starboard side labeled ''FIREWORKS—STAY AWAY.'' This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white

background. Shore sites used in these locations will display a sign labeled ''FIREWORKS—STAY AWAY'' with the same dimensions.

TABLE 1 OF T01–0550

6	June
6.1 Salute to Veterans	• Date: June 25, 2011. • Rain date: June 26, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Hempstead, NY in approximate position 40°35′36.62″ N, 073°35′20.72″ W (NAD 83).
7	July
7.1 Town of Islip Fireworks	• Date: July 4, 2011. • Rain date: July 5, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Great South Bay off Bay Shore Manor Park, Islip, NY in approximate position 40°42′24″ N, 073°14′24″ W (NAD 83).
7.2 Village of Port Jefferson Fireworks	• Date: July 4, 2011. • Rain date: July 5, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Long Island Sound, Port Jefferson Harbor off East Beach, Village of Port Jefferson, NY in approximate position 40°57′53.189″ N, 073°3′9.72″ W (NAD 83).
7.3 Fairfield Aerial Fireworks	• Date: July 4, 2011. • Rain date: July 5, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of long Island Sound off Jennings Beach, Fairfield, CT in approximate position 41°08′17.232″ N, 073°14′1.028″ W (NAD 83).
7.4 Xirinachs Family Foundation Fireworks	• Date: July 10, 2011. • Rain date: July 11, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Water of Long Island Sound, Huntington Bay, Huntington, NY approximate position 40°54′23.27″ N, 073°25′08.04″ W (NAD 83).
7.5 Icim's 40th Birthday Party Fireworks	• Date: July 16, 2011. • Rain date: July 17, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Shelter Island Sound, off Lomangino Dock, Southold, NY approximate position 41°02′22.53″ N, 072°23′20.11″ W (NAD 83).
7.6 Berman Wedding Fireworks	• Date: July 16, 2011. • Rain date: July 17, 2011 • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Bellport Bay, Bellport, NY approximate position 40°44′59.73″ N, 072°55′58.67″ W (NAD 83).
8	August
8.1 Town of Babylon Fireworks	• Date: August 27, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off of Cedar Beach Town Park, Babylon, NY in approximate position 40°37′53″ N, 073°20′12″ W (NAD 83).
9	September
9.1 East Hampton Fire Department Fireworks	• Date: September 03, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off Main Beach, East Hampton, NY in approximate position 40°56′40.28″ N, 072°11′21.26″ W (NAD 83).
9.2 Port Washington Sons of Italy Fireworks	• Date: September 9, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Hempstead Harbor off Bar Beach, North Hempstead, NY in approximate position 40°49′48.04″ N, 073°39′24.32″ W (NAD 83).

TABLE 1 OF T01–0550—Continued

9.3 Village of Island Park Labor Day Celebration Fireworks	• Date: September 03, 2011. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off Village of Island Park Fishing Pier, Village Beach, NY in approximate position 40°36′30.95″ N, 073°39′22.23″ W (NAD 83).

Dated: June 24, 2011.

H.L. Najarian,

Commander, U.S. Coast Guard, Acting Captain of the Port Sector Long Island Sound.

[FR Doc. 2011–16892 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0561]

Drawbridge Operation Regulation; Christina River, Wilmington, DE

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District has issued a temporary deviation from the regulations governing the operation of the Walnut Street Bridge, across the Christina River, at mile 2.8, in Wilmington, DE. The deviation restricts the operation of the draw span in order to facilitate the inspection of the operational equipment.

DATES: This deviation is effective from 8 a.m. June 23, 2011 until 5 p.m. July 22, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0561 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0561, in the ''Keyword'' box and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Terrance Knowles, Environmental Protection Specialist, Fifth Coast Guard District, at telephone 757–398–6587, e-mail *Terrance.A.Knowles@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Delaware Department of Transportation (DELDOT), who owns and operates this bascule type drawbridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.237(c) to facilitate the inspection of the operational equipment within the structure.

The Walnut Street Bridge, at mile 2.8, across the Christina River in Wilmington, DE has a vertical clearance in the closed position to vessels of 13 feet above mean high water.

Under the regular operating schedule the bridge opens on signal as required by 117.237(c).

Under this temporary deviation, the Walnut Street Bridge will be closed to vessels and will require two hours advance notice to open each day from 8 a.m. to 5 p.m., on June 23, 2011 until July 1, 2011, and on July 18, 2011 until July 22, 2011. At all other times, the Walnut Street Bridge will open on signal.

Vessels that can pass under the closed span without an opening may do so at all times. There are no alternate routes for vessels transiting this section of the Christina River.

There are three vessels that travel through the bridge several times per week whose vertical clearance surpasses the closed bridge position, requiring an opening of the draw span. DELDOT has coordinated this replacement work with these three waterway users and the Coast Guard will inform the other users of the waterway through our Local and Broadcast Notices to Mariners of the closure periods for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation. The bridge may be delayed when opening for an emergency during the proposed equipment inspections.

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

Dated: June 23, 2011.

By direction of the Commander.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2011–16909 Filed 7–5–11; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0566]

Drawbridge Operation Regulation; Cape Fear River, and Northeast Cape Fear River, in Wilmington, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Cape Fear River Memorial Bridge across the Cape Fear River, mile 26.8, and the Isabel S. Holmes Bridge across Northeast Cape Fear River, at mile 1.0, both in Wilmington, NC. The deviation restricts the operation of the draw spans to accommodate the 29th Annual Wilmington Family YMCA Tri-Span race.

DATES: This deviation is effective from 7 a.m. to 9 a.m. on July 9, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of the docket USCG–2011–0566 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0566 in the ''Keywords'' box, and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Mr. Waverly W. Gregory, Jr., Bridge Program Manager, Fifth Coast Guard District; telephone 757–398–

6222, e-mail *Waverly.W.Gregory@uscg.mil.* If you have questions on viewing the docket, call Renne V. Wright, Program Manager, Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION: The Wilmington Family YMCA, on behalf of the North Carolina Department of Transportation, who owns and operates the Cape Fear River Memorial Bridge across the Cape Fear River, mile 26.8, and the Isabel S. Holmes Bridge across Northeast Cape Fear River, at mile 1.0, both in Wilmington, NC, requested a temporary deviation from the current operating schedules to accommodate the 29th Annual Wilmington Family YMCA Tri-Span race scheduled for July 9, 2011.

The Cape Fear Memorial Bridge is a vertical-lift drawbridge with a vertical clearance of 65 feet above mean high water in the closed position to vessels and the Isabel S. Holmes Bridge is a double-leaf bascule drawbridge with a vertical clearance of 40 feet above mean high water in the closed position to vessels.

Under the regular operating schedules during the requested period for the Cape Fear Memorial Bridge and the Isabel S. Holmes Bridge, the draws need not open for the passage of vessels from 8 a.m. to 10 a.m. on the second Saturday of July of every year set out at 33 CFR 117.823 and at 33 CFR 117.829(a)(4), respectively.

Due to the extreme high temperatures expected for Saturday July 9, 2011 (the second Saturday of July 2011), the Wellness Director for the Wilmington Family YMCA requested to change the closure times to vessels for the aforementioned drawbridges from 8 a.m. to 10 a.m. to 7 a.m. to 9 a.m.

Under this temporary deviation, the drawbridges will be closed to vessels from 7 a.m. to 9 a.m. on Saturday July 9, 2011.

Typical vessel traffic on the Cape Fear River and Northeast Cape Fear River includes a variety of vessels from freighters, tug and barge traffic, and recreational vessels. Vessels that can pass under the bridges without a bridge opening may continue to do so at anytime.

The Coast Guard has carefully coordinated the restrictions with commercial and recreational waterway users. The Coast Guard will use Local and Broadcast Notice to Mariners to inform all users of the waterways of the closure periods for the bridges so that vessels can arrange their transits to minimize any impacts caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the draw must return to its regular operating schedule immediately at the end of the designated time period.

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: June 23, 2011.

By direction of the Commander.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2011–16915 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 111

Shortpaid and Unpaid Information-Based Indicia (IBI) Postage and Shortpaid Express Mail Postage

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service will revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 604.4, 604.8, and 604.10, to implement revenue protection procedures for mailpieces entered with shortpaid and unpaid Information Based Indicia (IBI) postage payment and to implement revenue protection procedures for shortpaid Express Mail® postage.

DATES: Effective September 6, 2011.

FOR FURTHER INFORMATION CONTACT: Carla Sherry at 703–280–7068, or Carol A. Lunkins at 202–268–7262.

SUPPLEMENTARY INFORMATION: On February 22, 2011, the Postal Service published the **Federal Register** proposed rule, *Shortpaid and Unpaid Information-Based Indicia (IBI) Postage and Shortpaid Express Mail Postage, Revised Proposal* (76 FR 9702–9705). The Postal Service received four comments and gave them each consideration and will adopt the proposed rule with minor revisions.

Comments

One commenter raised concerns about the ability of customers who pay postage with IBI postage meters to use an existing account and/or payment method in lieu of a credit card to pay revenue deficiencies. At the present time, the Postal Service will not permit customers to use existing accounts and/or payment methods in lieu of credit cards to pay revenue deficiencies, but this may be a future consideration.

One commenter expressed concern regarding the Postal Service's proposal to use an electronic notification process to recover revenue deficiencies from customers using IBI postage meters. Only customers who pay postage with postage evidencing systems with e-mail addresses either on file with the Postal Service or with whom the Postal Service has an agreement and a process in place to obtain e-mail addresses will receive an electronic notification. If a customer's e-mail address is not available, the Postal Service will use other existing processes to recover revenue deficiencies.

One commenter asked for clarification of ''other non-electronic processes'' that will be used to identify shortpaid and unpaid postage. In the event that the new electronic processes are unavailable, the Postal Service will use existing methods to collect unpaid and shortpaid IBI postage. The Postal Service is making a minor change in the language to state, ''In the event that electronic processes are unavailable, other existing processes may be used to recover revenue deficiency as required.''

One commenter asked for clarification regarding the procedures for remedying postage deficiencies generated from Click-N-Ship. The Postal Service is making a minor change to further clarify that the new automated procedures for detecting and recovering postage deficiencies apply to shortpaid and unpaid postage generated from Click-N-Ship. However, this does not preclude the use of existing processes to identify or recover postage deficiencies. For items with shortpaid IBI postage that is generated from Click-N-Ship, the Postal Service will continue to allow mailers to remit payments for such postage deficiencies via Click-N-Ship and follow the existing postage deficiency process.

With this final rule, the Postal Service implements new procedures to manage shortpaid Express Mail postage and a new process to detect mailpieces with shortpaid and unpaid IBI postage generated from the following postage evidencing systems: Click-N-Ship®, IBI postage meters, and PC Postage® products.

The Postal Service also implements a new USPS Web-based resolution process to remedy shortpaid and unpaid IBI postage payment deficiencies; a process to dispute shortpaid and unpaid IBI postage deficiency assessments; and a process to appeal USPS decisions relative to shortpaid and unpaid IBI postage. During this process, customers will be notified electronically of the postage deficiency and be provided a link to a specific USPS Web-based customer payment portal to resolve the shortage. In addition to this new process, the Postal Service will continue to use the existing postage deficiency payment process for shortpaid and

unpaid postage generated by Click-N-Ship.

Express Mail Shortpaid Procedure

For an Express Mail Next Day, Second Day, Military, or Custom Designed Service item received at the origin office of mailing with insufficient postage, the mailer is contacted to correct the postage deficiency prior to dispatch of the Express Mail item. If the mailer cannot be contacted before dispatch from the origin office, or if the Express Mail item with insufficient postage is identified during processing operations or at the destination Post Office, the Express Mail item is endorsed ''Postage Due'', marked to show the total deficiency of postage and fees, and then dispatched to the destination Post Office for delivery to the addressee upon payment of the deficiency.

If the addressee refuses to pay the postage due amount, the Express Mail item is endorsed ''Return to Sender—Refused.'' The postage deficiency is then collected when the Express Mail item is returned to the original sender. If the original sender chooses to remail the item, a new Express Mail label and new postage and fees must be affixed.

Postage Evidencing Systems

Postage meters, PC Postage products, and Click-N-Ship are collectively identified as ''postage evidencing systems.'' A postage evidencing system is a device or system of components a customer uses to print evidence that postage required for mailing has been paid.

Information-Based Indicia

Information-Based Indicia (IBI) are digitally generated indicia that include a two-dimensional barcode.

Revenue Deficiency

Revenue deficiency includes both shortpaid and unpaid postage which occurs when any mailpiece has less postage than required for the applicable price category and associated class, weight, shape, zone, and extra services.

Shortpaid postage is revenue deficiency for which the valid postage on a mailpiece is less than the amount due.

Unpaid postage is a revenue deficiency for which postage is deficient due to the lack of affixed postage or the use of counterfeited, replicated, duplicated, falsified, or otherwise modified postage.

Detection Process for Revenue Deficiency

When potential shortpaid or unpaid IBI postage is detected on a mailpiece, the Postal Service will subsequently verify the postage to ensure its validity and determine whether the amount is sufficient. When the IBI postage on a mailpiece is confirmed to be shortpaid or unpaid, the corrective measures outlined below will be taken to recover the applicable revenue deficiency.

Electronic Notification of Revenue Deficiencies

In most cases, the Postal Service will electronically notify both the mailer and the postage evidencing system service provider of the revenue deficiency and deliver the mailpiece to the addressee. The electronic notification provides a link to the USPS® Web-based customer payment portal that will enable the mailer to pay or dispute the revenue deficiency. In the event that electronic means are unavailable, other existing processes may be used to recover revenue deficiencies as required.

Resolution Process

Where applicable, the Postal Service will provide a resolution process that will be accessible through the USPS Web-based customer payment portal to enable mailers to pay, dispute or appeal revenue deficiencies for IBI postage generated from postage evidencing systems. These processes are outlined below.

Payment Process

The mailer has 14 days from the date that the Postal Service sends the revenue deficiency electronic notification to pay the deficiency. The payment process is as follows:

- During the 14-day resolution period, the mailer must remit the payment for the revenue deficiency by accessing the USPS Web-based customer payment portal or through an otherwise authorized Postal Service payment method as indicated in the electronic notification.
- After 14 days, if a mailer has not paid or taken action to dispute a revenue deficiency, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account.
- When an electronic notification sent to a mailer is undeliverable, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account prior to the end of the 14-day period.
- When a mailer's cumulative revenue deficiency continues to increase during the 14-day period, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account prior to the end of the 14-day period.
- If the mailer feels the revenue deficiency is in error, the mailer may dispute the revenue deficiency during this 14-day period.

Dispute Process

The mailer has 14 days from the date the Postal Service sends the revenue deficiency electronic notification to dispute the deficiency. The Postal Service will also send an electronic notification of the approved (upheld) or denied dispute to the mailer. If the Postal Service upholds the mailer's dispute, then the mailer is required to take no further action. The dispute process is as follows:

- During this 14-day period, the mailer must take action to dispute the revenue deficiency by accessing the USPS Web-based customer payment portal or through an otherwise authorized Postal Service dispute method as indicated in the electronic notification.
- The mailer must provide information to substantiate that the postage affixed was valid and sufficient for the postage and service fees associated with the mailpiece.
- After 14 days, if a mailer has not taken action to pay or dispute a revenue deficiency, the Postal Service will notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account.
- When an electronic notification that is sent to a mailer is undeliverable, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account prior to the end of the 14-day period.
- When a mailer's cumulative revenue deficiency continues to increase during this 14-day period, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account prior to the end of the 14-day period.

Denied Disputes and the Appeal Process

When a dispute is denied, the mailer has 7 days from the date that the Postal Service sends the electronic notification of the denial to pay the revenue deficiency or to file an appeal. The mailer may pay the deficiency or appeal the decision by accessing the USPS Web-based customer payment portal or through an otherwise authorized Postal Service payment or appeal method as indicated in the electronic notification. The Postal Service will make a final

decision regarding the appeal request. If the Postal Service upholds the mailer's appeal, the Postal Service will notify the mailer of the decision, and the mailer is required to take no further action. The appeal process is as follows:

- The appeal process requires that the mailer provide additional evidence to substantiate that the postage affixed was valid and sufficient for the postage and service fees associated with the mailpiece.
- After 7 days, if a mailer has not taken action to pay or appeal the revenue deficiency denied in the dispute request, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account.
- When an electronic notification that is sent to a mailer is undeliverable, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account prior to the end of the 7-day period.
- When a mailer's cumulative revenue deficiency continues to increase during this 7-day period, the Postal Service may notify the mailer's postage evidencing system service provider to temporarily suspend the mailer's account prior to the end of the 7-day period.

Denied Appeals

When the Postal Service denies the appeal request, the mailer will be notified of the decision. The mailer must then pay the revenue deficiency, within 7 days from the date that of the electronic notification of appeal denial, by accessing the USPS Web-based customer payment portal or through an otherwise authorized Postal Service payment method as indicated in the electronic notification. The process for denied appeals is as follows:

- If a mailer has not taken action to pay the revenue deficiency within 7 days, the Postal Service notifies the mailer's postage evidencing system service provider to suspend the mailer's account.
- If the electronic notification to a mailer is undeliverable, the Postal Service may notify the mailer's postage evidencing system service provider to suspend the mailer's account prior to the end of the 7-day period.
- If a mailer's cumulative revenue deficiency continues to increase during this 7-day period, the Postal Service may notify the mailer's postage evidencing system service provider to suspend the mailer's account prior to the end of the 7-day period.

Denial of Use of Postage Evidencing Systems

When a mailer fails to meet the standards, submits false or incomplete information, or deposits shortpaid and unpaid mailpieces in the mailstream, the Postal Service may deny a mailer use of a postage evidencing system.

Any mailer who deposits mailpieces with shortpaid or unpaid IBI postage or fees may be subject to some or all of the following proposed actions:

- Collection of the shortpaid or unpaid postage.
- Revocation of the mailer's account privileges.
- Civil and criminal fines and penalties pursuant to existing Federal law.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), which is incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

604 Postage Payment Methods

* * * * *

4.0 Postage Meters and PC Postage Products (''Postage Evidencing Systems'')

4.1 Basic Information

* * * * *

4.1.2 Product Categories

* * * The primary characteristics of postage meters and PC Postage products are described below.

* * * * *

[Revise items 4.1.2b and c as follows:]

b. PC Postage products allow mailers to purchase and print postage with Information-Based Indicia (IBI) directly onto mailpieces, shipping labels, and USPS-approved customized labels.

c. Click-N-Ship and USPS-approved commercial providers offer PC Postage products for mailers through subscription service agreements.

* * * * *

4.2 Authorization To Use Postage Evidencing Systems

* * * * *

4.2.4 Denial of Use

[Revise 4.2.4 as follows:]

The mailer authorized to use a postage evidencing system may be denied use when the mailer:

a. Fails to comply with mailing standards.

b. Submits false or incomplete information.

c. Enters shortpaid or unpaid mailpieces into the mailstream.

[Renumber current item 4.2.5 as new 4.2.6 and add new item 4.2.5 as follows:]

4.2.5 Surrender of Postage Evidencing System

If authorization to use a Postage Evidencing System is denied, the mailer must surrender the systems, upon request, to the service provider, USPS, or USPS authorized agent.

4.2.6 Appeal Process

[Revise text of renumbered 4.2.6 as follows:]

Appeals regarding standards in this section or on the basis of noncompliance may be filed as follows:

a. IBI postage mailers must appeal under 4.4.8.

b. All other appeals must be in writing to the manager, Postage Technology Management (see 608.8.1 for address).

4.3 Postage Payment

4.3.1 Paying for Postage

[Revise the first sentence of 4.3.1 as follows:]

The value of the postage on each mailpiece must be equal to or greater than the amount due for the applicable price and any extra service fees, or another amount permitted by mailing standards. * * *

* * * * *

[Renumber current items 4.4 through 4.6 as new 4.5 through 4.7, and add new item 4.4 as follows:]

4.4 Shortpaid and Unpaid Information-Based Indicia (IBI)

4.4.1 Definitions

Mailpieces bearing shortpaid postage are those for which the total postage and

fees affixed are less than the postage required for the applicable price and any extra services fees. Mailpieces bearing unpaid IBI are those for which the mailer has not paid the postage or additional fees due to the lack of affixed postage, the use of counterfeited, replicated, duplicated, falsified, otherwise modified IBI, or IBI with zero value.

4.4.2 Detection Process for Revenue Deficiency

For mailpieces with shortpaid or unpaid postage found in the mailstream, manual and automated processes are used to detect and verify the revenue deficiencies.

4.4.3 Handling of Mailpieces With IBI Postage Revenue Deficiencies

For confirmed shortpaid or unpaid IBI postage, corrective measures may include:

a. Delivering the mailpiece to the addressee and collecting the revenue deficiency as postage due.

b. Collecting the revenue deficiency from the sender as described in 4.4.4 through 4.4.9.

c. Returning the mailpiece to the sender.

4.4.4 Electronic Notification of Revenue Deficiencies

Upon confirmation of a revenue deficiency with IBI postage, the Postal Service electronically notifies both the mailer and the postage evidencing system service provider of the revenue deficiency and delivers the mailpiece to the addressee. The notification provides a link to the Web-based customer payment portal that permits the mailer to pay or dispute the revenue deficiency.

4.4.5 Resolution Process

A resolution process is provided through the Web-based customer payment portal.

4.4.6 Payment Process

The mailer must make payment within 14 days from the date the Postal Service sends the electronic notification by accessing the Web-based customer payment portal or choose another method identified in the notification. Any mailer disputes regarding the revenue deficiency must be made during this 14-day period. The postage evidencing system service provider may be notified to temporarily suspend the mailer's account under the following conditions:

a. After 14 days, if a mailer has not paid or disputed a revenue deficiency.

b. When an electronic notification to a mailer is undeliverable.

c. When a mailer's cumulative revenue deficiency increases during the 14-day period due to additional mailpieces being identified as shortpaid or unpaid.

4.4.7 Dispute Process

Mailers wishing to dispute the deficiency payment must do so within 14 days by accessing the Web-based customer payment portal or other method identified in the electronic notification and substantiate that the postage affixed was valid and sufficient for the postage and applicable fees. An electronic notification is sent to the mailer of the decision to uphold or deny the dispute. If the Postal Service upholds the dispute, the mailer is not required to take further action.

4.4.8 Denied Disputes and the Appeal Process

If a dispute of a revenue deficiency is denied, the mailer has 7 days from the date of the electronic notification to file an appeal, by accessing the Web-based customer payment portal or choosing another method identified in the notification. The mailer must provide additional evidence to substantiate that the postage affixed was valid and sufficient for the postage and fees. If the appeal decision is upheld, the mailer takes no further action. The Postal Service may notify the postage evidencing system service provider to temporarily suspend the mailer's account under the following conditions:

a. After 7 days, if a mailer has not paid or appealed the revenue deficiency.

b. When an electronic notification to a mailer is undeliverable.

c. When a mailer's cumulative revenue deficiency increases during the 7-day period due to additional mailpieces being identified as shortpaid or unpaid.

4.4.9 Denied Appeals

If the appeal is denied, the mailer must pay the revenue deficiency within 7 days from the date of the electronic notification by accessing the Web-based customer payment portal or choosing another USPS-authorized method identified in the notification. The postage evidencing system service provider may be notified to suspend the mailer's account under the following conditions:

a. After 7 days, if a mailer has not paid the revenue deficiency.

b. When an electronic notification to a mailer is undeliverable.

c. When a mailer's cumulative revenue deficiency increases during the 7-day period due to additional mailpieces being identified as shortpaid or unpaid.

* * * * *

8.0 Insufficient or Omitted Postage

8.1 Insufficient Postage

8.1.1 Definition

[Revise the second and third sentences of 8.1.1, and add a new fourth sentence as follows:]

* * * Such individual pieces (or quantities fewer than 10) are delivered to the addressee on payment of the charges marked on the mail. For mailings of 10 or more pieces, the mailer is notified so that the postage charges may be paid before dispatch. For any mailpiece with insufficient postage generated by postage evidencing systems, the USPS may follow the process in 4.4.4 through 4.4.9.

* * * * *

[Renumber current item 8.1.7 as 8.1.8 and add new 8.1.7 as follows:]

8.1.7 Express Mail Corporate Accounts and Federal Agency Accounts

Express Mail Corporate accounts and Federal government accounts that use a ''Postage and Fees Paid'' indicia are debited for the correct amount of postage and fees at the time of mailing.

[Revise the heading and text of renumbered 8.1.8 as follows:]

8.1.8 Express Mail With Insufficient Postage—Acceptance

When Express Mail items are received at the office of mailing with insufficient postage, the Postal Service will contact the mailer to correct the postage deficiency prior to dispatch of the item. If the mailer cannot be contacted prior to dispatch, the deficiency is handled under 8.1.9.

[Add new items 8.1.9 through 8.1.11 as follows:]

8.1.9 Express Mail With Insufficient Postage—Processing Operations

For Express Mail items with insufficient postage that are identified during processing operations or at the destination Post Office, the Postal Service will:

a. Endorse the item ''Postage Due.''

b. Mark the item to show the total deficiency of postage and fees.

c. Deliver the item to the addressee upon payment of the postage due.

d. If payment is refused by addressee, endorse the item ''Return to Sender—Refused'' and return the item to the sender, upon collection of the postage deficiency.

8.1.10 Express Mail With Insufficient IBI Postage—Postage Evidencing Systems

For Express Mail items with insufficient IBI postage generated by postage evidencing systems, USPS may follow the process in 4.4.4 through 4.4.9.

8.1.11 Remailing Express Mail With Insufficient Postage

Express Mail items with insufficient postage are returned to the sender after collecting the postage deficiency when an effort to contact the sender before dispatch fails and when the addressee refuses to pay the postage due. If the item is remailed as Express Mail, the sender must affix a new Express Mail label with new postage and any applicable fees.

* * * * *

10.0 Revenue Deficiency

10.1 General

* * * * *

10.1.2 Appeal of Ruling

[Revise the first sentence of 10.1.2 as follows:]

Except as provided in 4.4.4 through 4.4.9, 10.2, and 703.1.0, a mailer may appeal a revenue deficiency assessment by sending a written appeal to the postmaster or manager in 10.1.2a through 10.1.2c within 30 days of receipt of the notification. * * *

* * * * *

We will publish an appropriate amendment to 39 CFR Part 111 to reflect these changes.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2011–16802 Filed 7–5–11; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0198; FRL–9425–4]

Revisions to the California State Implementation Plan, Imperial County Air Pollution Control District, Kern County Air Pollution Control District, and Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Imperial County Air Pollution Control District (ICAPCD), Kern County Air Pollution Control District (KCAPCD), and Ventura County Air Pollution Control District (VCAPCD) portions of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from architectural coating operations. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on September 6, 2011 without further notice, unless EPA receives adverse comments by August 5, 2011. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2011–0198, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: David Grounds, EPA Region IX, (415) 972–3019, *grounds.david@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to EPA.

Table of Contents

I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agencies and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Amended	Submitted
ICAPCD	424	Architectural Coatings	02/23/10	07/20/10

TABLE 1—SUBMITTED RULES—Continued

Local agency	Rule No.	Rule title	Amended	Submitted
KCAPCD	410.1	Architectural Coatings	03/11/10	07/20/10
VCAPCD	74.2	Architectural Coatings	01/12/10	07/20/10

On August 25, 2010, EPA determined that the submittals for ICAPCD Rule 424, KCAPCD Rule 410.1A, and VCAPCD Rule 74.2 met the completeness criteria in 40 CFR Part 51, Appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

We approved an earlier version of ICAPCD Rule 424 into the SIP on 01/04/07 (72 FR 267). We approved an earlier version of KCAPCD Rule 410.1 into the SIP on 02/06/98 (63 FR 6073). We approved an earlier version of VCAPCD Rule 74.2 into the SIP on 01/02/04 (69 FR 34).

C. What is the purpose of the submitted rule revisions?

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control VOC emissions. ICAPCD Rule 424, KCAPCD Rule 410.1A, and VCAPCD Rule 74.2 all impose more stringent requirements on VOC emissions from architectural coating operations. EPA's technical support documents (TSD) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see section 182(a)(2) and (b)(2)), and must not relax existing requirements (see sections 110(l) and 193). The ICAPCD (moderate) and VCAPCD (serious) regulate ozone nonattainment areas (see 40 CFR part 81), so these areas must implement RACT. KCAPCD (non-attainment subpart 1) does not need to fulfill RACT. Guidance and policy documents that we use to evaluate enforceability and RACT requirements consistently include the following:

1. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).

2. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).

3. National VOC Emission Standards for Architectural Coatings (40 CFR part 59 Subpart D, 9/11/98).

4. Control of Volatile Organic Emissions from Existing Stationary Sources, Volume I: Control Methods for Surface Coating Operations (EPA–450/2–76–028, 11/76).

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. The TSDs have more information on our evaluations.

C. EPA Recommendations to Further Improve the Rules

The TSDs describe additional rule revisions that we recommend for the next time the local agencies modify the rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by August 5, 2011, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on September 6, 2011. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 6, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: May 19, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (381)(i)(A)(*2*), (B)(*2*), and (C)(*2*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(381) * * *

(i) * * *

(A) * * *

(*2*) Rule 424, ''Architectural Coatings,'' amended on February 23, 2010.

(B) * * *

(*2*) Rule 410.1A, ''Architectural Coatings,'' adopted on March 11, 2010. Effective as of 1/1/2011.

(C) * * *

(*2*) Rule 74.2, ''Architectural Coatings,'' amended on January 12, 2010.

* * * * *

[FR Doc. 2011–16743 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002]

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–4064, or (e-mail) *luis.rodriguez1@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Federal Insurance and Mitigation Administrator has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Franklin County, Arkansas, and Incorporated Areas Docket Nos.: FEMA–B–1068 and FEMA–B–1089			
Arkansas River	Approximately 412 feet downstream of the confluence with Mikes Creek.	+367	Unincorporated Areas of Franklin County.
	Approximately 0.52 mile upstream of the confluence with Mikes Creek.	+367	
Flooding effects of Arkansas River into a previous shaded X zone downstream of the confluence of White Oak Creek.	Approximately 682 feet downstream of Missouri Pacific Railroad.	+382	Unincorporated Areas of Franklin County.
	Just downstream of Missouri Pacific Railroad	+382	
Flooding effects of Arkansas River into a previous shaded X zone downstream of the confluence of White Oak Creek.	Approximately 0.5 mile downstream of Missouri Pacific Railroad.	+381	Unincorporated Areas of Franklin County.
	Just downstream of Missouri Pacific Railroad	+381	
Mulberry River	Just upstream of Union Pacific Railroad	+392	Unincorporated Areas of Franklin County.
	Just downstream of I–40	+410	
Smith Creek	Just upstream of the confluence with Unnamed Tributary	+365	Unincorporated Areas of Franklin County.
	Approximately 1.02 miles upstream of the confluence with Unnamed Tributary.	+365	
Unnamed Tributary	Just upstream of the confluence with Smith Creek	+365	Unincorporated Areas of Franklin County.
	Approximately 0.55 mile upstream of the confluence with Smith Creek.	+365	
White Oak Creek	Approximately 0.62 mile downstream of Union Pacific Railroad.	+393	Unincorporated Areas of Franklin County.
	Approximately 1,865 feet upstream of Union Pacific Railroad.	+393	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Franklin County

Maps are available for inspection at 211 West Commercial Street, Ozark, AR 72949.

Bureau County, Illinois, and Incorporated Areas Docket No.: FEMA–B–1110			
Illinois River	Approximately 1.38 miles downstream of I–180	+462	City of Spring Valley, Unincorporated Areas of Bureau County, Village of Bureau Junction, Village of De Pue.
	Approximately 2.05 miles upstream of State Highway 89 ..	+463	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected

∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Spring Valley
Maps are available for inspection at City Hall, 215 North Greenwood Street, Spring Valley, IL 61362.

Unincorporated Areas of Bureau County
Maps are available for inspection at the Bureau County Courthouse, 700 South Main Street, Princeton, IL 61356.

Village of Bureau Junction
Maps are available for inspection at the Bureau Junction Village Hall, 101 East Nebraska Street, Bureau, IL 61315.

Village of De Pue
Maps are available for inspection at the Village Hall, 111 West 2nd Street, De Pue, IL 61322.

Knox County, Illinois, and Incorporated Areas
Docket No.: FEMA–B–1105

Cedar Creek	Approximately 0.51 mile upstream of West Knox Road	+731	City of Galesburg, Unincorporated Areas of Knox County.
	Approximately 350 feet upstream of Farnham Street	+777	
Spoon River	Approximately 0.47 mile downstream of Knox County Highway 39.	+537	Unincorporated Areas of Knox County.
	Approximately 0.39 mile upstream of Knox County Highway 39.	+538	
Tributary to Swegle Creek	Approximately 1,200 feet upstream of Terwilliger Street extended.	+539	Unincorporated Areas of Knox County.
	Approximately 1,260 feet upstream of Terwilliger Street extended.	+539	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Galesburg
Maps are available for inspection at City Hall, 55 West Tompkins Street, Galesburg, IL 61401.

Unincorporated Areas of Knox County
Maps are available for inspection at the Knox County Courthouse, 200 South Cherry Street, Galesburg, IL 61401.

Elkhart County, Indiana, and Incorporated Areas
Docket No.: FEMA–B–1016

Cobus Creek	At County Road 6	+765	Unincorporated Areas of Elkhart County.
	Approximately 3,370 feet upstream of County Road 2	+789	
Haverstick Ditch/Darkwood Ditch.	Just upstream of the confluence with Berlin Court Ditch	+835	Unincorporated Areas of Elkhart County.
	Approximately 3,550 feet upstream of County Road 7	+862	
Hoke Ditch	At the confluence with Yellow Creek	+782	Unincorporated Areas of Elkhart County.
	At State Road 19	+797	
Horn Ditch	At the confluence with Rock Run Creek	+799	City of Goshen, Unincorporated Areas of Elkhart County.
	At County Road 33	+825	
Little Elkhart River	Approximately 1,500 feet downstream of County Road 131.	+774	Unincorporated Areas of Elkhart County.
	At the LaGrange County boundary	+842	
Mather Ditch	Approximately 900 feet upstream of the confluence with the Little Elkhart River.	+816	Town of Middlebury, Unincorporated Areas of Elkhart County.
	Approximately 350 feet upstream of County Road 43	+844	
Pine Creek	Approximately 120 feet downstream of State Road 15	+807	Unincorporated Areas of Elkhart County.
	At County Road 35	+886	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Rock Run Creek	Approximately 200 feet upstream of the confluence with the Elkhart River.	+779	City of Goshen, Unincorporated Areas of Elkhart County.
	At County Road 35	+846	
Werntz Ditch	At the confluence with Baugo Creek	+810	Town of Wakarusa, Unincorporated Areas of Elkhart County.
	Approximately 900 feet upstream of Industrial Parkway	+853	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Goshen
Maps are available for inspection at the Department of Planning and Zoning, 204 East Jefferson Street, Suite 4, Goshen, IN 46528.

Town of Middlebury
Maps are available for inspection at the Town Hall, 418 North Main Street, Middlebury, IN 46540.

Town of Wakarusa
Maps are available for inspection at the Town Hall, 100 West Waterford Street, Wakarusa, IN 46573.

Unincorporated Areas of Elkhart County
Maps are available for inspection at the Elkhart County Public Services Building, 4230 Elkhart Road, Goshen, IN 46526.

Des Moines County, Iowa, and Incorporated Areas
Docket No.: FEMA–B–1093

Mississippi River	Approximately 6.6 miles upstream of Burlington Northern Railroad.	+532	City of Burlington, Unincorporated Areas of Des Moines County.
	Approximately 13.7 miles upstream of Lock and Dam No. 18.	+543	
Spring Creek	Approximately 0.6 mile downstream of Summer Street	+533	Unincorporated Areas of Des Moines County.
	Approximately 0.5 mile downstream of Summer Street	+534	
Unnamed Tributary (backwater effects from Long Creek).	Approximately 1,100 feet upstream of the confluence with Long Creek.	+700	City of Danville.
	Approximately 1,400 feet upstream of the confluence with Long Creek.	+700	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Danville
Maps are available for inspection at City Hall, 105 West Shepherd Street, Danville, IA 52623.

City of Burlington
Maps are available for inspection at City Hall, 400 Washington Street, Burlington, IA 52601.

Unincorporated Areas of Des Moines County
Maps are available for inspection at 200 North Front Street, Suite 400, Burlington, IA 52601.

Iowa County, Iowa, and Incorporated Areas
Docket No.: FEMA–B–1089

Old Mans Creek	Approximately 1,800 feet downstream of the corporate limits of the City of Williamsburg.	+754	Unincorporated Areas of Iowa County.
	At the southernmost corporate limit of the City of Williamsburg.	+756	
	Approximately 2,600 feet upstream of State Route 149	+765	
	Approximately 3,800 feet upstream of State Route 149	+766	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ^ Elevation in meters (MSL) Modified	Communities affected
ADDRESSES **Unincorporated Areas of Iowa County** Maps are available for inspection at 970 Court Avenue, Marengo, IA 52301.			
Woodford County, Kentucky, and Incorporated Areas Docket No.: FEMA–B–1117			
Brushy Run (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 0.4 mile upstream of the confluence with the Kentucky River.	+542	Unincorporated Areas of Woodford County.
Bucks Run (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 125 feet downstream of Buck Run Road.	+519	Unincorporated Areas of Woodford County.
Clear Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 2.5 miles upstream of the confluence with the Kentucky River.	+531	Unincorporated Areas of Woodford County.
Craig Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1,220 feet upstream of Gun Club Road.	+527	Unincorporated Areas of Woodford County.
Glenns Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1.2 miles upstream of the confluence with the Kentucky River.	+513	Unincorporated Areas of Woodford County.
Grier Creek (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 200 feet downstream of Shryocks Ferry Road.	+524	Unincorporated Areas of Woodford County.
Kentucky River	Approximately 2.3 miles downstream of the confluence with Kentucky River Tributary 92.	+514	Unincorporated Areas of Woodford County.
	Approximately 5.0 miles upstream of the confluence with Kentucky River Tributary 5.	+547	
Kentucky River Tributary 5 (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 950 feet upstream of the confluence with the Kentucky River.	+543	Unincorporated Areas of Woodford County.
Kentucky River Tributary 84 (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 510 feet upstream of the confluence with the Kentucky River.	+539	Unincorporated Areas of Woodford County.
Kentucky River Tributary 92 (backwater effects from Kentucky River).	From the confluence with the Kentucky River to approximately 1,770 feet upstream of the confluence with the Kentucky River.	+515	Unincorporated Areas of Woodford County.
Lee Branch	Just upstream of Leestown Pike	+780	City of Midway, Unincorporated Areas of Woodford County.
	Approximately 860 feet upstream of Old Frankfort Pike	+827	
Lee Branch Tributary 4 (backwater effects from Lee Branch).	From the confluence with Lee Branch to approximately 720 feet upstream of the confluence with Lee Branch.	+810	Unincorporated Areas of Woodford County.
Lee Branch Tributary 6 (backwater effects from Lee Branch).	From the confluence with Lee Branch to approximately 1,145 feet upstream of the confluence with Lee Branch.	+802	City of Midway, Unincorporated Areas of Woodford County.
Lee Branch Tributary 7 (backwater effects from Lee Branch).	From the confluence with Lee Branch to approximately 351 feet upstream of Midway College Road.	+802	City of Midway, Unincorporated Areas of Woodford County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
^ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Midway
Maps are available for inspection at City Hall, 101 East Main Street, Midway, KY 40347.

Unincorporated Areas of Woodford County
Maps are available for inspection at the Woodford County Courthouse, 103 South Main Street, Versailles, KY 40383.

Baltimore County, Maryland (Unincorporated Areas) Docket No.: FEMA–B–1098			
Gwynns Falls	Just downstream of the confluence with Red Run	+441	Unincorporated Areas of Baltimore County.
	Approximately 1,300 feet downstream of Painters Mill Road.	+446	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Roland Run	Approximately 1,166 feet upstream of Joppa Road	+261	Unincorporated Areas of Baltimore County.
	Approximately 810 feet downstream of Essex Farm Road	+262	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Baltimore County

Maps are available for inspection at the Baltimore County Office Building, 111 West Chesapeake Avenue, Suite 307, Towson, MD 21204.

Attala County, Mississippi, and Incorporated Areas
Docket No.: FEMA–B–1122

Canal Creek	Approximately 700 feet downstream of Jefferson Street	+404	City of Kosciusko.
	Approximately 500 feet downstream of Veterans Memorial Highway.	+411	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Kosciusko

Maps are available for inspection at 222 East Washington Street, Kosciusko, MS 39090.

Perry County, Missouri, and Incorporated Areas
Docket No.: FEMA–B–1120

Apple Creek	At the dam/unnamed road crossing approximately 300 feet downstream of U.S. Route 61.	+399	Unincorporated Areas of Perry County.
	Approximately 250 feet upstream of U.S. Route 61	+403	
Apple Creek (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 3.6 miles upstream of the confluence with the Mississippi River.	+368	Unincorporated Areas of Perry County.
Apple Creek Tributary 3 (backwater effects from Mississippi River).	From the confluence with Apple Creek upstream to County Road 456.	+368	Unincorporated Areas of Perry County.
Blue Spring Branch (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1.1 miles upstream of Christian Street.	+390	Town of Lithium, Unincorporated Areas of Perry County.
Blue Spring Branch Tributary 1 (backwater effects from Mississippi River).	From the confluence with Blue Spring Branch to approximately 0.5 mile upstream of County Road 926.	+390	Unincorporated Areas of Perry County.
Blue Spring Branch Tributary 3 (backwater effects from Mississippi River).	From the confluence with Blue Spring Branch to approximately 0.4 mile upstream of County Road 916.	+390	Unincorporated Areas of Perry County.
Brazeau Creek (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1.0 mile upstream of County Road 446.	+372	Unincorporated Areas of Perry County.
Brazeau Creek Tributary 3 (backwater effects from Mississippi River).	From the confluence with Brazeau Creek to approximately 0.5 mile upstream of County Road 438.	+372	Unincorporated Areas of Perry County.
Brazeau Creek Tributary 5 (backwater effects from Mississippi River).	From the confluence with Brazeau Creek to approximately 250 feet upstream of Missouri Route A.	+372	Unincorporated Areas of Perry County.
Christenson Branch Creek (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 350 feet upstream of the confluence with McClanahan Creek.	+385	Unincorporated Areas of Perry County.
Cinque Hommes Creek (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 3 miles upstream of County Road 322.	+384	Unincorporated Areas of Perry County.
Clines Branch (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1,400 feet downstream of the intersection of Missouri Route D and County Road 438.	+378	Unincorporated Areas of Perry County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Doodlebug Branch (backwater effects from Mississippi River).	From the confluence with Cinque Hommes Creek to approximately 4,000 feet upstream of the confluence with Cinque Hommes Creek.	+382	Unincorporated Areas of Perry County.
Dry Fork (backwater effects from Mississippi River).	From the confluence with Cinque Hommes Creek to approximately 1.4 miles upstream of the confluence with Cinque Hommes Creek.	+384	Unincorporated Areas of Perry County.
Dry Fork Tributary 1 (backwater effects from Mississippi River).	From the confluence with Dry Fork to approximately 0.6 mile upstream of the confluence with Dry Fork.	+384	Unincorporated Areas of Perry County.
Falls Branch (backwater effects from Mississippi River).	From the confluence with Blue Spring Branch to approximately 0.8 mile upstream of Missouri Route M.	+390	Unincorporated Areas of Perry County.
McClanahan Creek (backwater effects from Mississippi River).	From the confluence with Christenson Branch Creek to approximately 0.9 mile upstream of the confluence with Christenson Branch Creek.	+385	Unincorporated Areas of Perry County.
Mississippi River	At the Cape Girardeau County boundary	+368	Town of Lithium, Unincorporated Areas of Perry County.
	At the Ste. Genevieve County boundary	+391	
Mississippi River Tributary 21 (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 0.45 mile upstream of the confluence with the Mississippi River.	+376	Unincorporated Areas of Perry County.
Mississippi River Tributary 25 (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 0.8 mile upstream of the confluence with the Mississippi River.	+378	Unincorporated Areas of Perry County.
Omete Creek (backwater effects from Mississippi River).	From the confluence with Cinque Hommes Creek to approximately 1 mile upstream of County Road 340.	+380	Unincorporated Areas of Perry County.
Omete Creek Tributary 2 (backwater effects from Mississippi River).	From the confluence with Omete Creek to approximately 0.73 mile upstream of the confluence with Omete Creek.	+380	Unincorporated Areas of Perry County.
Owl Creek (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 2.2 miles upstream of the confluence with the Mississippi River.	+373	Unincorporated Areas of Perry County.
Patton Creek (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 0.76 mile upstream of the confluence with the Mississippi River.	+369	Unincorporated Areas of Perry County.
Patton Creek Tributary 1 (backwater effects from Mississippi River).	From the confluence with the Mississippi River to approximately 1.2 miles upstream of the confluence with the Mississippi River.	+370	Unincorporated Areas of Perry County.
Saint Laurent Creek (backwater effects from Mississippi River).	From the county boundary to approximately 1.2 miles upstream of Missouri Route H.	+391	Unincorporated Areas of Perry County.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Town of Lithium

Maps are available for inspection at 321 North Main Street, Suite 5, Perryville, MO 63775.

Unincorporated Areas of Perry County

Maps are available for inspection at 321 North Main Street, Suite 5, Perryville, MO 63775.

Miami County, Ohio, and Incorporated Areas
Docket No.: FEMA–B–1120

Great Miami River	Approximately 1.0 mile upstream of Peterson Road	+854	City of Piqua.
	Approximately 1.1 miles upstream of County Highway 25A	+866	
Great Miami River	At the Montgomery County boundary	+791	City of Tipp City, Unincorporated Areas of Miami County.
	At State Highway 571	+791	
Hatfield Ditch	Approximately 750 feet upstream of Main Street	+914	Unincorporated Areas of Miami County.
	Approximately 2,000 feet upstream of Main Street	+931	
Staunton Tributary	Approximately 1,865 feet downstream of Old Staunton Road.	+825	City of Troy, Unincorporated Areas of Miami County.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Stillwater River	Approximately 350 feet downstream of Stonyridge Avenue	+830	City of Union, Unincorporated Areas of Miami County, Village of West Milton.
	At the Montgomery County boundary	+832	
	Approximately 0.8 mile downstream of State Highway 55	+832	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Piqua
Maps are available for inspection at 201 West Water Street, Piqua, OH 45356.

City of Tipp City
Maps are available for inspection at 260 South Garber Drive, Tipp City, OH 45371.

City of Troy
Maps are available for inspection at City Hall, 100 South Market Street, Troy, OH 45373.

City of Union
Maps are available for inspection at 118 North Main Street, Union, OH 45322.

Unincorporated Areas of Miami County
Maps are available for inspection at 201 West Main Street, Troy, OH 45373.

Village of West Milton
Maps are available for inspection at 701 South Miami Street, West Milton, OH 45383.

Union County, South Carolina, and Incorporated Areas
Docket No.: FEMA–B–1108

Broad River	Approximately 10 feet downstream of State Highway 49	+367	Township of Lockhart.
	Approximately 1.1 miles upstream of State Highway 49	+412	
Canal	Approximately 28 feet downstream of State Highway 49	+393	Township of Lockhart.
	Just downstream of Lockhart Dam	+409	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Township of Lockhart
Maps are available for inspection at the Town Hall, 118 Mill Street, Lockhart, SC 29364.

Taylor County, West Virginia, and Incorporated Areas
Docket No.: FEMA–B–1115

Booths Creek	Just downstream of the county boundary	+959	Unincorporated Areas of Taylor County.
	At the confluence with Corbin Branch and Thomas Fork	+1000	
Corbin Branch	At the confluence with Booths Creek and Thomas Fork	+1000	Unincorporated Areas of Taylor County.
	Approximately 300 feet downstream of Nuzum Road	+1082	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Taylor County
Maps are available for inspection at the Taylor County Courthouse, 214 West Main Street, Grafton, WV 26354.

Manitowoc County, Wisconsin, and Incorporated Areas
Docket No.: FEMA–B–1095

Centerville Creek	Approximately 0.25 mile downstream of West Washington Avenue.	+682	Village of Cleveland.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ^ Elevation in meters (MSL) Modified	Communities affected
	Approximately 380 feet downstream of West Washington Avenue.	+688	
Little Manitowoc River	Approximately 0.47 mile downstream of Goodwin Road	+626	City of Manitowoc.
	At Goodwin Road	+643	
Sheboygan River	At State Highway 67/32	+882	City of Kiel.
	Approximately 0.25 mile upstream of State Highway 67/32	+884	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
^ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Kiel
Maps are available for inspection at 621 6th Street, Kiel, WI 53042.

City of Manitowoc
Maps are available for inspection at 900 Quay Street, Manitowoc, WI 54220.

Village of Cleveland
Maps are available for inspection at 1150 West Washington Street, Cleveland, WI 53015.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: June 23, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–16896 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100804323–0569–02]

RIN 0648–XA523

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Closure of the Directed Butterfish Fishery

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the directed fishery for butterfish in the Exclusive Economic Zone (EEZ) will be closed effective 0001 hours, July 6, 2011. Vessels issued a Federal permit to harvest butterfish may not retain or land more than 250 lb (0.11 mt) of butterfish per trip for the remainder of the year (through December 31, 2011). This action is necessary to prevent the fishery from exceeding its domestic annual harvest (DAH) of 495 mt, and to allow for effective management of this stock.

DATES: Effective 0001 hours, July 6, 2011, through 2400 hours, December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Lindsey Feldman, Fishery Management Specialist, 978–675–2179, Fax 978–281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the butterfish fishery are found at 50 CFR part 648. The regulations require specifications for maximum sustainable yield, initial optimum yield, allowable biological catch, domestic annual harvest (DAH), domestic annual processing, joint venture processing, and total allowable levels of foreign fishing for the species managed under the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP). The procedures for setting the annual initial specifications are described in § 648.21. The 2011 specification of DAH for butterfish is 495 mt (76 FR 8306, February 14, 2011).

Section 648.22 requires NMFS to close the directed butterfish fishery in the EEZ when 80 percent of the total annual DAH has been harvested. If 80 percent of the butterfish DAH is projected to be landed prior to October 1, a 250-lb (0.11-mt) incidental butterfish possession limit is put in effect for the remainder of the year, and if 80 percent of the butterfish DAH is projected to be landed on or after October 1, a 600-lb (0.27-mt) incidental butterfish possession limit is put in effect for the remainder of the year. NMFS is further required to notify, in advance of the closure, the Executive Directors of the Mid-Atlantic, New England, and South Atlantic Fishery Management Councils; mail notification of the closure to all holders of butterfish permits at least 72 hr before the effective date of the closure; provide adequate notice of the closure to recreational participants in the fishery; and publish notification of the closure in the **Federal Register**.

The Administrator, Northeast Region, NMFS, based on dealer reports and other available information, has determined that 80 percent of the DAH for butterfish in 2011 fishing year will be harvested. Therefore, effective 0001 hours, July 6, 2011, the directed fishery for the butterfish fishery is closed and vessels issued Federal permits for butterfish may not retain or land more than 250 lb (0.11 mt) of butterfish per trip or calendar day. The directed fishery will reopen effective 0001 hours, January 1, 2012, when the 2012 DAH becomes available.

Classification

This action is required by 50 CFR part 648, and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for

public comment because it would be contrary to the public interest. This action closes the butterfish fishery until January 1, 2012, under current regulations. The regulations at § 648.21 require such action to ensure that butterfish vessels do not exceed the 2011 DAH. Data indicating the butterfish fleet will have landed at least 80 percent of the 2011 DAH have only recently become available. If implementation of this closure is delayed to solicit prior public comment, the quota for this year will be exceeded, thereby undermining the conservation objectives of the FMP. The AA further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

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

Dated: June 29, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–16885 Filed 6–30–11; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 129
Wednesday, July 6, 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 THE TREASURY

5 CFR Chapter XXI

12 CFR Chapters I, V, XV, and XVIII

17 CFR Chapter IV

19 CFR Chapter I

26 CFR Chapter I

27 CFR Chapter I

31 CFR Subtitle A and Chapters I, II, IV Through VIII, IX, and X

48 CFR Chapter 10

Preliminary Plan for Retrospective Analysis of Existing Rules; Notice of Availability

AGENCY: Department of the Treasury.

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of the Treasury announces the availability of its Preliminary Plan for Retrospective Analysis of Existing Rules and invites interested members of the public to submit comments on the plan. Issued pursuant to Executive Order 13563, ''Improving Regulation and Regulatory Review,'' Treasury developed its preliminary plan to facilitate the review of existing regulations through the use of retrospective review.

DATES: *Comment due date:* July 25, 2011.

ADDRESSES: Interested persons are invited to submit comments on all aspects of the preliminary plan. You may submit comments, identified by docket number TREAS–DO–2011–0003 through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Electronic Submission of Comments. Interested persons must submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department to make them 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.

Public Inspection of Comments. Properly submitted comments will be available for inspection and downloading at *http://www.regulations.gov.*

Additional Instructions. In general, comments received, including attachments and other supporting materials, are part of the public record and are immediately available to the public. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Office of the Assistant General Counsel for General Law, Ethics, and Regulation at *guidance@treasury.gov.*

SUPPLEMENTARY INFORMATION: On January 18, 2011, the President issued Executive Order 13563, ''Improving Regulation and Regulatory Review,'' to ensure that federal regulations seek less burdensome means to achieve policy goals and that agencies give careful consideration to the benefits and costs of those regulations. The Executive Order requires each agency to develop a preliminary plan to periodically review its existing significant regulations to determine whether any regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving its regulatory objectives.

On March 30, 2011 (76 FR 17572), the Department published a notice and request for comment in the **Federal Register** that invited input from the public in developing Treasury's preliminary plan and eleven comments were received. On June 1, 2011, the Department posted the preliminary plan on its Open Government Web site, *http://www.treasury.gov/open* and on *http://www.regulations.gov,* and is requesting public comments on the plan. Comments may be submitted on or before July 15, 2011.

Dated: June 28, 2011.

George W. Madison,

General Counsel.

[FR Doc. 2011–16865 Filed 7–5–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2011–0060]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL—030 Use of the Terrorist Screening Database System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a newly established system of records pursuant to the Privacy Act of 1974 for the ''Department of Homeland Security/ALL—030 Use of the Terrorist Screening Database System of Records'' and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before August 5, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0060, by one of the following methods:

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

comments received go to *http://www.regulations.gov.*

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

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

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) proposes to establish a new system of records titled, ''DHS/ALL—030 Use of the Terrorist Screening Database (TSDB) System of Records.'' DHS is maintaining a mirror copy of the Department of Justice (DOJ)/Federal Bureau of Investigation (FBI)—019 Terrorist Screening Records System of Records (August 22, 2007, 72 FR 47073) in order to automate and simplify the current method for transmitting the TSDB to DHS and its components.

Homeland Security Presidential Directive 6 (HSPD–6), issued in September 2003, called for the establishment and use of a single consolidated watchlist to improve the identification, screening, and tracking of known or suspected terrorists and their supporters. The FBI/TSC maintains and distributes the TSDB as the U.S. government's consolidated terrorist watchlist. DHS and the FBI/TSC, working together, have developed the DHS Watchlist Service (WLS) in order to automate and simplify the current method for transmitting TSDB records from the FBI/TSC to DHS and its components.

The WLS will allow the FBI/TSC and DHS to move away from a manual and cumbersome process of data transmission and management to an automated and centralized process. The WLS will replace multiple data feeds from the FBI/TSC to DHS and its components, as documented by information sharing agreements, with a single feed from the FBI/TSC to DHS and its components. The WLS is a system to system secure connection with no direct user interface.

DHS and its components are authorized to access TSDB records via the WLS pursuant to the terms of information sharing agreements with FBI/TSC. DHS is publishing this SORN and has published privacy impact assessments to provide additional transparency into how DHS has implemented WLS. DHS will review and update this SORN no less then biennially as new DHS systems come online with the WLS and are approved consistent with the terms of agreements with FBI/TSC. There are five DHS systems that currently receive TSDB data directly from the FBI/TSC and will use the WLS. These systems have existing SORNs that cover the use of the TSDB:

(1) Transportation Security Administration (TSA), Office of Transportation Threat Assessment and Credentialing: DHS/TSA—002 Transportation Security Threat Assessment System (May 19, 2010, 75 FR 28046);

(2) TSA, Secure Flight Program: DHS/TSA—019 Secure Flight Records System (November 9, 2007, 72 FR 63711);

(3) U.S. Customs and Border Protection (CBP), Passenger Systems Program Office for inclusion in TECS: DHS/CBP—011 TECS System (December 19, 2008 73 FR 77778);

(4) U.S. Visitor and Immigration Status Indicator Technology (US-VISIT) Program for inclusion into the DHS Enterprise Biometrics Service (IDENT): DHS/USVISIT—0012 DHS Automated Biometric Identification System (June 5, 2007, 72 FR 31080); and

In addition, two DHS components will receive TSDB data via the WLS in the form of a computer readable extract. The components' use of the TSDB data is covered by existing SORNs:

(1) Office of Intelligence and Analysis (I&A): DHS/IA–001 Enterprise Records System, (May 15, 2008 73 FR 28128), and

(2) U.S. Immigration and Customs Enforcement (ICE): DHS/ICE–009 External Investigations, (January 5, 2010 75 FR 404).

Information stored in the WLS will be shared back with the FBI/TSC in order to ensure that DHS and the FBI/TSC can reconcile any differences in the database and ensure DHS has the most up-to-date and accurate version of TSDB records. All other sharing will be conducted pursuant to the programmatic system of records notices and privacy impact assessments discussed in this SORN.

DHS is planning future enhancements to the WLS that will provide for a central mechanism to receive information from DHS components when they encounter a potential match to the TSDB and send this information to the FBI/TSC. DHS will update this SORN to reflect such enhancements to the WLS, as part of its biennial reviews of this SORN once that capability is implemented.

DHS is publishing this SORN to cover the Department's use of the TSDB in order to provider greater transparency to the process.

Concurrent with the publication of this SORN, DHS is issuing a Notice of Proposed Rulemaking to exempt this system from specific sections of the Privacy Act.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

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

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/ALL—030 Use of the Terrorist Screening Database System of Records. Some information in DHS/ALL—030 Use of the Terrorist Screening Database System of Records relates to official DHS national security and law enforcement activities. These exemptions are needed to protect information relating to DHS activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension. In addition, as a recipient of a mirror copy of the

TSDB, which is maintained by the FBI/TSC, DHS is carrying forward the exemptions taken by the DOJ/FBI—019 Terrorist Screening Records System of Records (August 22, 2007, 72 FR 47073) in order to prevent these records from improper disclosure. The exemptions proposed here are standard law enforcement and national security exemptions exercised by a large number of federal law enforcement and intelligence agencies. In appropriate circumstances, where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/ALL—030 Use of Terrorist Screening Database System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

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

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

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

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

2. At the end of Appendix C to Part 5, add paragraph 55 to read as follows:

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

* * * * *

55. The DHS/ALL—030 Use of Terrorist Screening Database System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/ALL—030 Use of Terrorist Screening Database System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities; and protection of the President of the U.S. or other individuals pursuant to Section 3056 and 3056A of Title 18. The DHS/ALL—030 Use of Terrorist Screening Database System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (e)(12); (f); (g)(1); and (h) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(1) and (k)(2). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

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

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

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

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

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (e)(12) (Computer Matching) if the agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(k) From subsection (h) (Legal Guardians) the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–16806 Filed 7–5–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1301 and 1309

[Docket No. DEA–346P]

RIN 1117–AB32

Controlled Substances and List I Chemical Registration and Reregistration Fees

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: DEA proposes adjusting the fee schedule for DEA registration and reregistration fees necessary to recover the costs of its Diversion Control Program relating to the registration and control of the manufacture, distribution, dispensing, importation and exportation of controlled substances and List I chemicals as mandated by the Controlled Substances Act.

DATES: Electronic comments must be submitted and written comments must be postmarked on or before September 6, 2011. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–346'' on all electronic and written correspondence. DEA encourages all comments be submitted electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document and supplemental information to this proposed rule are also available at the *http://www.regulations.gov* Web site for easy reference. Paper comments that duplicate the electronic submission are not necessary as all comments submitted to *http://www.regulations.gov* will be posted for public review and are part of the official docket record. Should you, however, wish to submit written comments via regular or express mail, they should be sent to the Drug Enforcement Administration, Attention: DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, VA 22152.

FOR FURTHER INFORMATION CONTACT: Imelda L. Paredes, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone (202) 307–7165.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the DEA's public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted, and the comment, in redacted form, will be posted online and placed in the DEA's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the ''For Further Information'' paragraph.

Background

Legal Authority

The Drug Enforcement Administration (DEA) is a component of the Department of Justice and is the primary agency responsible for coordinating the drug law enforcement activities of the United States. DEA also assists in the implementation of the President's National Drug Control Strategy. DEA's mission is to enforce U.S. controlled substances laws and regulations and bring to the criminal and civil justice system those organizations and individuals involved in the growing, manufacturing or distribution of controlled substances and listed chemicals appearing in or destined for illicit traffic in the U.S., including organizations that use drug trafficking proceeds to finance terrorism. The diversion control program (DCP) is a strategic component of the DEA's law enforcement mission. The DCP carries out the mandates of the Controlled Substances and Chemical Diversion and Trafficking Acts. It is primarily the DCP within DEA that implements and enforces Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act (CSIEA) (21 U.S.C. 801–971), as amended (hereinafter, ''CSA'').[1] DEA drafts and publishes the implementing regulations for these statutes in Title 21 of the Code of Federal Regulations (CFR), Parts 1300 to 1321. The CSA together with these regulations are designed to prevent, detect, and eliminate the diversion of controlled substances and listed chemicals into the illicit market while ensuring a sufficient supply of controlled substances and listed chemicals for legitimate medical, scientific, research, and industrial purposes.

Pursuant to the CSA, controlled substances are classified in one of five schedules based upon their potential for abuse, their currently accepted medical use, and the degree of dependence the substance may cause. 21 U.S.C. 812. Likewise, under the CSA, listed chemicals are separately classified based on their importance to the manufacture of controlled substances (List I chemicals) or their use in manufacturing controlled substances (List II chemicals). 21 U.S.C. 802(33)–(35). The CSA mandates that DEA register persons or entities who manufacture, distribute, dispense, import, export, or conduct research or chemical analysis with controlled substances and listed chemicals. These registrants are permitted to handle controlled substances and listed chemicals as authorized by their registration and are required to comply with the applicable requirements associated with their registration. 21 U.S.C. 822. The identification and registration of all individuals and entities authorized to handle controlled substances and listed chemicals establishes a closed system over which DEA is charged to inspect, investigate, and enforce applicable federal law.

[1] The Attorney General's delegation of authority to DEA may be found at 28 CFR 0.100.

Under the CSA, DEA is authorized to charge reasonable fees relating to the registration and control of the manufacture, distribution, dispensing, import, and export of controlled substances and listed chemicals. 21 U.S.C. 821 and 958(f). DEA must set fees at a level that ensures the recovery of the full costs of operating the various aspects of its DCP. 21 U.S.C. 886a. Each year, DEA is required by statute to transfer the first $15 million of fee revenues into the general fund of the Treasury and the remainder of the fee revenues is deposited into a separate fund of the Treasury called the Diversion Control Fee Account (DCFA). 21 U.S.C. 886a(1). On at least a quarterly basis, the Secretary of the Treasury is required to reimburse DEA an amount from the DCFA ''in accordance with estimates made in the budget request of the Attorney General for those fiscal years'' for the operation of the DCP.[2] 21 U.S.C. 886a(1)(B) and (D). The first $15 million of fee revenues that are transferred to the Treasury do not support any DCP activities.

History of Fees

In 1970, Congress consolidated more than 50 laws related to the control of legitimate channels of narcotics and dangerous drugs into one statute—the CSA. The statute was ''designed to improve the administration and regulation of the manufacturing, distribution, and dispensing of controlled substances by providing for a 'closed' system of drug distribution for legitimate handlers of such drugs'' with criminal penalties for transactions outside the legitimate chain.[3] With enactment of the CSA, the Bureau of Narcotics and Dangerous Drugs (BNDD) was also granted authority to charge reasonable fees relating to the registration and control of the manufacture, distribution, dispensing, export, and import of controlled substances.[4] To this end, BNDD established a three-tiered fee structure for companies and individuals wishing to participate in the U.S. controlled substance industry.[5] Before the enactment of the CSA, the U.S. House of Representatives held hearings to discuss the proposed Controlled Substances Act. In these hearings, there was a discussion about whether the Attorney General should be allowed to charge reasonable fees relating to both registration and control (including enforcement costs) or just registration.[6] In the end, Congress enacted the CSA and allowed the Attorney General to charge reasonable fees relating to both registration and control.[7]

In 1973, the BNDD was abolished and all BNDD functions were transferred to DEA, including the authority to charge registrants reasonable fees.[8] In 1982, a General Accounting Office (GAO) report[9] advised that the 1971 fee schedule did not adequately recover the costs for the DCP administered by DEA. An increase in fees was proposed and finalized in the **Federal Register** in 1983.[10] All fees collected from 1971 through 1992 were deposited into the general fund of the United States Treasury.

In the 1993 appropriations for DEA, Congress determined that the DCP would be fully funded by fees and no longer by appropriations.[11] Congress established the DCFA as a separate account of the Treasury to ''ensure the recovery of the full costs of operating the various aspects of [the Diversion Control Program]'' by those participating in the closed system established by the CSA. 21 U.S.C. 886a(1)(C). Congress specified the general operation of the DCFA. Each fiscal year, the first $15 million of deposited fees are retained in the general fund of the Treasury and are not available for use by the DCP. The amounts in excess of $15 million are deposited into the DCFA for the operation of DEA's diversion control program. The funds in the DCFA remain available until expended and are paid by the Secretary of the Treasury to reimburse DEA for expenses incurred in the operation of the DCP in accordance with estimates made in the budget request of the Attorney General. 21 U.S.C. 886a(1). Thus, specific statutory authorizations set the parameters of the DCFA, but not the details of the application of those standards to the activities of DEA.

Shortly after the 1993 Appropriations Act, DEA published a proposed rule proposing to increase the existing fee schedule to comply with Congress' direction to set fees at a level that ensures the recovery of the full costs of operating the DCP.[12] After a comment period, a final rule was published on March 22, 1993, implementing changes to the fee structure and excluding chemical control costs from the calculation of fees.[13] Several members of the registrant population impacted by the fee increase challenged the new fee, first in federal district court, where it was upheld, and subsequently on appeal to the U.S. Court of Appeals where it was remanded without being vacated for inadequate information supporting the selected fees.[14]

In December of 1993, the Domestic Chemical Diversion Control Act of 1993 was passed by Congress to amend the CSA to require that manufacturers, distributors, importers, and exporters of List I chemicals obtain a registration from DEA. Coincident with the new registration requirements, DEA was also authorized to charge ''reasonable fees relating * * * to the registration and control of regulated persons and regulated transactions.'' [15] (Congress modified this language in 2004, as it currently reads at 21 U.S.C. 821, to make it uniform with other provisions

[2] The diversion control program (DCP) consists of the controlled substance and chemical diversion control activities of DEA. These activities are related to the registration and control of the manufacture, distribution, dispensing, importation, and exportation of controlled substances and listed chemicals (21 U.S.C. 886a(2)).

[3] H.R. Rep. No. 91–1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4571–4572.

[4] DEA's authority to charge reasonable fees was later expanded to include manufacturers, distributors, importers and exporters of List I chemicals. The Domestic Chemical Diversion Control Act of 1993, Pub. L. 103–200, 107 Stat. 2333.

[5] 36 FR 4928, March 13, 1971, 36 FR 7776, April 24, 1971.

[6] Drug Abuse Control Amendments of 1970: Hearing on H.R. 1170 and H.R. 13743 Before Subcomm. on Public Health and Welfare of the H. Comm. on Interstate and Foreign Commerce, 91st Cong. 145–148, 359–365, and 412–414 (Feb. 3 & 20, 1970) and Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings Before H. Comm. on Ways and Means, 91st Cong. 211–214 and 468–474 (July 20 & 21, 1970).

[7] The term ''control'' as defined in 21 U.S.C. 802(5) specifically applies to Part B of Title II of the CSA only (21 U.S.C. 811–814). In general, ''diversion control'' is a broad term encompassing activities related to preventing and detecting the diversion of controlled substances and listed chemicals from legitimate commerce into the illicit market. In 1992, Congress established the Diversion Control Fee Account (DCFA) and required that the fees charged by DEA under its diversion control program be set at a level that ensures the recovery of the full costs of operating the various aspects of that program (Pub. L. 102–395, 106 Stat. 1843). In 2004, Congress amended the CSA and defined ''diversion control program'' and ''controlled substance and chemical diversion control activities'' (Pub. L. 108–447, 118 Stat. 2921, codified in 21 U.S.C. 886a). The ''diversion control program'' means the controlled substance and chemical diversion control activities of the Drug Enforcement Administration. 21 U.S.C. 886a(2)(A).

[8] Reorganization Plan No. 2 of 1973, 38 FR 18380 (July 2, 1973).

[9] GAO/GGD–83–2, October 29, 1982.

[10] 48 FR 14640, April 5, 1983; 48 FR 56043, December 19, 1983.

[11] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1993, Public Law 102–395, codified in relevant part at 21 U.S.C. 886a.

[12] 57 FR 60148–01, December 18, 1992.

[13] 58 FR 15272–01, March 22, 1993.

[14] *American Medical Association* v. *Reno,* 857 F.Supp. 80 (D.D.C. 1994); *American Medical Association* v. *Reno,* 57 F.3d 1129 (D.C. Cir. 1995).

[15] The Domestic Chemical Diversion Control Act of 1993, Public Law 103–200, 107 Stat. 2333.

of the CSA.[16]) This amendment to the CSA was made after publication of DEA's March 22, 1993 final rule and the commencement of the legal challenges. List I chemical registration and reregistration fees were not addressed in the DCFA until the fee calculation initiated with a proposed rule published November 2005.[17]

The fee was finalized in 1996 with a request for further comment.[18] DEA instituted studies and internal reorganizations to enable DEA to better identify DCP activities and costs. Additional information on the components and activities of the fee-funded DCP and what was deemed to be part of that program as well as DEA's response to comments received was published in 2002 for additional public comment.[19] After that publication, a review of DEA's DCP by the Office of the Inspector General, Department of Justice (OIG) concluded DEA was not adequately supporting the DCP program.[20]

In February 2003, DEA published a proposed rule to raise registration and reregistration fees in an effort to comply with the statutory requirement to charge fees at a level that ensures the recovery of the full costs of operating the various aspects of the DCP.[21] Shortly thereafter, DEA created an organization within headquarters known as the Validation Unit. This Unit reviews and ensures that every DCFA expenditure over $500 is in support of diversion control-related activities. The Validation Unit is independent of the Office of Diversion Control and reports directly to the DEA Deputy Administrator. If an expense only partially supports the DCP, such as a field office's rent or utility cost, the Validation Unit determines the portion of the expense that should be funded by the DCFA. A new fee was finalized by publication of a final rule on October 10, 2003.[22]

In 2004, Congress provided additional guidance in the relevant 2005 Appropriations Act.[23] Specifically, the CSA was amended to define the DCP as ''the controlled substance and chemical diversion control activities of the Drug Enforcement Administration.'' 21 U.S.C. 886a(2)(A). Furthermore, ''controlled substance and chemical diversion control activities'' means ''those activities related to the registration and control of the manufacture, distribution, dispensing, importation, and exportation of controlled substances and listed chemicals.'' 21 U.S.C. 886a(2)(B). Congress further provided that reimbursements from the DCFA ''shall be made without distinguishing between expenses related to controlled substance activities and expenses related to chemical activities'' (21 U.S.C. 886a(1)(B)) and amended the language of 21 U.S.C. 821 and 958(f) to be consistent with the definition of the DCP articulated in 21 U.S.C. 886a(2). As a result, all registration and reregistration fees for controlled substances and chemicals are deposited into the DCFA and reimbursements by the Secretary of the Treasury are made without distinction.

In 2005, based upon the internal organizational changes and the 2005 Appropriations Act, DEA proposed an adjusted fee schedule to appropriately reflect all costs associated with the DCP.[24] In July 2006, the OIG reported on its *Follow-up Review of DEA's Efforts to Control the Diversion of Controlled Pharmaceuticals* and recommended that DEA apply more resources to diversion control.[25] The OIG also recommended that DEA provide more Special Agent support to the DCP and increase training for those individuals who support the program. The OIG also noted that the diversion of controlled substance pharmaceuticals had dramatically increased over recent years and that the increase coincided with the use of emerging technologies such as the Internet. Twelve comments were received and analyzed in response to DEA's proposed fee rule and DEA published the final rule on August 29, 2006.[26]

The OIG completed a *Review of DEA's Use of the Diversion Control Fee Account* in 2008 and did not find any misused DCFA funds for non-diversion control activities between FY 2004 and FY 2007. To the contrary, the OIG found that DEA did not fully fund all diversion control costs with the DCFA as required by law.[27] It has been approximately five years since the last fee adjustment. It should be noted, however, that collections associated with the last fee adjustment did not begin until FY 2007.

Diversion Control Program (DCP)—Scope

The scope of the DCP has evolved since its inception. In late 1971, the BNDD's Compliance Program was created to provide a specialized work force that could focus exclusively on controlled substance diversion and take full advantage of the controls and penalties established by the CSA. The program was placed under the BNDD's Office of Enforcement and staffed by compliance investigators, later called diversion investigators. In 1973, the BNDD was abolished and all BNDD functions were transferred to DEA.[28]

From 1971 to 1983, DEA's legal authority with regard to diversion and abuse of drugs remained relatively unchanged. The CSA originally provided DEA with substantially more authority to regulate controlled substance manufacturers and distributors than retail dispensers such as medical professionals and retail pharmacies. Congress, acknowledging that registration is the cornerstone of the closed system of distribution, required DEA to find that manufacturer and distributor registrations are consistent with a specifically defined public interest and with U.S. international obligations as a prerequisite to granting such registrations.[29] In contrast, practitioners were entitled to a registration if they were authorized to handle controlled substances by the state in which they practiced. Furthermore, a practitioner's registration could be revoked only on the following three bases: conviction of a drug-related felony; revocation of a state license; or submission of a materially falsified application. There was also great disparity in the recordkeeping and security requirements applicable to the two groups, with manufacturers and distributors subject to the tighter

[16] It authorizes ''reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals.'' 21 U.S.C. 821.

[17] 70 FR 69474, November 16, 2005. See also 108 H. Rpt. 576, July 1, 2004.

[18] 61 FR 68624, December 30, 1996.

[19] 67 FR 51988, August 9, 2002.

[20] ''Review of the Drug Enforcement Administration's Control of the Diversion of Controlled Pharmaceuticals,'' I–2002–010, October 2002, *http://www.usdoj.gov/oig/reports/DEA/e0210/index.htm.*

[21] 68 FR 7728, February 18, 2003.

[22] 68 FR 58587, October 10, 2003. DEA published a correction to this final rule where the internal DEA computer system, Firebird, was identified as being solely funded through appropriations. The Firebird system costs are properly apportioned as a DCP cost as well as a non-DCP appropriations expense. 69 FR 34568, June 22, 2004.

[23] Public Law 108–447, Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 2005, signed into law on December 8, 2004.

[24] 70 FR 69474, November 16, 2005.

[25] ''Follow-Up Review of the Drug Enforcement Administration's Efforts to Control the Diversion of Controlled Pharmaceuticals,'' I–2006–004, July 2006, *http://www.usdoj.gov/oig/reports/DEA/e0604/final.pdf.*

[26] 71 FR 51105, August 29, 2006.

[27] ''Review of the Drug Enforcement Administration's Use of the Diversion Control Fee Account,'' I–2008–002, February 2008, *http://www.usdoj.gov/oig/reports/DEA/e0802/final.pdf.*

[28] Reorganization Plan No. 2 of 1973, 38 FR 18380 (July 2, 1973).

[29] 21 U.S.C. 823(a)–(e).

controls. This disparity in regulatory authority generated more regulatory oversight and, hence, compliance, at the manufacturer and distributor level than at the retail level. The limitations on DEA's statutory authority severely restricted its ability to regulate practitioners.

By 1977, all 197 DEA compliance investigators (now diversion investigators) were fully occupied monitoring approximately 3,300 controlled substance manufacturers, distributors, importers, exporters, and narcotic treatment programs, where large stocks of controlled substances and the potential for large-scale diversion were present.[30] At that time, 98 percent of DEA registrants were in the dispensing category, *i.e.,* physicians, dentists, veterinarians, retail pharmacies, hospitals, and teaching institutions.[31] In 1978, the Comptroller General issued a report to Congress that examined DEA's efforts to prevent diversion of controlled substances at the retail level, *i.e.,* by doctors and pharmacists.[32] The report explored the barriers to DEA's efforts to control retail diversion: inadequate statutory authority, weak regulatory requirements, and inadequate resources. One of the Comptroller General's recommendations to Congress was that Congress change DEA's role by authorizing DEA to exercise direct regulatory authority over retail level practitioners. This would have been a deviation from DEA's traditional enforcement role and would require significant legislative changes and manpower increases.

Shortly thereafter, many amendments to the CSA between 1984 and 1990 strengthened and expanded DEA's statutory authority. The Dangerous Drug Diversion Control Act of 1984 [33] provided DEA with new authority to deny or revoke a practitioner's DEA registration on the basis of specifically defined public interest grounds [34] and also provided DEA with emergency scheduling authority.[35] The Anti-Drug Abuse Act of 1986 established penalties for the manufacture and distribution of ''designer drugs.'' [36] The Anti-Drug Abuse Act of 1988 for the first time required recordkeeping and reporting by chemical distributors, importers, and exporters, and established penalties for illegal activities related to precursor and essential chemicals.[37] The Anabolic Steroids Control Act of 1990 brought steroids under the regulatory oversight and control of the DEA by placing certain anabolic steroids in schedule III of the CSA.[38] This Act required certain steroid manufacturers and distributors to register with DEA and brought anabolic steroids under the recordkeeping, reporting, security, prescribing, import, and export controls of the CSA.

As discussed above, the Domestic Chemical Diversion Control Act of 1993 amended the CSA to require manufacturers, distributors, importers, and exporters of List I chemicals obtain a registration from the DEA, thus greatly expanding the authority and activities of the DCP.

On October 17, 2000, Congress passed the Drug Addiction Treatment Act, permitting qualified physicians to treat narcotic dependence with certain schedule III through V narcotic controlled substances.[39] The Act waived the requirement for certain qualified physicians to obtain a separate DEA registration as a Narcotic Treatment Program. However, upon application, the DCP must issue such qualifying physicians an identification number for inclusion with the physician's DEA Certificate of Registration.[40] As a result, when a qualifying physician submits notice of his waiver pursuant to the Act, the DCP issues the physician a new DEA Certificate of Registration with the appropriate identification number.

Renamed from the Office of Compliance and Regulatory Affairs and then the Diversion Control Program, today, the DEA Office of Diversion Control administers the DCP.[41] As such, it is responsible for ensuring the availability of controlled substances and listed chemicals for legitimate uses in the United States while exercising controls to prevent the diversion of these substances and chemicals for illegal uses. The Office of Diversion Control maintains an overall geographic picture of the drug and chemical diversion and abuse problems to identify new trends or patterns in diversion and abuse. This enables the Office of Diversion Control to appropriately direct resources.

The DCP is executed by maintaining the closed system of distribution, regulating and controlling nearly 1.4 million DEA registrants,[42] and investigating activity related to the diversion of controlled substances and listed chemicals. The DCP's regulatory function is accomplished through routine regulatory inspections, by providing information and assistance to registrants, and by controlling and monitoring the manufacture, distribution, dispensing, import, and export of controlled substances and listed chemicals. The DCP's enforcement function is accomplished by identifying and investigating those persons or entities responsible for diverting controlled substances and listed chemicals from legitimate commerce. Violators are subject to administrative sanction, and civil and criminal prosecution.

To ensure accountability within the closed system of distribution, the DCP administers, maintains, controls, and oversees the DEA registration system.[43] This entails processing, reviewing, and, if necessary, investigating all applications for registration and reregistration, collecting fees, and, when appropriate, proposing to take administrative action on registrations or applications for registration, such as restriction, revocation, suspension, or denial of an application. Maintaining the DEA registration system requires coordination with state regulatory agencies and other federal agencies such as the Center for Substance Abuse Treatment.[44]

In addition, the DCP exercises statutory authority to determine the appropriate procedures necessary to the ordering and distribution of schedule I and II controlled substances.[45] This enables the DCP to monitor the flow of certain controlled substances from their point of manufacture through commercial distribution. It also monitors registrant compliance with

[30] GAO/GGD–78–22, March 10, 1978 at 3, 18.

[31] GAO/GGD–78–22 at 3.

[32] GAO/GGD–78–22.

[33] Part B—Diversion Control Amendments, Public Law 98–473, 98 Stat. 2070 (Oct. 12,1984).

[34] 21 U.S.C. 823(f), 824(a)(4).

[35] 21 U.S.C. 811(h) (The amendment provided for one-year emergency scheduling of a drug, the abuse of which constituted an ''imminent hazard to the public safety.'' The drug would remain in schedule I for up to one year, during which the normal scheduling procedures would proceed).

[36] Subtitle E—Controlled Substances Analogue Enforcement Act, Public Law 99–570, 100 Stat. 3207 (Oct. 27, 1986).

[37] Title VI, Subtitle A—Chemical Diversion and Chemical Trafficking Act of 1988, Public Law 100–690, 102 Stat. 4181 (Nov. 18, 1988).

[38] Public Law 101–647, 104 Stat. 4851 (Nov. 29, 1990).

[39] Public Law 106–310, 114 Stat. 1222 (Oct. 17, 2000).

[40] 21 U.S.C. 823(g)(2)(D)(ii).

[41] 28 CFR Part 0, Appendix to Subpart R.

[42] This represents the total registrant population. Approximately seven percent of the total registrant population consists of fee exempt registrants who are not included in the fee calculations presented herein. The registrant population grew at a rate of approximately 2.6 percent per year from 2007 to 2010.

[43] See 21 U.S.C. 822–25, 827–29, 831, 952–54, 956–58, 971.

[44] See 21 U.S.C. 823(g).

[45] 21 U.S.C. 828.

electronic reporting systems such as the Automation of Reports and Consolidated Orders System (ARCOS), and manages the cataloging of controlled substances based on the National Drug Code (NDC) system, the Drug/Ingredient file, Trade Name file, DEA Generic Name file and U.N. Code/Name file. Other oversight activities include maintaining the Controlled Substance Ordering System (CSOS), monitoring CSOS activities through the initial certification process, and periodic auditing of registrant systems. CSOS provides registrants with an electronic platform that reduces costs to registrants while ensuring a more efficient and effective ordering process.

One of the primary functions of the DCP is to ensure that registrants are in compliance with the safeguards inherent in the CSA. This proactive approach is designed to identify and prevent the large scale diversion of controlled substances and listed chemicals into the illicit market.

Registrant compliance is determined primarily through the conduct of pre-registration, scheduled, and complaint investigations. DCP regulatory activities have an inherent deterrent function, and they are designed to ensure that those businesses and individuals registered with DEA to handle controlled substances or listed chemicals have sufficient measures in place to prevent the diversion of these substances. These investigations also help registrants understand and comply with the CSA [46] and identify those registrants who violate the CSA and implementing regulations. Preregistration investigations reduce the possibility of registering unauthorized subjects, ensure that the means to prevent diversion are in place, and determine whether registration is consistent with the public interest.

Manufacturers, distributors, reverse distributors, importers, exporters, and narcotic treatment programs pose the greatest potential for large-scale diversion. Accordingly, scheduled investigations of these non-practitioner registrants are a major priority of the DCP. These investigations serve as a deterrent to diversion through the continuous evaluation of registrants' recordkeeping procedures, security, and overall adherence to the CSA. Emphasis during these investigations is given to verifying inventory, records and recordkeeping procedures, a review of customers and their ordering patterns, and security protocols.

The DCP is constantly evaluating diversion trends, patterns, routes, and techniques in order to appropriately focus its regulatory, civil and criminal enforcement activities. This is accomplished in many ways, including collecting and analyzing targeting and analysis data, conducting diversion threat assessments, working with state and local medical and pharmacy boards and state and local law enforcement agencies, and developing intelligence.

The DCP conducts criminal enforcement activities primarily through Tactical Diversion Squads (TDSs). TDSs are comprised of many DEA specialties, including DEA Special Agents and Diversion Investigators, and state and local counterparts such as state law enforcement and regulatory personnel. These groups combine varied resources and expertise in order to investigate, disrupt, and dismantle those individuals or organizations involved in diversion schemes (*e.g.,* doctor shoppers, prescription forgers, and prevalent retail-level violators).

In fulfillment of its function to control the import and export of controlled substances and listed chemicals, the DCP issues import and export registrations and permits, and monitors declared imports, exports, and transshipments of these substances. The DCP must ensure that all imports and exports of controlled substances and listed chemicals meet the requirements of the CSA. As such, the DCP maintains and monitors many electronic reporting systems, such as the Chemical Handlers Enforcement Management System (CHEMS), which provides information on entities manufacturing, distributing, and exporting and importing regulated chemicals, and encapsulating and tableting machines.[47]

The DCP's authority over controlled substances and listed chemicals requires its support of domestic and foreign investigations of these substances. As such, the DCP serves as the Competent National Authority (CNA) for the United States vis-à-vis precursor chemicals and international treaties. The DCP works with the international community to identify and seize international shipments of precursor and essential chemicals destined for clandestine laboratories for use in manufacturing controlled substances. The DCP also works on a bilateral basis to urge international partners to take effective action, in cooperation with chemical companies, to prevent the diversion of precursor chemicals from legitimate trade. In addition to its other oversight and regulatory responsibilities in this area,[48] the DCP reviews and approves importation requests for List I chemicals and reviews chemical registrant submissions.

Not only does the DCP exercise authority and control over the registrant population, the DCP exercises authority over the classification of substances.[49] This is accomplished by evaluating drugs and chemicals to determine whether these substances are being abused or potentially involved in illicit traffic, and to evaluate whether any substances should be scheduled as a controlled substance. This requires the collection and analysis of data from various sources across the United States. These evaluations are used by DEA as a basis for developing appropriate drug control policies, determining the status of controlled, excluded, or exempted drugs and drug products, and supporting United States initiatives in international forums.

Another crucial function of the DCP is the annual establishment of quotas for all schedule I and II controlled substances and the List I chemicals pseudoephedrine, ephedrine, and phenylpropanolimine.[50] Along with this responsibility, the DCP also provides scientific support for policy guidance and training, expert witness testimony and conference presentations. The DCP fulfills U.S. treaty obligations pertaining to the CSA, including the preparation of periodic reports for submission to the United Nations as mandated by U.S. international drug control treaty obligations on the manufacture and distribution of narcotic and psychotropic substances as well as determining the anticipated future needs for narcotic and psychotropic substances.

In the execution of its regulatory functions, the DCP reviews proposed legislation pertinent to the availability of controlled substances and listed chemicals for legitimate uses in the United States and controls to prevent the diversion of these substances and chemicals. The DCP constantly reviews its own regulations and develops and implements regulations designed to enhance DEA's diversion control efforts and to implement newly enacted legislation.

All DCP regulatory activities require education and outreach to ensure appreciation of and compliance with the CSA and applicable policies and regulations. Providing such guidance is also necessary to reduce the likelihood of diversion from legitimate commerce

[46] See 21 U.S.C. 827 (records and reports of registrants).

[47] See 21 U.S.C. 830, 957–58.

[48] 21 U.S.C. 830; 21 CFR Parts 1310, 1313, 1314.

[49] 21 U.S.C. 811–814.

[50] 21 U.S.C. 826.

to illegitimate purposes. One aspect of the DCP's outreach efforts is establishing and maintaining liaison and working relationships with other federal agencies, as well as foreign, state and local governments, and the regulated community. Other efforts include developing and maintaining manuals and other publications; organizing and conducting national conferences on current issues, policies, and initiatives; and providing guidance to the general public.

Changes in the Controlled Substances Act Since the Last Fee Rule in 2006

Since implementation of the last fee rule in 2006, Congress has made several changes to the CSA that impact how the DCP operates to control controlled substances and listed chemicals and register those individuals who wish to handle these substances. Additionally, the nature of the diversion control problem has increased in size and complexity. These statutory changes, in addition to the changing scope of diversion, required the DCP to implement program and organizational changes. These changes impact DEA beyond its DCP and thus are not necessarily funded through the DCFA.

Methamphetamine Abuse

Congress has enacted a series of legislative initiatives to combat the rise in methamphetamine abuse. Methamphetamine is a highly addictive drug with potent central nervous system stimulant properties. Control as a schedule II substance and the removal of methamphetamine injectable formulations from the United States market, combined with a better appreciation for its high abuse potential, led to a drastic reduction in the abuse of this drug in 1971. However, a resurgence of methamphetamine abuse occurred in the 1980s and it is currently considered a major drug of abuse. The widespread availability of methamphetamine today is largely fueled by illicit production in large and small clandestine laboratories throughout the United States and illegal production and importation from Mexico.

Methamphetamine is abused for its stimulant and euphoric effects. High-dose chronic abuse has been associated with irritability, tremors, convulsions, anxiety, paranoia, and neurotoxic effects that cause damage to neurons and blood vessels. Aggressive and violent behavior by users, often directed at spouses and children, pose a significant risk to those individuals in contact with methamphetamine addicts. Death has resulted from extreme anorexia, hyperthermia, convulsions, and cardiovascular collapse (including stroke and heart attacks).

The methods used to manufacture methamphetamine are directly impacted by the availability of precursor chemicals and ease of synthesis. Currently, methamphetamine is primarily produced domestically by utilizing diverted pseudoephedrine combination products that are sold at retail and, to a lesser extent, ephedrine products. The manufacture of this drug poses a significant threat to the public health and safety due to the toxic waste and the risk of fire and explosion associated with the clandestine laboratories that manufacture the drug, and the fact that many individuals, including children, are at risk of exposure to toxic chemicals and waste generated during the manufacturing process.

A Rand Corporation study reported that the 2005 cost to the U.S. for overall methamphetamine-related activities including crime and criminal justice costs, health care costs, endangered children put in foster care, the loss of productivity, drug treatment, and injuries and death at methamphetamine laboratories was estimated at $23.4 billion.[51] Similarly, the Vanderbilt University Medical Center in Tennessee reported spending $325 million between July 2009 and June 2010 for uncompensated medical care at its Burn Center.[52] One-third of its patients were burned from exploding methamphetamine laboratories.[53]

In 2010, there were in excess of 10,000 clandestine laboratory incidents in the United States related to the manufacture of methamphetamine.[54] Coinciding with the upward trend in methamphetamine laboratory seizures is an alarming upward trend in methamphetamine abusers. According to the 2009 National Survey on Drug Use and Health, between 2008 and 2009 there was a 60 percent increase in the number of past month users of methamphetamine.[55] This comes after a significant reduction of past month users between 2006 and 2008, a period when the U.S. was experiencing decreases in the number of methamphetamine laboratory seizures.

The Combat Methamphetamine Epidemic Act of 2005 (CMEA) was enacted on March 9, 2006. 21 U.S.C. 971. It requires retailers of non-prescription products containing pseudoephedrine, ephedrine and phenylpropanolamine to place these products behind the counter or in a locked cabinet. Consumers must show identification and sign a logbook for each purchase. An interim final rule was published to implement section 716 of the Act and require additional reporting for import, export, and international transactions involving all List I and List II chemicals.[56] On October 14, 2008, Congress enacted the Methamphetamine Production Prevention Act of 2008, which amended the CSA to require the sellers of methamphetamine precursor chemicals to record information about sales and purchasers in electronic logbooks or bound paper books. 21 U.S.C. 830(e)(1)(A)(iv)–(vi). Further, on October 12, 2010, the Combat Methamphetamine Enhancement Act of 2010 (MEA) was enacted, establishing new requirements for mail-order distributors of scheduled listed chemical products (Pub. L. 111–268).

Internet Diversion

On October 15, 2008, Congress amended the CSA with enactment of the Ryan Haight Online Pharmacy Consumer Protection Act of 2008. DEA amended its regulations accordingly by interim final rule to prevent the illegal distribution and dispensing of controlled substances by means of the Internet.[57]

Disposal of Controlled Substances

Lastly, on October 12, 2010, Congress amended the CSA with the enactment of the Secure and Responsible Drug Disposal Act of 2010 (Pub. L. 111–273). Pursuant to this amendment, DEA must promulgate new regulations that allow ultimate users and long-term care facilities to dispose of controlled substances through a variety of methods of collection and disposal. DEA is in the process of drafting these regulations.

[51] Nancy Nicosia et al., ''The Economic Cost of Methamphetamine Use in the United States, 2005,'' RAND Corporation, 2009.

[52] John Brannon, ''Meth-related Burns a Growing Part of Uncompensated Care at Vanderbilt,'' *Messenger,* August 12, 2010, *http://www.nwtntoday.com/news.php?viewstory=44736.*

[53] *Id.*

[54] The El Paso Intelligence Center (EPIC) has not validated this data as of the date of this Notice of Proposed Rulemaking, however, all indications are that there were approximately 12,000 such clandestine laboratory incidents in 2010.

[55] Substance Abuse and Mental Health Services Administration (SAMHSA), ''Results from the 2009 National Survey on Drug Use and Health: Volume I, Summary of National Findings,'' Office of Applied Studies, 2010 (NSDUH Series H–38A, HHS Publication No. SMA 10–4856), *http://www.oas.samhsa.gov/nsduh/2k9NSDUH/2k9Results.pdf.*

[56] 72 FR 17401, April 9, 2007. Implementation was delayed an additional 30 days until June 8, 2007, to allow industry more time to fully comply with the new provisions. 72 FR 28601, May 22, 2007.

[57] 74 FR 15596, April 6, 2009.

Increased Need for Diversion Control

Coincident with the above statutory changes, the increased misuse of controlled substances and listed chemicals highlights the urgency of and need for diversion control. The National Survey on Drug Use and Health (NSDUH) (formerly the National Household Survey on Drug Abuse) is an annual survey of the civilian, non-institutionalized, population of the United States aged 12 or older. The survey is conducted by the Department of Health and Human Services Office of Applied Studies, Substance Abuse and Mental Health Services Administration. Findings from the 2009 NSDUH [58] estimate that 7.0 million persons used prescription-type psychotherapeutic drugs—pain relievers, anti-anxiety medications, stimulants, and sedatives—non-medically in the previous month. This represents 2.8 percent of the population aged 12 or older. These estimates were 13 percent higher than those from the 2008 Survey. From 2002 to 2009, there was an increase in the rate of current non-medical use of prescription-type drugs (from 5.5 to 6.3 percent) among young adults aged 18 to 25, driven primarily by an increase in pain reliever misuse. In 2009, an estimated 3.1 million persons aged 12 or older used an illicit drug for the first time within the past twelve months. Of those, an estimated 28.7 percent initiated with psychotherapeutics, including 17.1 percent with pain relievers, 8.6 percent with tranquilizers, 2.0 percent with stimulants, and 1.0 percent with sedatives.

Abuse of prescription controlled substances among teenagers is second only to abuse of illegal marijuana. The 2010 ''Monitoring the Future'' survey of teenagers found that 8 percent of high school seniors reported non-medical use of Vicodin, and 5.1 percent reported non-medical use of OxyContin, both scheduled controlled substances (painkillers).[59] This reported abuse is consistent with reports by high-school students of increased non-medical use of painkillers in the past five years.[60] As reported by The Partnership at Drugfree.org (formerly the Partnership for a Drug-Free America) from its 2009 survey, more than 50 percent of teenagers (grades 9–12) believe that prescription drugs are easier to obtain than illegal drugs. There is a concern that young people may perceive prescription and/or over-the-counter drugs as ''safer'' than illegal drugs because of their intended, legitimate medical use.[61]

The consequences of prescription drug abuse are seen in the data collected by the Substance Abuse and Mental Health Services Administration (SAMHSA) on emergency room visits. According to their latest data, ''Drug Abuse Warning Network (DAWN), 2009: National Estimates of Drug-Related Emergency Department Visits,'' SAMHSA estimates that of the 4.6 million emergency department visits in 2009 associated with drug use, about 1.2 million visits involved the non-medical use of pharmaceuticals.[62] Emergency department visits involving non-medical use of pharmaceuticals (misuse or abuse) almost doubled between 2004 and 2009 from 627,291 in 2004 to 1,244,679 visits in 2009 (98.4 percent increase).[63] About half of the 2009 emergency department visits related to abuse or misuse of pharmaceuticals involved painkillers and more than one-third involved drugs to treat insomnia and anxiety.[64]

According to the Centers for Disease Control, overdose deaths caused by prescription drugs is the second leading cause of accidental death in the United States among young people.[65] The Florida Medical Examiner's Commission reported that between 2005 and 2009 the number of deaths in Florida associated with oxycodone rose 248.5 percent.[66]

Operational Changes of the DCP Since 2006

As discussed above, the OIG reviewed DEA's efforts to control the diversion of controlled pharmaceuticals and in 2006 recommended that DEA incorporate law enforcement support and law enforcement authority to assist the DCP in performing criminal investigations that inherently require law enforcement authority, *e.g.,* the authority to arrest, execute search warrants, and conduct surveillance and undercover activities. As discussed above, DEA expanded the use of Tactical Diversion Squads comprised of many DEA specialized resources such as Special Agents, Diversion Investigators and state and local law enforcement and regulatory personnel to more effectively investigate, disrupt, and dismantle those individuals or organizations involved in diversion schemes. Since the last fee calculation, DEA added 161 Special Agent positions to the DCP. The majority of these positions were allocated to the DCP Tactical Diversion Squads. By 2009, there were 37 operational Tactical Diversion Squads across the United States and DEA is committed to increasing this number within this fee cycle. These squads are designed to address controlled substance diversion in consonance with the traditional Diversion Investigator regulatory efforts.

DEA made other organizational changes to incorporate in the DCP those units responsible for diversion control operations. To ensure the proper utilization of DCFA resources, DEA created a Diversion Value and Analysis Unit in the Diversion Planning and Resources Section to identify and prevent duplication of effort, conduct cost benefit analyses, and develop, oversee, and review acquisitions.

In 2009, the DCP intensified its regulatory activities to help the registrant population better comply with the CSA and to identify those registrants who violated the CSA and implementing regulations. The modifications included increasing investigation cycles as well as depth of review. Scheduled investigations were increased from every five years to every three years for controlled substance manufacturers, bulk manufacturers, distributors, reverse distributors, importers, exporters, bulk importers, and Narcotic Treatment Programs; scheduled investigations for chemical manufacturers, bulk manufacturers, distributors, importers, exporters, and bulk importers were increased from two

[58] SAMHSA, ''Results from the 2009 National Survey on Drug Use and Health: Volume I, Summary of National Findings,'' Office of Applied Studies, 2010 (NSDUH Series H–38A, HHS Publication No. SMA 10–4856), *http://www.oas.samhsa.gov/nsduh/2k9NSDUH/2k9Results.pdf.*

[59] Lloyd D. Johnson, PhD, *et al,* ''Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2010,'' Institute for Social Research, The University of Michigan, 2011.

[60] Lloyd D. Johnston, PhD, *et al,* ''Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2009,'' National Institute of Drug Abuse, 2010 (NIH Publication No. 10–7583).

[61] Partnership for a Drug-Free America and MetLife Foundation, ''2009 Parents and Teens Attitude Tracking Report,'' March 2, 2010.

[62] SAMHSA, Highlights of the 2009 Drug Abuse Warning Network (DAWN) Findings on Drug-Related Emergency Department Visits, Center for Behavioral Health Statistics and Quality, The DAWN Report, December 28, 2010.

[63] *Id.* at 4.

[64] *Id.* at 3.

[65] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (WISQARS), ''20 Leading Causes of Death, United States, 2007, All Races, Both Sexes.''

[66] Florida Dep't of Law Enforcement, Medical Examiners Commission, ''Drugs Identified in Deceased Persons by Florida Medical Examiners 2005 Report,'' at 15 (May 2006) and Florida Dep't of Law Enforcement, Medical Examiners Commission, ''Drugs Identified in Deceased Persons by Florida Medical Examiners 2009 Report,'' at 17 (June 2010).

per Diversion Investigator per year to all such registrants every three years. Investigations of Office Based Opioid Treatment/Buprenorphine Physicians, currently referred to as DATA–Waived Practitioners, were increased from one such registrant per Diversion Group per year to all such registrants per Diversion Group every five years. Researchers were increased from only being investigated on a complaint basis to two schedule I researchers plus two schedule II–V researchers per Diversion Group per year. Finally, analytical laboratories, previously not subject to scheduled investigations, were increased to include analytical laboratories affiliated with manufacturers being investigated every three years in tandem with the affiliated manufacturer's scheduled investigation.

In an effort to enhance the DCP's enforcement capabilities, to reduce costs, to streamline the regulatory compliance process for registrants, and to keep the public informed, the DCP made several improvements to its information technology capabilities. Underperforming contracts were terminated and a new unit was created within the DCP to manage all information technology projects exclusively for the DCP. This resulted in significant cost reductions and improved program efficiency and responsiveness to both registrants and the public.

The new unit successfully made cost-saving improvements to the technology infrastructure of the Controlled Substances Ordering System (CSOS) and streamlined the application process for registrants by implementing an online system for new applications and renewal applications for registrations. The DCP is also enhancing the communications system to allow interconnectivity between many different systems. The DCP is continually working to improve the quality and accessibility of its reporting systems, such as the Automated Reports and Consolidated Orders System (ARCOS) and Drug Theft/Loss (DTL). These two programs generate timely, accurate, and actionable data that improve the DCP's enforcement and control efforts as well as providing for a more efficient means by which registrants may submit such reports.

DEA's Interim Final Rule on Electronic Prescriptions for Controlled Substances (EPCS), effective June 1, 2010, will enhance diversion control as a means to protect against fraudulent prescriptions and will streamline the recordkeeping process for pharmacies (75 FR 16236, March 31, 2010). This rule provides practitioners with the option to electronically sign and transmit prescriptions for controlled substances. Likewise, with this new rule, pharmacies are permitted to receive and archive electronic prescriptions. The DCP is working to develop and implement EPCS.

As part of the requirements of the Combat Methamphetamine Epidemic Act of 2005 (CMEA), regulated sellers of scheduled listed chemical products are required to self-certify annually. Regulated sellers can self-certify and find training manuals on the Diversion Control Program Web site.

Need for a New Fee Calculation

DEA last adjusted the fee schedule in August 2006, however, collections did not begin until FY 2007.[67] This fee schedule was intended to be sufficient to cover the ''full costs'' of the DCP for FY 2006 through FY 2008 or October 1, 2005 through September 30, 2008. The DCP program has continued to operate under this fee schedule due to cost savings through reorganization and modernization efforts and by inadvertently excluding certain costs to the DCP. As indicated by the above-referenced 2008 OIG report, additional salary and other costs attributable to diversion control activities need to be incorporated into the DCP. In addition, the mission of the DCP has been expanded by Congress and by the need to address an explosion in the abuse of prescription drugs that seriously impact public health and safety. The National Drug Control Strategy is focused on all aspects of the problem—supply, demand, and treatment.

The Office of Diversion Control at DEA is focused on the supply side of this serious threat to the public health and safety. At the end of FY 2008, a reorganization within DEA expanded the use of Tactical Diversion Squads across the country to allow Diversion Investigators to focus their expertise on regulatory oversight and the deterrent effect of increased regulatory investigations. Tactical Diversion Squads incorporate the criminal investigative skills and statutory authority of Special Agents and state and local Task Force Officers to bring to the criminal justice system those organizations and individuals who violate the CSA by diverting controlled substances and listed chemicals into the illicit market. Diversion Investigators are a key asset to Tactical Diversion Squads because they lend their keen knowledge of the closed system of distribution to the Tactical Diversion Squads. Diversion Investigators' familiarity and detailed understanding of the closed system of distribution require, however, that they continue to lead the regulatory oversight of DEA registrants. DCP costs increase with an expanded number and use of Tactical Diversion Squads.

Due to the alarming rise in prescription drug abuse, as well as an increase in the production and use of chemicals that are harmful if abused, the DCP has increased scheduled investigations of registrants and drug and chemical scheduling initiatives, as well as other modifications in its control efforts. The DCP continues to draw technical expertise from Diversion Investigators, and the DCP has incorporated greater numbers of Special Agents, Chemists, Information Technology Specialists, Attorneys, Intelligence Research Specialists, and State and Local personnel. It is essential to utilize a diverse skilled workforce and constantly review and modify all aspects of the DCP to successfully execute the National Drug Control Strategy and effectively prevent, detect, and eliminate the diversion of controlled substances and listed chemicals into the illicit market while ensuring a sufficient supply of these substances for legitimate medical, scientific, research, and industrial purposes.

DEA has been and will continue to be fiscally responsible and will remain vigilant towards identifying methods to improve efficiencies or identifying other cost saving measures. As discussed above, however, a new fee calculation is needed. Without an adjustment in the annual registration fees, DEA will be unable to continue current operations and will be in violation of the statutory mandate that fees charged ''shall be set at a level that ensures the recovery of the full costs of operating the various aspects of [the diversion control program].'' 21 U.S.C. 886a(1)(C). For example, collections under the current fee schedule will require the DCP to significantly cut existing and planned DCP operations vital to its mission. DEA relies on the DCP to maintain the integrity of the closed system for controlled substances and listed chemicals, particularly at this time of dramatic increases in abuse and diversion.

DEA must determine the proper scope of the DCP, the projected costs for the program, a fee calculation methodology, and a new fee schedule that recovers the costs of the DCP and sets reasonable fees for the registration and control of manufacturers, distributors, importers, exporters and dispensers of controlled substances and listed chemicals.

[67] 71 FR 50115, August 29, 2006.

Fee Calculation

DEA is delegated the task of determining the details of fulfilling the statutory requirements of ensuring the recovery of the full costs of operating the diversion control program (DCP) as described above, while charging registrants participating in the closed system of distribution reasonable fees relating to the registration and control ''of the manufacture, distribution, dispensing'' and ''of importers and exporters'' of controlled substances and listed chemicals. For the DCP to have funds to function, DEA must determine, in advance of actual expenditures, a reasonable fee to be charged. As a result, historical data and projections must be used rather than actual, current costs to project the annual costs of the DCP. Additionally, a reasonable fee must be calculated that will fully recover the costs of the DCP based on the variability over time of the number of registrants in the different categories of registration, *e.g.,* manufacturers, distributors, importers, exporters, reverse distributors, practitioners, and individual researchers. Since the fees collected must be available to fully fund the DCFA and to reimburse DEA for expenses incurred in the operation of the DCP (21 U.S.C. 886a), there must always be more collected than is actually spent to avoid running a deficit and being in violation of federal fiscal law.[68] In operating the DCP, DEA must be prepared for changes in investigative priorities, diversion trends, and emerging drugs or chemicals posing new threats to the public health and safety. By definition, it is an inexact effort. Given that fact, the agency must select a single methodology that it consistently follows throughout any given fee cycle.

Current options to calculate fees are also limited by the feasibility and practicability of tracking and allocating detailed costs, although the agency continues to improve its capabilities on this front. DEA has made progress through reorganization and there is recognition throughout the agency of the need to separate DCP costs from other agency costs. DEA is in the process of testing a system where personnel would account for their daily hours according to whether their time is spent on DCP or other DEA mission activities. Part of the difficulty stems from the fact that the mission of DEA involves investigations and actions that may involve poly-drug organizations or that may start out as one type of investigation and result in another, based upon the way the facts develop.

To date, tracking costs within the DCP according to registrant categories or within a given registrant category has not been feasible or cost-efficient. Such detailed cost attribution may or may not be feasible in the future. However, Congress recognized that the costs of the registration and control of controlled substances and listed chemicals are not properly attributed on a per registrant basis when it differentiated among the categories of registrants for purposes of calculating a reasonable fee, e.g., manufacturers, distributors, importers, exporters, and dispensers.[69] Thus, the methodology used to calculate fees needs to distinguish among these categories. The historical fee calculation based on a weighted ratio of 12.5 for manufacturers, 6.25 for distributors (including importers and exporters), and 1 for dispensers was used for many years prior to and when Congress established the DCFA and has been the method used to date.

As discussed in more detail below, DEA considered several methodologies to calculate the new fee. One methodology considered was a flat fee that takes projected DCP costs and divides it among all registrants regardless of their business activity/registrant group. On its face, this would not result in a ''reasonable'' fee for a large portion of registrants given the disparity in economic size among registrants and the different levels of control needed among the registrant categories. Registrants range from multi-billion dollar manufacturers in possession of large quantities of controlled substances or listed chemicals to canine handlers in possession of small amounts of controlled substances. Thus, the inspection, investigation and oversight costs associated with a manufacturer are much greater than for a canine handler. A flat fee methodology has been rejected since the inception of a fee.

DEA considered another fee calculation methodology called the Past-Based Option. This method is based on the principle that the cost of the DCP should be shared equally among all paying registrants, except for the cost of scheduled or regularly planned investigations and the preregistration investigation costs to determine eligibility of registrant applicants, as these additional costs vary by registrant category. Rather, these historical costs should be allocated to the registrant group receiving the scheduled and preregistration investigations. Since the direct labor costs of scheduled and preregistration investigations are historically around three percent of total DCP costs, this methodology results in concerns similar to the flat fee as the base amount is nearly as great as the flat fee amount.

DEA considered another methodology called the Future-Based Option, which takes the same approach described in the preceding paragraph, but the costs of scheduled investigations are derived from planned work, not historical work hours. This methodology results in large differences in fees among registrant groups and has been rejected by DEA as not a ''reasonable'' charge.

Since the inception of the fee, the agency has selected a weighted-ratio method to determine a reasonable fee for each category of registrants. Under this method, registrants are assigned to a business activity or category (*e.g.,* researcher, practitioner, distributor, manufacturer, *etc.*) based on the statutory fee categories. Then a base fee rate is established according to the annual estimated costs of the DCP. A projected population is calculated for each category or business activity. That figure is then multiplied by a ratio of 1.0 for researchers, 3.0 for practitioners (for administrative convenience the fee is collected every three years for practitioners), 6.25 for distributors and 12.5 for manufacturers. By utilizing these different ratios, the agency recognizes the statutory need to charge reasonable fees relating to the registration and control of the manufacture, distribution, dispensing, importation and exportation of controlled substances and listed chemicals. As historical costs support, inspections, scheduled investigations and other control and monitoring costs are greatest for manufacturers. This is because there is an increased risk associated with the quantity of controlled substances and/or chemicals located at this point in the closed system. All of the individual business activity figures are then added together to form a weighted sum for one projected year. This process is performed for two more years using future projected registrant populations for those years multiplied by the ratio. The annual figures for these three years are then added together and divided into the total budget requirements for that three-year period to arrive at the base rate fee to be charged to each category of registrant.

DEA continues to review possible methodologies as technology continues to afford increased tracking and

[68] In general, no officer or employee of the United States Government may make or authorize an expenditure or obligation in excess of an amount available in an appropriation or fund. 31 U.S.C. 1341.

[69] 21 U.S.C. 886a(2)(B).

allocation of specific costs. However, at this time, DEA has determined that it is both practicable and reasonable to continue to apply the weighted-ratio methodology. Consistent with the statutory direction to charge reasonable fees relating to the registration and control of the manufacture of controlled substances and listed chemicals and the associated oversight costs, the 12.5 ratio is applied to the manufacturing registrant group. At 50 percent of that ratio is the 6.25 ratio which applies to the ''distribution'' of controlled substances or the distributor registrant group. Likewise, ''dispensing'' has the largest number of registrants, but with relatively low oversight costs and a relatively small quantity of controlled substances or listed chemicals within their physical possession. The base fee or the 1 ratio is charged for those dispensing or individuals registered to do research or other such activities that use the substance and create limited vulnerability to the closed system, and thus require less control in protecting the closed system. The practitioner fee is the base fee on an annual basis but is collected every three years for administrative convenience.

Thus, the current fees, some of which are paid annually and some of which are paid every three years, range from $184 for ratio 1 to $2,293 for ratio 12.5 depending upon the particular registrant category. Specifically, practitioners, mid-level practitioners, dispensers, researchers, and narcotic treatment programs pay an annual registration fee of $184. For administrative convenience for both the collection and the payment, practitioners pay a combined registration fee of $551 every three years. Distributors, importers and exporters pay an annual fee of $1,147 and manufacturers pay an annual fee of $2,293. 21 CFR 1301.13 and 1309.11.

Projected Costs for the Diversion Control Program

In calculating fees to recover the mandated full costs of operating the DCP, DEA estimates the costs of operating the DCP for the next three fiscal years.[70] To develop the DCFA budget request estimates for FY 2012, FY 2013 and FY 2014, DEA compiles: (1) The DCFA Budget Request for Fiscal Year (FY) 2011, which forms a base spending level for the current level of service, (2) the estimated additional required funds for FY 2012, FY 2013 and FY 2014, and (3) the required annual $15 million transfer to the United States Treasury as mandated by the CSA (21 U.S.C. 886a). The following paragraphs explain the annual revenue calculations and how the total amount to be collected for the FY 2012–2014 period was calculated. In developing this figure, DEA begins with annual projected DCP obligations, including payroll, operational expenses and necessary equipment. The DCP budget has increased due to inflationary adjustments for rent and payroll and to increase staffing resources that support the regulatory and law enforcement activities of the program. The fees have not been adjusted to reflect these factors as they last covered the time period of FY 2006–2008. Specific details on the DCP budget are available in the annual President's Budget Submission and supplemental budget justification documents provided to Congress.[71]

Total obligations for the DCP have increased from FY 2007 to FY 2010 by approximately 49 percent. For the FY 2006–2008 period, payroll expenses (staff compensation and benefits) composed the largest component of DCP costs at 55.7 to 57.6 percent per year. Between the period of FY 2006 and FY 2010, payroll constituted an average of 56.7 percent of DCP expenses. Operating expenses and capital expenditures made up the remainder of DCP costs. Operating expenses (an average of 39.3 percent for the FY 2006–2010 period) include daily operation costs such as purchase of evidence or payment for information as part of investigations, travel, and non-equipment purchases. Capital expenditures, including equipment and furniture purchases, capital leases, and land/structure improvements and purchases, averaged 4.0 percent during this same period.

For the FY 2012–2014 period covered by this rulemaking, the overall breakdown of DCP major cost categories does not depart significantly from previous years in terms of *percent* of budget; however, total budgets for each of these major cost categories do increase to reflect additional costs in each of these categories.

In addition to the budget for each of the fiscal years, the cost components outlined below are also considered in determining required registration fee collections.

Recoveries From Money Not Spent as Planned (Deobligation of Prior Year Obligations)

At times, DEA enters into an obligation to make a purchase of a product or service that is not delivered immediately, such as in a multi-year contract. Changes in obligations can occur for a variety of reasons, *i.e.,* changes in planned operations, delays in staffing, implementation of cost savings, changes in vendor capabilities, etc. When DEA does not expend its obligation, the ''deobligated'' funds are ''recovered'' and the funds become available for DCP use. Based on historical trends and for purposes of calculating the fee levels, the recovery from deobligation of prior year obligations is estimated at $10 million per year.

Payment to Treasury

In the 1993 appropriations for DEA, Congress determined that the DCP would be fully funded by registration fees and no longer by appropriations.[72] Congress established the DCFA as a separate account of the Treasury to ''ensure the recovery of the full costs of operating the various aspects of [the Diversion Control Program]'' by those participating in the closed system established by the CSA. 21 U.S.C. 886a(1)(C). Fees collected are deposited into a separate Treasury account. Each fiscal year, the first $15 million is transferred to the Treasury and is not available for use by the DCP. Therefore, DEA needs to collect an additional $15 million per year beyond estimated costs for payment to the Treasury.

Operational Continuity Fund (OCF)

DEA maintains an operational continuity fund (OCF) based on the need to maintain DCP operations during historically low (or negative) collection periods (*e.g.,* the first quarter of a new fiscal year when the first $15 million collected is transferred to Treasury). Monthly collections and obligations fluctuate throughout the year. There are times when obligations (spending) exceed collections. This can happen consecutively for several months. Therefore, an operational continuity fund is maintained in order to avoid operational disruptions due to these fluctuations and monthly differences in collections and obligations (spending). Using statistical analysis of the historical fluctuations between amounts collected and amounts obligated, DEA has determined that seven percent of the projected obligations is normally adequate to avoid operational disruptions. The amount required to bring the operational continuity fund

[70] See ''Proposed New Registrant Fee Schedule Calculations'' in this rulemaking docket found at *http://www.regulations.gov.*

[71] See this rulemaking docket found at *http://www.regulations.gov.*

[72] Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1993, Public Law 102–395, codified in relevant part at 21 U.S.C. 886a.

balance to the $15 million plus seven percent level is added to projected costs.

The increase in OCF balance for FY 2012, FY 2013, and FY 2014 are $6,452,395, $1,067,428, and $800,291 respectively.

TABLE 1—INCREASE IN OPERATIONAL CONTINUITY FUND BALANCE FY 2012–2014

	FY 2012	FY 2013	FY 2014
Budget	$321,990,000	$356,582,322	$371,831,295
Target OCF ($15M + 7%)	39,960,763	41,028,191	41,828,482
Beginning OCF balance	*33,508,367*	*39,960,763*	*41,028,191*
Increase in OCF balance	6,452,395	1,067,428	800,291

Combat Methamphetamine Act of 2005 (CMEA) Collections

Under CMEA, DEA collects a self-certification fee for regulated sellers of scheduled listed chemical products, which is included as part of the total collections. The fee is waived for any person holding a current DEA registration in good standing such as a pharmacy to dispense controlled substances. DEA has observed an approximately 15 percent decline in self-certifications from FY 2008 to FY 2010 and anticipates that the decline will continue through FY 2014. The self-certification fee is $21. CMEA self-certification fee collection estimates for FY 2012, FY 2013, and FY 2014 for purposes of calculating the fee levels are $173,040, $146,853, and $124,635, respectively.

TABLE 2—CMEA COLLECTIONS FY 2012–2014

	FY 2012	FY 2013	FY 2014
Number of paying self-certifications	8,240	6,993	5,935
Fee	$21	$21	$21
CMEA collection estimate	$173,040	$146,853	$124,635

Other Collections

DEA also derives revenue from the sale/salvage of official government vehicles dedicated to DCP use. DEA's estimate for other collections is $307,153 per year. This is the actual amount for FY 2010.

Estimated Total Required Collections

Based on these figures, DEA calculated the total amount required to be collected for the FY 2012–2014 period for purposes of calculating the fee levels as follows:

Required registration fee collections for FY 2012 are $332,962,203. This figure includes the budget of $321,990,000, net of $10 million in recoveries, plus $15 million for transfer to Treasury, plus $6,452,395 for increase in OCF balance, net of $173,040 in CMEA self-certification collections, and net of $307,153 in other collections.

Required registration fee collections for FY 2013 are $362,195,745. This figure includes the budget of $356,582,322, net of $10 million in recoveries, plus $15 million for transfer to Treasury, plus $1,067,428 for increase in OCF balance, net of $146,853 in CMEA self-certification collections, and net of $307,153 in other collections.

Required registration fee collections for FY 2014 are $377,199,798. This figure includes the budget of $371,831,295, net of $10 million in recoveries, plus $15 million for transfer to Treasury, plus $800,291 for increase in OCF balance, net of $124,635 in CMEA self-certification collections, and net of $307,153 in other collections.

TABLE 3—NEEDED FEE COLLECTIONS FY 2012–2014

	FY 2012	FY 2013	FY 2014	3-yr total
Budget	$321,990,000	$356,582,322	$371,831,295	$1,050,403,617
Recoveries	*(10,000,000)*	*(10,000,000)*	*(10,000,000)*	*(30,000,000)*
Net Budget	311,990,000	346,582,322	361,831,295	1,020,403,617
Payment to Treasury	15,000,000	15,000,000	15,000,000	45,000,000
Increase in OCF balance	6,452,395	1,067,428	800,291	8,320,115
CMEA Self-cert collections	(173,040)	(146,853)	(124,635)	(444,528)
Other collections	*(307,153)*	*(307,153)*	*(307,153)*	*(921,458)*
Required collections from Registration Fees	332,962,203	362,195,745	377,199,798	1,072,357,746

Numbers are rounded.

In total, DEA needs to collect $1,072,357,746 in registration fees over the three year period, FY 2012–FY 2014 to fully fund the DCP.

As in the past, DEA proposes to set the fee for each registrant category for a three-year period (FY 2012–2014). The vast majority of registrants are practitioners who pay a three-year registration fee. These registrants are divided into three separate groups who pay their three-year registration fees on alternate year cycles. Because registration cycles may differ from year to year, the total amount collected through fees in a given year may not exactly match the projected amount.

DEA Efforts To Control DCP Costs

DEA continually reviews the DCP and its methods of operation to ensure that it is fiscally responsible. The DCP works diligently to provide the registrants with cost effective and state-of-the-art means for conducting their businesses related to manufacturing, distributing, dispensing, importing, and exporting controlled substances and listed chemicals. Some examples of this include online registration, the Controlled Substance Ordering System (CSOS) for electronic controlled substance ordering between registrants, and electronic reporting of thefts and significant losses of controlled substances.

DEA takes seriously its responsibilities to manage the DCP in an efficient and effective manner, particularly in light of the current economy. The Office of Diversion Control acknowledges the important role that the Validation Unit provides in the appropriate expenditure of the DCFA. DEA cannot foresee Congressionally-mandated changes to the DCP or diversion trends, but it is committed to managing in a fiscally responsible manner. The Office of Diversion Control is committed to reviewing the registration process to ensure efficiency and accountability as well as reviewing current regulations related to fee exempt registrants. In addition, to ensure careful decision-making at all levels of the DCP, the Office of Diversion Control is considering several measures to ensure accountability for the effective utilization of resources.

Proposed Methodology for New Fee Calculation

In developing this proposed rule, DEA examined alternative methodologies to calculate the registration and registration fees. DEA analyzed alternative methodology approaches keeping in mind its statutory obligations under the CSA. First, pursuant to statute, DEA is authorized to charge reasonable fees relating to the registration and control of the manufacture, distribution, dispensing, importation, and exportation of controlled substances and listed chemicals. 21 U.S.C. 821 and 958(f). Second, DEA must set fees at a level that ensures the recovery of the full costs of operating the various aspects of its diversion control program (DCP). 21 U.S.C. 886a. Accordingly, in examining each alternative methodology DEA considered whether the fee calculation (1) was reasonable and (2) could fully fund the costs of operating the various aspects of the DCP.

Moreover, the CSA establishes a specific regulatory requirement that DEA charge fees to fully fund the DCP, but that the fees collected by DEA are to be expended through the budget process only. Specifically, each year DEA is required by statute to transfer the first $15 million of fee revenues into the general fund of the Treasury and the remainder of the fee revenues is deposited into a separate fund of the Treasury called the Diversion Control Fee Account (DCFA). 21 U.S.C. 886a(1). On at least a quarterly basis, the Secretary of the Treasury is required to refund DEA an amount from the DCFA ''in accordance with estimates made in the budget request of the Attorney General for those fiscal years'' for the operation of the DCP. 21 U.S.C. 886a(1)(B) and (D). For that reason, DEA is only considering alternative methodologies to calculate the registration and reregistration fees, not alternative approaches to expend fees collected because those decisions are governed by the CSA and the budget process.

In developing this rule, DEA considered four methodologies to calculate registration and reregistration fees: Past-Based Option, Future-Based Option, Flat Fee Option, and Weighted-Ratio Option. Although the increase in the fees may be passed down to the registrants' customers, the alternatives are analyzed on the worst-case scenario where the increase in the fee is absorbed fully by the registrants.

For each of the alternatives considered, the calculated fees are analyzed for reasonableness by examining: (1) The absolute amount of the fee increase, (2) the change in fee as a percentage of revenue from 2007 to 2012, and (3) the relative fee increase across registrant groups. Additionally, each calculation methodology is re-evaluated for its overall strengths and weaknesses.

Past-Based Option

Option 1 is called the Past-Based Option, and is based on historic investigation work hour data to set the apportionment of cost to each registrant category. In considering Option 1, DEA used historic investigation work hour data from the Fiscal Year 2007–2009. DEA's records permit an accurate apportionment of work hours for certain types of diversion control activities (*e.g.,* investigations) among classes of registrants. DEA estimates that approximately three to five percent of costs can be directly linked to pre-registration and scheduled investigations. Although some criminal investigations can be attributed to registrant groups, DEA did not include the cost of criminal investigations for the fee calculation under the Past-Based Option. While DEA develops annual work plans for the number of scheduled investigations by registrant type, DEA does not develop such plans for criminal investigations. Therefore, the cost of criminal investigations is allocated equally across all registrant groups, regardless of business activity. The remaining costs associated with DCP activities and components benefit all registrants (*e.g.,* policy, registration, and legal activities); however, DEA records cannot attribute these costs by registrant class. Under Option 1, pre-registration and scheduled investigation costs are assigned to registrant classes and all other costs are recovered on an equal, per-registrant basis.

DEA calculated the annual registrant fee for key registrant groups under Option 1 and compared this fee to the current fee. Although distributors and importers/exporters are in the same fee class in the current fee structure (Weighted-Ratio Option), in this analysis, distributors are separated from importers and exporters based on the available historic work hour data and reported work hours by type of registrant.

In the past-based option, the calculated fees increase by a factor of 1.16, 3.19, 1.10, and 1.32 for manufacturers, distributors, importers/exporters, and practitioners, respectively.

The proposed fees as a percentage of revenue is very low as indicated in Table 4 below, 0.000 to 0.019 percent, 0.005 to 0.134 percent, 0.000 to 0.005 percent, and 0.125 to 0.257 percent for manufacturers, distributors, pharmacies, and practitioners, respectively. The impact of the incremental increase in the fee from current fees as a percentage of revenue is even lower.

Finally, the largest increase, by a factor of 3.19, is incurred by distributors, largely as a consequence of their separation from exporters and importers, while the increases for other groups range from a factor of 1.10 to 1.32.

TABLE 4—ANNUAL REGISTRANT FEES UNDER PAST-BASED OPTION

	Current fee (annual)	Past-based fee (annual)	Increase from current fee	Ratio: past-based fee to current fee	Percent of annual revenue current fee **	Percent of annual revenue past based fee ***
Manufacturers	$2,293	$2,668	$375	1.16	0.000%–0.017%	0.000%–0.019%
Distributors	1,147	3,361	2,214	2.93	0.002%–0.042%	0.005%–0.123%
Importers/exporter	1,147	1,258	111	1.10	*	*
Pharmacies	184	243	59	1.32	0.000%–0.004%	0.000%–0.005%
Practitioners	184	243	59	1.32	0.119%–0.237%	0.125%–0.257%

Source: 2007 Economic Census; Bureau of Labor Statistics.
* No NAICS code for Importer/Exporter of controlled substances and/or List I chemicals.
** Current Fee divided by average revenue/income in 2007, first full year of the current fee.
*** Past-Based Fee divided by average revenue in 2007 for manufacturers, distributors and pharmacies. Past-Based Fee divided by projected average income in 2012 for practitioners. Only 2002 and 2007 data are available for manufacturers, distributors, and pharmacies, while practitioner income projection is based on five years of income data, 2004–2009.

While Option 1 is based on accurate historical data, it does not allow for future needs, demands and shifting responsibilities of the DCP, such as Agency priorities, new legislation, control of substances, new investigative requirements, and other program needs.

Conclusion

DEA does not propose the past-based option for two key reasons. First, the fee increase is disproportionately burdensome to a small number of registrants. Distributors' fees would increase by over three fold, while the fees for the remaining registrant groups would increase from 10 percent to 32 percent. DEA deemed this option unreasonable. Second, the past-based option is backward looking and implicitly assumes that the future will be similar to the past. DEA cannot assume that future workload will reflect past DEA work hour data. For example, DEA plans to conduct more scheduled investigations in accordance with the new scheduled investigation work plan. As a result, DEA has concluded that past data is not the best basis for the calculation of proposed fees.

Future-Based Option

Option 2 is called the Future-Based Option, and is based on projected work hours for each registrant class using scheduled investigation work plan goals and anticipated/planned resources. In considering Option 2, DEA based its calculations on projected work hour data by registrant group for FY 2012–2014. The future-based option is based on DEA's projection of work plan goals and the resources required for these years—specifically, examining the direct cost of anticipated scheduled investigations.[73] Based on the data used to develop the projections, the future-based option divides registrants into six classes and examines the projected work hour data within these categories. In contrast to Option 1 above, which is calculated using actual data, Option 2 is calculated using projected data relative to work plan goals and resources. This type of calculation results in a more finely tuned analysis of anticipated work hours. DEA calculated the projected annual fees under Option 2 and compared these fees to the current fees. Table 5 presents these results:

TABLE 5—ANNUAL REGISTRANT FEES UNDER FUTURE-BASED OPTION

	Current fee (annual)	Future-based fee (annual)	Amount of increase from current fee	Ratio: future-based fee to current fee	Percent of Annual revenue current fee **	Percent of Annual revenue future-based fee ***
Manufacturers 1: controlled substance manufacturers.	$2.293	$17,595	$15,302	$7.67	0.000%–0.017%	0.001%–0.128%
Manufacturers 2: List I chemical manufacturers	2,293	8,124	5,831	3.54	0.000%–0.017%	0.001%–0.059%
Distributors 1: controlled substance distributors and List I chemical distributors.	1,147	6,546	5,399	5.71	0.002–0.042%	0.009%–0.239%
Distributors 2: exporters and importers of controlled substances.	1,147	4,968	3,821	4.33	*	*
Distributors 3: List I chemical exporters and importers.	1,147	4,021	2,874	3.51	*	*
Pharmacies	184	232	48	1.26	0.000%–0.004%	0.000%–0.005%
Practitioners	184	232	48	1.26	0.119%–0.237%	0.119%–0.245%

Source: 2007 Economic Census; Bureau of Labor Statistics.
* No NAICS code for Importer/Exporter of controlled substances and/or List I chemicals.
** Current Fee divided by average revenue/income in 2007, first full year of the current fee.
*** Future-Based Fee divided by average revenue in 2007 for manufacturers, distributors and pharmacies. Future-Based Fee divided by projected average income in 2012 for practitioners. Only 2002 and 2007 data is available for manufacturers, distributors, and pharmacies, while practitioner income projection is based on five years of income data, 2004–2009.

In the future-based option, as shown in the table above, the fee increase ranges from a factor of 1.26 for practitioners to 7.67 for manufacturers of controlled substances.

[73] Many criminal investigations are attributable to the type of registrant(s) being investigated. However, because DEA cannot anticipate the volume of criminal cases initiated, either historically or in future years, these costs were not attributed directly to the registrant types affected. Rather, criminal investigative costs are spread across all registrants equally in both Option 1 and Option 2.

The proposed fees as a percentage of revenue is very low as indicated in Table 5: 0.001 to 0.128 percent for controlled substances manufacturers, 0.001 to 0.059 percent for manufacturers of List I chemical manufacturers, 0.009 to 0.239 percent for distributors, 0.000 to 0.005 percent for pharmacies, and 0.119 to 0.245 percent for practitioners. The impact of the incremental increase in the fee from current fees as a percentage of revenue is even lower. As expected, registrant groups with a larger fee increase under this option would experience a larger increase as a percentage of revenue.

Under this option, the increases in fees vary greatly across registrant groups. For example, controlled substances manufacturers incur the largest proportional increase by a factor of 7.67 or $15,302 annually, while practitioner fees increase by a factor of 1.26 or $48 annually.

Option 2 is calculated using projected data relative to work plan goals and resources. This results in a more finely tuned analysis of anticipated work hours. The disadvantage of Option 2 is that, because the calculation is based on projected work hour data, it may not be able to adapt to the shifting priorities and demands of DCP operations. Additionally, a change in work plan can cause actual cost to be much different for some registrant groups, causing a contradiction between the rationales used to calculate the fees and actual operations.

Conclusion

In reviewing Option 2, DEA concluded that for most registrant categories, the large proportional increase in fees would not pass the ''reasonable fee'' standard required by statute and could represent a significant burden on some registrants. Additionally, DEA believes that the vast disparity in the increase, where fees for manufacturers increase by more than seven fold, while fees for registrants increase by 26 percent, is unreasonable. Although there is concern regarding a potential difference between the scheduled investigation work plan and actual operations, DEA recognizes that no plan is perfect and operations may be adjusted as the environment changes. This potential exists for all four options. Therefore, the potential change in work plan did not weigh into the DEA's decision to not select Option 2. DEA's decision to not select Option 2 is based on the unreasonable increase in fees for some registrants and the severe disparity in increase among the registrant groups.

Flat Fee Option

Option 3 is called the Flat Fee Option. The flat fee option would provide equal fees across all registrant groups regardless of the proportion of DCP costs and resources the registrant group may require (*e.g.,* investigation resources). The fee calculation is straightforward: the total amount needed to be collected over the three year period is divided by the total number of registration fee transactions over the three year period, adjusting for registrants on the three year registration cycle (so that the fees for a three year period are three times the annual fee).

DEA calculated the annual registrant fee for key registrant groups under Option 3 and compared this fee to the current fee:

TABLE 6—ANNUAL REGISTRANT FEES UNDER FLAT-FEE OPTION

	Current fee (annual)	Flat fee (annual)	Amount of increase from current fee	Ratio: flat fee to current fee	Percent of annual revenue current fee*	Percent of annual revenue flat fee**
Manufacturers	$2,293	$247	$(2,046)	0.11	0.000%–0.017%	0.000%–0.002%
Distributors	1,147	247	(900)	0.22	0.002%–0.042%	0.000%–0.009%
Practitioners	184	247	63	1.34	0.119%–0.237%	0.127%–0.261%

Source: 2007 Economic Census; Bureau of Labor Statistics.

* Current Fee divided by average revenue/income in 2007, first full year of the current fee.

** Flat Fee divided by average revenue in 2007 for manufacturers, distributors and pharmacies. Flat Fee divided by projected average income in 2012 for practitioners. Only 2002 and 2007 data is available for manufacturers, distributors, and pharmacies, while practitioner income projection is based on five years of income data, 2004–2009.

In the flat-fee option, the registration fees for manufacturers and distributors are reduced significantly, from $2,293 for manufacturers and $1,147 for distributors to $247 for both. This reduction represents an 89 percent and 78 percent reduction for manufacturers and distributors respectively. The registration fee for practitioners increases by 34 percent to $247 on an annual basis.

The proposed fees as a percentage of revenue is very low as indicated in Table 6 above: 0.000 to 0.002 percent for manufacturers, 0.000 to 0.009 percent for distributors, and 0.127 to 0.261 percent for practitioners. The impact of the incremental increase in the fee from current fees as a percentage of revenue is even lower. Registrant groups with a decrease in fee under this option would experience a decrease as a percentage of revenue.

As with the other options, the calculation considered in Option 3 results in a dramatic fee disparity among registrant groups. The fees for manufacturers and distributors decrease, while the fees for practitioners increase.

The flat fee option has positive and negative aspects. The fee that DEA is required to charge registrants is based on a statutory requirement—it is not a user fee. A user fee calculation would require a calculation of the direct and indirect costs associated with each of the registrant groups and set fees to recover the costs associated with each of these groups. Since the registration fee is not a user fee, DEA is not required to calculate fees according to its costs by registrant groups. General historical costs of scheduled investigations support different fees among the categories. However, setting the same fees for all registrants, from multi-national corporations to mid-level practitioners is unreasonable.

Conclusion

After consideration of the flat fee option, DEA did not select this option to calculate the proposed new fees. The fee disparity among registrant groups caused by this calculation alternative is too great. Under this option, the calculation would result in reduced fees for manufacturers and distributors by 89 percent and 78 percent respectively, while practitioner fees would increase by 34 percent. Setting the fees at the same level across all registrant groups is not ''reasonable.'' DEA registrants include some of the largest corporations

in the world although the vast majority of registrants are practitioners, such as physicians and nurses. To satisfy the ''reasonable'' standard, registration fees should be different among the categories to account for cost and economic differences among the registrant categories. Option 3 did not satisfy this requirement.

Weighted-Ratio Option (Selected Methodology)

Option 4 is called the Weighted-Ratio Option. In this option, fees are assigned to different registrant categories based on DEA's general historical cost data. This option distinguishes among the categories to establish a ''reasonable'' fee for each category. The different fees are expressed in ratios: 1 for researchers, canine handlers, analytical labs, and narcotics treatment programs; 3 for registrants on three year registration cycles, pharmacies, hospitals/clinics, practitioners, teaching institutions, and mid-level practitioners; 6.25 for distributors and importers/exporters; and 12.5 for manufacturers. The adopted ratios are applied for administrative convenience since historically costs vary and a fee must be set in advance. To determine the fee, a weighted ratio is assigned based on registrant group, and the amount needed to be collected over the FY 2012–FY 2014 period is divided by the weighted number of estimated registrations to determine the fees.

TABLE 7—ANNUAL REGISTRANT FEES UNDER WEIGHTED-RATIO OPTION

[Registrants on three year registration cycle]

Registrant class/business	Current three year fee*	Proposed three year fee*	Difference per year
Pharmacy	$551	$732	$60
Hospital/Clinic	551	732	60
Practitioner	551	732	60
Teaching Institution	551	732	60
Mid-Level Practitioner	551	732	60

* Pharmacies, hospitals/clinics, practitioners, teaching institutions, and mid-level practitioners currently pay a fee for a three-year period. This current three-year fee is $551. The proposed new fee for the three year registration period would be $732. The three year difference is $181 or an annual difference of $60.

[Registrants on annual registration cycle]

Registrant class/business	Current annual fee	Proposed annual fee	Difference
Researcher/Canine Handler	$184	$244	$60
Analytical Lab	184	244	60
Maintenance	184	244	60
Detoxification	184	244	60
Maintenance and Detoxification	184	244	60
Compounder/Maintenance	184	244	60
Compounder/Detoxification	184	244	60
Compounder/Maintenance/Detoxification	184	244	60
Distributor (chemical and controlled substances)	1,147	1,526	379
Reverse distributor	1,147	1,526	379
Importer (chemical and controlled substances)	1,147	1,526	379
Exporter (chemical and controlled substances)	1,147	1,526	379
Manufacturer (chemical and controlled substances)	2,293	3,052	759

In the weighted-ratio option, the registration fees for all registrant groups increase by 33 percent from current fees, although the absolute dollar amount may differ. The proposed new registration fees range from $244 annually (or annual equivalent) to $3,052. Registration fees are collected by location and by registered business activity. Most small registrants are expected to pay a single registration fee of $244 ($60 annual increase), $1,526 ($379 annual increase) or $3,052 ($759 annual increase). Registration fees for all registrant groups increase by 33 percent and as a result, there is no disparity in the fee increase among registrant groups.

The weighted-ratio methodology, much like the flat fee, is straightforward and easy to understand, but unlike the flat fee, this method applies historic weighted ratios to differentiate fees among registrant groups. Additionally, the fees calculated using this methodology are similar to fees calculated in the past-based option, which allocates historical pre-registration and scheduled investigations costs to registrant groups. Finally, this method does not create a disproportionate fee increase in any registrant group.

Conclusion

DEA selected Option 4 to calculate the proposed new fee structure. This approach has been used since Congress established registrant fees and continues to be a reasonable reflection of differing costs. The registration fees under the weighted-ratio option result in differentiated fees among registrant groups, where registrants with larger revenues and costs pay higher fees than registrants with lower revenues and costs. Furthermore, the weighted-ratio does not create a disparity in the relative increase in fees from the current to the proposed fees. The weighted ratios used by DEA to calculate the proposed fee have proven effective and reasonable over time. Additionally, the selected calculation methodology accurately reflects the differences in activity level, notably in inspections, scheduled investigations and other control and monitoring, by registrant category; for example, these costs are greatest for manufacturers. DEA selected this option because it is the only option that resulted in ''reasonable'' fees for all registrant groups.

Proposed New Fees

Based on thorough analysis of the identified fee calculation options—including the anticipated economic impact on registrants—DEA has determined that the current weighted-ratio option represents the most reasonable approach to calculate registrant fees sufficient to fully fund the DCP.

The proposed fee schedule would replace the current fee schedule for controlled substance and chemical registrants in order to recover the full costs of the DCP so that it may continue to meet the programmatic responsibilities set forth by statute, Congress, and the President. As discussed, without an adjustment to fees, the DCP will be unable to continue current operations, necessitating dramatic program reductions, and possibly weakening the closed system of distribution. Accordingly, DEA proposes the following new fees for the FY 2012–2014 period.

TABLE 8—PROPOSED REGISTRATION AND REREGISTRATION FEES BY CLASS/BUSINESS

[Registrants on three year registration cycle]

Registrant class/business	Current three year fee*	Proposed three year fee*	Difference per year
Pharmacy	$551	$732	$60
Hospital/Clinic	551	732	60
Practitioner	551	732	60
Teaching Institution	551	732	60
Mid-Level Practitioner	551	732	60

* Pharmacies, hospitals/clinics, practitioners, teaching institutions, and mid-level practitioners currently pay a fee for a three-year period. This current three-year fee is $551. The proposed new fee for the three year registration period would be $732. The three year difference is $181 or an annual difference of $60.

[Registrants on annual registration cycle]

Registrant class/business	Current annual fee	Proposed annual fee	Annual difference
Researcher/Canine Handler	$184	$244	$60
Analytical Lab	184	244	60
Maintenance	184	244	60
Detoxification	184	244	60
Maintenance and Detoxification	184	244	60
Compounder/Maintenance	184	244	60
Compounder/Detoxification	184	244	60
Compounder/Maintenance/Detoxification	184	244	60
Distributor (chemical and controlled substances)	1,147	1,526	379
Reverse distributor	1,147	1,526	379
Importer (chemical and controlled substances)	1,147	1,526	379
Exporter (chemical and controlled substances)	1,147	1,526	379
Manufacturer (chemical and controlled substances)	2,293	3,052	759

TABLE 9—OVERVIEW OF PROPOSED DIVERSION CONTROL FEE ACCOUNT (DCFA)

	FY2011	FY2012	FY2013	FY2014
Congressional Budget	290,304,000	321,990,000	356,582,322	371,831,295
Operational Continuity Fund (OCF) Brought Forward From Prior Year	68,089,927	33,508,367	63,225,476	50,588,959
Collections: Registration Fees*	257,254,274	356,226,916	348,491,800	366,937,230
Collections:				
CMEA	203,889	173,040	146,853	124,635
Treasury	*(15,000,000)*	*(15,000,000)*	*(15,000,000)*	*(15,000,000)*
Net Collections	242,458,163	341,399,956	333,638,653	352,061,865
Recoveries from Deobligations	12,957,124	10,000,000	10,000,000	10,000,000
Other Collections	*307,153*	*307,153*	*307,153*	*307,153*
Subtotal Availability	323,812,367	385,215,476	407,171,281	412,957,977
Obligations**	290,304,000	321,990,000	356,582,322	371,831,295
End of Year OCF Balance	33,508,367	63,225,476	50,588,959	41,126,682
Target OCF ($15M + 7% of Budget)	*37,539,300*	*39,960,763*	*41,028,191*	*41,828,482*

Numbers are rounded.

* NOTE: Total FY 2012–2014 collections from registration fees is $1,071,655,946. This amount is different from the total required collections of $1,072,357,746 described in Table 3: Needed Fee Collections FY 2012–2014. Initially, the required collection of $1,072,357,746 resulted in a calculated base (ratio: 1) annual fee of $244.16. The weighted ratios were applied and rounded to the whole dollar to determine the proposed fees. Due to rounding of the fees to the whole dollar, the proposed fees generate $1,071,655,946 rather than $1,072,357,746.

** For purposes of the proposed fee calculation, the Congressional Budget and Obligations are treated as the same.

Summary of Impact of Proposed New Fee Relative to Current Fee

Affected Entities

As of December 2010 there were a total of 1,378,609 controlled substances and chemical registrants (1,377,466 controlled substances registrants and 1,143 chemical registrants), as shown in Table 10.

TABLE 10—NUMBER OF REGISTRANTS BY BUSINESS ACTIVITY

Registrant class/business	Controlled substances	Chemicals
Pharmacy	66,766	
Hospital/Clinic	15,774	
Practitioner	1,097,454	
Teaching Institution	351	
Mid-Level Practitioner	183,538	
Researcher/Canine Handler	8,997	
Analytical Lab	1,496	
Narcotic Treatment Program	1,272	
Distributor	795	584
Reverse Distributor	56	
Importer	203	180
Exporter	236	166
Manufacturer	528	213
Total	1,377,466	1,143
Total (all registrants)	1,378,609	

* Data as of December 2010.

Not all registrants listed in Table 10 are subject to the fees. Publicly owned institutions, law enforcement agencies, Indian Health Services, the Department of Veterans Affairs, Federal Bureau of Prisons, and military personnel are exempt from fees.

The number of registrations exceeds the number of individual registrants because some registrants are required to hold more than one registration. The CSA requires a separate registration for each location where controlled substances are handled and a separate registration for each business activity; that is, a registration for activities related to the handling of controlled substances and a registration for activities related to the handling of List I chemicals. Some registrants may conduct multiple activities under a single registration (*e.g.,* manufacturers may distribute substances they have manufactured without being registered as a distributor), but firms may hold multiple registrations for a single location. Individual practitioners who prescribe, but do not store controlled substances, may use a single registration at multiple locations within a state, but need separate registrations for each state in which they practice and are authorized to dispense controlled substances. Firms with multiple locations must have separate registrations for each location.

Characteristics of Entities

This proposed rule affects those manufacturers, distributors, dispensers, importers, and exporters of controlled substances and List I chemicals that are required to obtain and pay a registration fee with DEA pursuant to the CSA (21 U.S.C. 822 and 958(f)). As of December 2010, there were 1,378,609 controlled substances and chemical registrants (1,377,466 controlled substances registrants and 1,143 chemical registrants), as shown above in Table 10.

Pharmacies, hospitals/clinics, practitioners, teaching institutions, and mid-level practitioners make up 98.9 percent of all registrants. These registrants register every three years. Other registrants maintain an annual registration. Registration and reregistration costs vary by registrant category as is described in more detail in the sections below.

The proposed fees would affect a wide variety of entities. Table 11 indicates the sectors affected by the proposed rule and their average annual revenue/income. Most DEA registrants are small entities under Small Business Administration (SBA) standards. Almost all practitioners, which are the largest category of registrants, would be considered small (annual revenues of less than $6 million to $8.5 million, depending on specialty), and practitioners and mid-level practitioners total 1,280,992 (as of December 2010).

TABLE 11—INDUSTRIAL SECTORS OF DEA REGISTRANTS

Sector	NAICS Code	Average annual revenue *
Manufacturers:		
Petro-chemical Manufacturing (organic, inorganic)	32511	$1,390,485,971
Medicinal and Botanical Manufacturing	325411	27,601,834
Pharmaceutical Manufacturing	325412	144,173,821
Adhesive Manufacturing	325520	17,482,468
Toilet Preparation Manufacturing	325620	50,322,290
Other Chemical Manufacturing	325998	13,720,807
Distributors:		

TABLE 11—INDUSTRIAL SECTORS OF DEA REGISTRANTS—Continued

Sector	NAICS Code	Average annual revenue *
Drugs and Druggist Sundries Wholesalers	424210	64,793,480
General Line Grocery Wholesalers	424410	45,518,407
Confectionary Merchant Wholesalers	414450	17,175,982
Chemical Wholesalers	424690	12,856,993
Tobacco Wholesalers	424940	71,437,205
Miscellaneous Wholesalers	424990	2,741,857
Pharmacies:		
Supermarkets	445110	7,247,540
Drug Stores	446110	4,829,487
Discount Stores	452112	26,535,201
Warehouse Clubs and Superstores	452910	76,300,280
Other:		
Testing Labs	541380	1,907,414
Packaging and Labeling Services	561910	2,696,904
Other Practitioners:		
Professional Schools	611310	1,373,855
Ambulatory Health Care Services	621	1,236,852
Hospitals	622	108,286,641

Source: 2007 Economic Census. *http://www.census.gov/econ/census07.*

Supermarkets, discount stores, warehouse clubs, and superstores handle controlled substances through their distribution centers and pharmacies. Drug products containing List I chemicals are primarily distributed as over-the-counter medicines. These are distributed by drug wholesalers who specialize in non-prescription drugs, wholesalers who supply convenience stores, and grocery, pharmacy, and discount stores (*e.g.,* superstores) that operate their own distribution centers.

Economic Impact Analysis of Proposed Fee

The proposed fee, if implemented, is expected to have two levels of impact. Initially, the increase in the fee will impact the registrants. Then the fee increase or portion of the fee increase is expected to be eventually passed on to the general public. To be analytically conservative, the analysis below assumes that the impact of the fee increase is absorbed entirely by the registrants.

DEA assumes that the registration fees are business expenses for all registrants. As a result, the increase in the fee will be dampened by reduced tax liability, as a result of the increase in registration fee expense. For example, if a practitioner pays an additional $60 per year in registration fees and the combined federal and state income tax is 35 percent, the net cash impact is $39, not $60. The additional $60 causes income/profit to decrease by $60, decreasing the tax liability by $21. The net cash outlay is $39.[74]

DEA examined the proposed fees as a percentage of income for physicians, dentists, and physician's assistants in the practitioner registrant group and as a percentage of revenue for pharmacies, manufacturers and distributors. This analysis indicates the fee increase is expected to have the greatest affect on small businesses in the practitioner registrant group. The majority of practitioners and mid-level practitioners work in small businesses. Physicians, dentists, and physician's assistants reflect a representative sub-group of the practitioner and mid-level practitioner registrant groups. The effect of the fee increase is diminished by any increase in registrant income.

The table below describes the average income for physicians, dentists, and physician's assistants from 2004 to 2012. The table below also reflects the impact of the proposed fee increase as a percentage of average income. This analysis assumes that the fee increase is absorbed personally by each practitioner/mid-level practitioner. The analysis ignores the dampening effect of registration fees as a business expense and the potential that the fee increase might be passed on to customers.

TABLE 12—FEE AS PERCENTAGE OF INCOME FY 2004–2012

Year	Average income [75]			Fee	Fee as % of average income		
	Physicians	Dentists	Physician assistants	(Annual basis)	Physicians	Dentists	Physician assistants
2004	137,610	130,300	68,780				
2005	138,910	133,680	71,070				
2006	142,220	140,950	74,270	184	0.129%	0.131%	0.248%
2007	155,150	147,010	77,800	184	0.119%	0.125%	0.237%
2008	165,000	154,270	81,610	184	0.112%	0.119%	0.225%
2009	173,860	156,850	84,830	184	0.106%	0.117%	0.217%
2010	179,370	163,901	87,933	184	0.103%	0.112%	0.209%
2011	187,154	169,632	91,230	184	0.098%	0.108%	0.202%
2012	194,939	175,363	94,528	244	0.125%	0.139%	0.258%

[74] This example is for illustration purposes only. Each entity should seek competent tax advice for tax consequences of the proposed rule.

[75] Source: Bureau of Labor Statistics, *http://www.bls.gov.*

TABLE 12—FEE AS PERCENTAGE OF INCOME FY 2004–2012—Continued

Year	Average income [75]			Fee	Fee as % of average income		
	Physicians	Dentists	Physician assistants	(Annual basis)	Physicians	Dentists	Physician assistants
Increase from 2007 to 2012	26%	19%	22%	33%	6%	11%	9%
Increase from 2006 to 2012	37%	24%	27%	33%	−7%	3%	4%

* Average income data for 2004 to 2009 is provided by the Bureau of Labor Statistics. 2010 to 2012 are estimated figures based on linear regression, where a straight-line increase is calculated from years 2004 to 2009, then using the line to estimate average income for 2010 to 2012.

In 2007, the current fee of $184 on an annual basis represents 0.119 percent, 0.125 percent, and 0.237 percent of annual income for physicians, dentists, and physician's assistants respectively. In 2012, the proposed fee of $244 (on an annual basis) would represent approximately 0.125 percent, 0.139 percent, and 0.258 percent of annual income for physicians, dentists, and physician's assistants respectively. While proposed fees are 33 percent above the current fees implemented at the end of 2006, average incomes for physicians, dentists, and physician's assistants increased 26 percent, 19 percent, and 22 percent respectively. This estimated increase in average income dampens the effect of the fee increase as a percentage of average income. The 33 percent fee increase as a percentage of average income is 6 percent for physicians, 11 percent for dentists, and 9 percent for physician's assistants from 2007 to 2012. The diminishing effect is more apparent when comparing 2012 to 2006, the year for which the current fee was calculated and implemented. Additionally, as the average income grows in 2013 and 2014, the income adjusted fees are not any higher than in recent history.

Exempt from the payment of registration fees are any hospital or other institution that is operated by an agency of the United States, of any State, or any political subdivision of an agency thereof. Likewise, an individual who is required to obtain a registration in order to carry out his/her duties as an official of a federal or State agency is also exempt from registration fees.[76] Fee exempt registrants are not affected by the proposed fees.

Conclusion

DEA concludes that this proposed rule is not a significant regulatory action because it does not result in a materially adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.[77] The proposed fee, if implemented, would initially affect all fee paying registrants. The fees may eventually be passed on to the general public, diminishing the impact of the proposed fee increase on individual registrants. The impact of the proposed fee on registrants is also diminished by a reduction in tax liabilities and an increase in average income. Additionally, hospitals and institutions operated by federal, State, or local governments and their employees are exempt from registration fees.[78] Moreover, DEA believes that this proposed rule will enhance the public health and safety.

Regulatory Analyses

This proposed rule is necessary to ensure the full funding of the DCP through registrant fees as required by 21 U.S.C. 886a. It has been five years since the last fee change. As discussed above, statutory and operational changes to the DCP cannot be fully offset by improved operational efficiencies and require a recalculation of registrant fees. This proposed rule does not change the requirement to register to handle controlled substances and/or List I chemicals but rather changes the annual fee associated with registration and reregistration that will allow DEA to meet its statutory obligations. DEA recognizes that the proposed fee changes affect small businesses, but does not believe the relative individual impact is significant. The average annual increase in estimated registration fee collections is less than $100 million at an estimated annual increase of $88,333,030.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511)

This proposed rule will not impose additional information collection requirements on the public.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) (RFA), federal agencies must evaluate the impact of rules on small entities and consider less burdensome alternatives. DEA has evaluated the impact of this proposed rule on small entities as summarized above and concluded that although the rule will affect a substantial number of small entities, it will not impose a significant economic impact on any regulated entities.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Deputy Assistant Administrator hereby certifies that this proposed rulemaking has been drafted consistent with the Act and that a regulatory analysis on the effects or impact of this proposed rulemaking on small entities has been done and summarized above.[79] While DEA recognizes that this proposed increase in fees will have a financial effect on registrants, the change in fees will not have a significant economic impact. A change in fees is necessary to fully comply with 21 U.S.C. 886a and related statutes governing the Diversion Control Program (DCP) and the Diversion Control Fee Account by which DEA is legally mandated to collect fees to cover the full costs of the DCP as defined by all activities relating to the registration and control of the manufacture, distribution, import, export, and dispensing of controlled substances and listed chemicals.

This rule is not a discretionary action but implements statutory direction to charge reasonable fees to recover the full costs of activities constituting the DCP

[76] See 21 CFR 1301.21 for complete fee exemption requirements.

[77] In accordance with 25 U.S.C. 1616q, employees of a tribal health or urban Indian organization are exempt from ''payment of licensing, registration, and any other fees imposed by a Federal agency to the same extent that officer of the commissioned corps of the Public Health Service and other employees of the Service are exempt from those fees.'' To the extent that any hospital or other institution operated by or any individual practitioner associated with an Indian Tribal Government must pay fees, the economic impact is not substantial.

[78] See 21 CFR 1301.21 for complete requirements for exemption of registration fees.

[79] See ''Economic Impact Analysis of Proposed Rule on Controlled Substances and List I Chemical Registration and Reregistration Fees, DEA–346'' in this rulemaking docket found at *http://www.regulations.gov.*

through registrant fees (21 U.S.C. 821, 886a, and 958(f)). As discussed above and in the Economic Impact Analysis of the Proposed Rule found in the rulemaking docket at *http://www.regulations.gov,* DEA analyzed four fee calculation methodologies—Past-Based, Future-Based, Flat Fee, and Weighted-Ratio. DEA selected the weighted-ratio methodology to calculate the proposed new fee structure. This approach has been used since Congress established registrant fees and continues to be a reasonable reflection of differing costs. The registration fees under the weighted-ratio option result in differentiated fees among registrant groups, where registrants with larger revenues pay higher fees than registrants with lower revenues. Furthermore, the weighted-ratio does not create a disparity in the relative increase in fees from the current to the proposed fees. The weighted-ratios used by DEA to calculate the proposed fee have proven effective and reasonable over time. Additionally, the selected calculation methodology accurately reflects the differences in activity level, notably in pre-registration and scheduled investigations, by registrant category: for example, these costs are greatest for manufacturers. DEA selected this option because it is the only option that resulted in reasonable fees for all registrant groups.

Under the weighted-ratio methodology, the individual effect on small business registrants is minimal. Practitioners and mid-level practitioners represent 92.9 percent of all registrants and nearly all practitioners and mid-level practitioners are employed by small businesses pursuant to SBA standards. Practitioners and mid-level practitioners would pay a three-year registration fee of $732 or the equivalent of $244 per year.

For consideration of the impact of the proposed fee increase on small businesses, DEA analyzed the proposed registration fee as a percentage of annual income for a representative practitioner group: physicians, dentists, and physician's assistants. While there are many specialists listed in the Bureau of Labor Statistics income data, incomes for physicians, dentists, and physician's assistants are representative of the practitioner and mid-level practitioner registrant groups. For practitioners and mid-level practitioners, the proposed new fee, on an annual basis, would be $244; the annual increase would be $60 from the current fee. From the calculation performed in the preceding section, *Economic Impact Analysis of Proposed Rule,* the impacts of the proposed fees, $60 per year increase from current fees, were found to be 0.007 percent, 0.014 percent, and 0.022 percent of annual income for physicians, dentists, and physician's assistants respectively, when normalized for income increases. In consideration of the calculated impact and potentially further mitigating factors discussed in the *Economic Impact Analysis of Proposed Rule,* DEA concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Executive Orders 13563 and 12866

This proposed rule to increase registrant fees has been developed in accordance with the principles of Executive Orders 13563 and 12866. Public comment is encouraged through the Internet with easy Internet access to supporting information found at *http://www. regulations.gov.* The difference between the current fees and the proposed new fee—the fee increase—is less than $100 million annually. Specifically, the difference in the fees projected to be collected under the current fee rates and in the fees projected to be collected under the proposed new fee rates for the three years of FY 2012–FY 2014 is $264,999,092. Thus, the annual increase is $88,333,030. This proposed rule has been reviewed by the Office of Management and Budget.

The primary cost of the proposed rule is the incremental increase in the combined registration fees paid by registrants. Benefits of the proposed rule are an extension of the benefits of the DCP. The DCP is a strategic component of United States law and policy aimed at preventing, detecting, and eliminating the diversion of controlled substances and listed chemicals into the illicit market while ensuring a sufficient supply of controlled substances and listed chemicals for legitimate medical, scientific, research and industrial purposes. The absence of or significant reduction in this program would result in enormous costs for the citizens and residents of the United States due to the diversion of controlled substances and listed chemicals into the illicit market as outlined in the Economic Impact Assessment found in the rulemaking docket.

Executive Order 12988

This proposed regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform to eliminate ambiguity, minimize litigation, establish clear legal standards and reduce burden.

Executive Order 13132

This rulemaking does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rule does not contain a federal mandate and will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $126,400,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. DEA notes that many governmental entities operate DEA-registered facilities and that they are currently fee exempt. Moreover, the effect of the proposed increase on individual entities and practitioners is minimal. The majority of the affected entities will pay a fee of $732 for a three year registration period ($244 per year or an increase of $60 per year). This rule is promulgated in compliance with 21 U.S.C. 886a that the full costs of operating the DCP be collected through registrant fees.

Executive Order 13175

This proposed rule is required by statute, will not have tribal implications and will not impose substantial direct compliance costs on Indian tribal governments.

List of Subjects

21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

21 CFR Part 1309

Administrative practice and procedure, Drug traffic control, Exports, Imports, Security measures.

For the reasons set out above, 21 CFR Parts 1301 and 1309 are proposed to be amended as follows:

PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS AND DISPENSERS OF CONTROLLED SUBSTANCES

1. The authority citation for Part 1301 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 831, 871(b), 875, 877, 886a, 951, 952, 953, 956, 957, 958.

2. Amend § 1301.13 by revising paragraph (e)(1) to read as follows:

§ 1301.13 Application for registration; time for application; expiration date; registration for independent activities; application forms, fees, contents and signature; coincident activities.

* * * * *

(e) * * *

(1)

Business activity	Controlled substances	DEA Application forms	Application fee ($)	Registration period (years)	Coincident activities allowed
(i) Manufacturing	Schedules I–V	New–225, Renewal—225a.	$3,052	1	Schedules I–V: May distribute that substance or class for which registration was issued; may not distribute or dispose of any substance or class for which not registered. Schedules II–V: except a person registered to dispose of any controlled substance may conduct chemical analysis and preclinical research (including quality control analysis) with substances listed in those schedules for which authorization as a mfg. was issued.
(ii) Distributing	Schedules I–V	New—225, Renewal—225a.	1,526	1	
(iii) Reverse distributing	Schedules I–V	New—225, Renewal—225a.	1,526	1	
(iv) Dispensing or instructing (includes Practitioner, Hospital/Clinic, Retail Pharmacy, Central fill pharmacy, Teaching Institution).	Schedules II–V	New—224, Renewal—224a.	732	3	May conduct research and instructional activities with those substances for which registration was granted, except that a mid-level practitioner may conduct such research only to the extent expressly authorized under State statute. A pharmacist may manufacture an aqueous or oleaginous solution or solid dosage form containing a narcotic controlled substance in Schedule II–V in a proportion not exceeding 20% of the complete solution, compound or mixture. A retail pharmacy may perform central fill pharmacy activities.

Business activity	Controlled substances	DEA Application forms	Application fee ($)	Registration period (years)	Coincident activities allowed
(v) Research	Schedule I	New—225, Renewal—225a.	244	1	A researcher may manufacture or import the basic class of substance or substances for which registration was issued, provided that such manufacture or import is set forth in the protocol required in § 1301.18 and to distribute such class to persons registered or authorized to conduct research with such class of substance or registered or authorized to conduct chemical analysis with controlled substances.
(vi) Research	Schedules II–V	New—225, Renewal—225a.	244	1	May conduct chemical analysis with controlled substances in those schedules for which registration was issued; manufacture such substances if and to the extent that such manufacture is set forth in a statement filed with the application for registration or reregistration and provided that the manufacture is not for the purposes of dosage form development; import such substances for research purposes; distribute such substances to persons registered or authorized to conduct chemical analysis, instructional activities or research with such substances, and to persons exempted from registration pursuant to § 1301.24; and conduct instructional activities with controlled substances.
(vii) Narcotic Treatment Program (including compounder).	Narcotic Drugs in Schedules II–V.	New—363, Renewal—363a.	244	1	
(viii) Importing	Schedules I–V	New—225, Renewal—225a.	1,526	1	May distribute that substance or class for which registration was issued; may not distribute any substance or class for which not registered.
(ix) Exporting	Schedules I–V	New—225, Renewal—225a.	1,526	1	

Business activity	Controlled substances	DEA Application forms	Application fee ($)	Registration period (years)	Coincident activities allowed
(x) Chemical Analysis	Schedules I–V	New—225, Renewal—225a.	244	1	May manufacture and import controlled substances for analytical or instructional activities; may distribute such substances to persons registered or authorized to conduct chemical analysis, instructional activities, or research with such substances and to persons exempted from registration pursuant to § 1301.24; may export such substances to persons in other countries performing chemical analysis or enforcing laws related to controlled substances or drugs in those countries; and may conduct instructional activities with controlled substances.

* * * * *

PART 1309—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, IMPORTERS, AND EXPORTERS OF LIST I CHEMICALS

3. The authority citation for Part 1309 is corrected to read as follows:

Authority: 21 U.S.C. 802, 821, 822, 823, 824, 830, 871(b), 875, 877, 886a, 952, 953, 957, 958.

4. Revise § 1309.11 to read as follows:

§ 1309.11 Fee amounts.

(a) For each application for registration or reregistration to manufacture the applicant shall pay an annual fee of $3,052.

(b) For each application for registration or reregistration to distribute, import, or export a List I chemical, the applicant shall pay an annual fee of $1,526.

5. In § 1309.21, paragraph (c) is revised to read as follows:

§ 1309.21 Persons required to register.

* * * * *

(c) * * *

SUMMARY OF REGISTRATION REQUIREMENTS AND LIMITATIONS

Business activity	Chemicals	DEA Forms	Application fee	Registration period (years)	Coincident activities allowed
Manufacturing	List I, Drug products containing ephedrine, pseudoephedrine, phenylpropanolamine.	New—510	$3,052	1	May distribute that chemical for which registration was issued; may not distribute any chemical for which not registered.
		Renewal—510a	3,052		
Distributing	List I, Scheduled listed chemical products.	New—510	1,526	1	
		Renewal—510a	1,526		
Importing	List I, Drug Products containing ephedrine, pseudoephedrine, phenylpropanolamine.	New—510	1,526	1	May distribute that chemical for which registration was issued; may not distribute any chemical for which not registered.
		Renewal—510a	1,526		
Exporting	List I, Scheduled listed chemical products.	New—510	1,526	1	
		Renewal—510a	1,526		

Dated: June 30, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator.

[FR Doc. 2011–16847 Filed 7–5–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–114206–11]

RIN 1545–BK21

Encouraging New Markets Tax Credit Non-Real Estate Investments; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to advance notice of proposed rulemaking.

SUMMARY: This document contains a correction to advance notice of proposed rulemaking (REG–114206–11) that was published in the **Federal Register** on Tuesday, June 7, 2011 (76 FR 32880). This document invites comments from the public on how the new markets tax credit program may be amended to encourage non-real estate investments.

FOR FURTHER INFORMATION CONTACT: Julie Hanlon-Bolton, (202) 622–3040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 45D of the Internal Revenue Code.

Need for Correction

As published, the advance notice of proposed rulemaking (REG–114206–11) contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of advance notice of proposed rulemaking (REG–114206–11), which was the subject of FR Doc. 2011–13981, is corrected as follows:

On page 32881, column 2, in the preamble, under the paragraph heading ''Background'', second paragraph of the column, fourth line, the language ''nonprofit corporation) or partnership if'' is corrected to read ''nonprofit corporation) or partnership, if''.

LaNita Van Dyke,

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

[FR Doc. 2011–16824 Filed 7–5–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–118809–11]

RIN 1545–BK27

Modification of Treasury Regulations Pursuant to Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing final and temporary regulations that remove any reference to, or requirement of reliance on, credit ratings in regulations under the Internal Revenue Code (Code) and provide substitute standards of credit-worthiness where appropriate. The Dodd-Frank Wall Street Reform and Consumer Protection Act requires each Federal agency to take such actions regarding its regulations. These regulations affect persons subject to various provisions of the Code. The text of the temporary regulations published in the Rules and Regulations section of the **Federal Register** also serves as the text of the proposed regulations.

DATES: Written and electronic comments and requests for a public hearing must be received by August 30, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–118809–11), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–118809–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–118809–11).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Arturo Estrada, (202) 622–3900; concerning submissions of comments and requests for a public hearing, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 939A(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (124 Stat. 1376 (2010)), (the ''Dodd-Frank Act''), requires each Federal agency to review its regulations that require the use of an assessment of credit-worthiness of a security or money market instrument, and to review any references or requirements in those regulations regarding credit ratings. Section 939A(b) directs each agency to modify any regulation identified in the review required under section 939A(a) by removing any reference to, or requirement of reliance on, credit ratings and substituting a standard of credit-worthiness that the agency deems appropriate. Numerous provisions under the Code are affected.

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR part 1) under sections 150, 171, 197, 249, 475, 860G, and 1001 of the Code. The temporary regulations also amend the Manufacturers and Retailers Excise Tax Regulations (26 CFR part 48) under section 4101 of the Code. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and the proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

These regulations were drafted by personnel in the Office of Associate Chief Counsel (Financial Institutions and Products), the Office of Associate Chief Counsel (Income Tax and Accounting), the Office of Associate Chief Counsel (International) and the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 48 are proposed to be 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 1.150–1 is amended as follows:

1. Paragraph (a)(4) is added.

2. In paragraph (b), the definition of *Issuance costs,* is revised.

The addition and revision read as follows:

§ 1.150–1 Definitions.

* * * * *

(4) [The text of the proposed amendments to § 1.150–1(a)(4) is the same as the text of § 1.150–1T(a)(4) published elsewhere in this issue of the **Federal Register**].

(b) * * *

Issuance costs. [The text of the proposed amendments to § 1.150–1(b), *Issuance costs,* is the same as the text of § 1.150–1T(b), *Issuance costs,* published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 3. Section 1.171–1 is amended by revising paragraph (f) *Example 2* to read as follows:

§ 1.171–1 Bond premium.

* * * * *

(f) * * *

Example 2. [The text of the proposed amendments to § 1.171–1(f) *Example 2* is the same as the text of § 1.171–1T(f) *Example 2* published elsewhere in this issue of the **Federal Register**].

Par. 4. Section 1.197–2 is amended by revising paragraph (b)(7) to read as follows:

§ 1.197–2 Amortization of goodwill and certain other intangibles.

* * * * *

(b) * * *

(7) [The text of the proposed amendments to § 1.197–2(b)(7) is the same as the text of § 1.197–2T(b)(7) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 5. Section 1.249–1 is amended by revising paragraphs (e)(2)(ii) and adding paragraph (f)(3) to read as follows:

§ 1.249–1 Limitation on deduction of bond premium on repurchase.

* * * * *

(e) * * *

(2) * * *

(ii) [The text of the proposed amendments to § 1.249–1(e)(2)(ii) is the same as the text of § 1.249–1T(e)(2)(ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) *Effective/applicability dates.* * * *

(3) [The text of the proposed amendments to § 1.249–1(f)(3) is the same as the text of § 1.249–1T(f)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 6. Section 1.475(a)–4 is amended by revising paragraph (d)(4) *Examples 1, 2,* and *3* to read as follows:

§ 1.475(a)–4 Valuation safe harbor.

* * * * *

(d) * * *

(4) * * *

Example 1. [The text of the proposed amendments to § 1.475(a)–(4)(d)(4) *Example 1* is the same as the text of § 1.475(a)–4T(d)(4) *Example 1* published elsewhere in this issue of the **Federal Register**].

Example 2. [The text of the proposed amendments to § 1.475(a)–4(d)(4) *Example 2* is the same as the text of § 1.475(a)–4T(d)(4) *Example 2* published elsewhere in this issue of the **Federal Register**].

Example 3. [The text of the proposed amendments to § 1.475(a)–4(d)(4) *Example 3* is the same as the text of § 1.475(a)–4T(d)(4) *Example 3* published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 7. Section 1.860G–2 is amended by revising paragraphs (g)(3)(ii)(B), (C), and (D) to read as follows:

§ 1.860G–2 Other rules.

* * * * *

(g) * * *

(3) * * *

(ii) * * *

(B) [The text of the proposed amendments to § 1.860G–2(g)(3)(ii)(B) is the same as the text of § 1.860G–2T(g)(3)(ii)(B) published elsewhere in this issue of the **Federal Register**].

(C) [The text of the proposed amendments to § 1.860G–2(g)(3)(ii)(C) is the same as the text of § 1.860G–2T(g)(3)(ii)(C) published elsewhere in this issue of the **Federal Register**].

(D) [The text of the proposed amendments to § 1.860G–2(g)(3)(ii)(D) is the same as the text of § 1.860G–2T(g)(3)(ii)(D) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 8. Section 1.1001–3 is amended as follows:

1. Paragraph (d) *Example 9* is revised.

2. Paragraph (e)(4)(iv)(B) is revised.

3. Paragraph (e)(5)(ii)(B)(*2*) is revised.

4. Paragraph (g) *Examples 1, 5,* and *8* are revised.

The revisions read as follows:

§ 1.1001–3 Modifications of debt instruments.

* * * * *

(d) * * *

Example 9. [The text of the proposed amendments to § 1.1001–3(d) *Example 9* is the same as the text of § 1.1001–3T(d) *Example 9* published elsewhere in this issue of the **Federal Register**].

* * * * *

(e) * * *

(4) * * *

(iv) * * *

(B) [The text of the proposed amendments to § 1.1001–3(e)(4)(iv)(B) is the same as the text of § 1.1001–3T(e)(4)(iv)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(5) * * *

(ii) * * *

(B) * * *

(*2*) [The text of the proposed amendments to § 1.1001–3(e)(5)(ii)(B)(*2*) is the same as the text of § 1.1001–3T(e)(5)(ii)(B)(*2*) published elsewhere in this issue of the **Federal Register**].

* * * * *

(g) * * *

Example 1. [The text of the proposed amendments to § 1.1001–3(g) *Example 1* is the same as the text of § 1.1001–3T(g) *Example 1* published elsewhere in this issue of the **Federal Register**].

* * * * *

Example 5. [The text of the proposed amendments to § 1.1001–3(g) *Example 5* is the same as the text of § 1.1001–3T(g) *Example 5* published elsewhere in this issue of the **Federal Register**].

* * * * *

Example 8. [The text of the proposed amendments to § 1.1001–3(g) *Example 8* is the same as the text of § 1.1001–3T(g) *Example 8* published elsewhere in this issue of the **Federal Register**].

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Par. 9. The authority citation for part 48 continues to read in part as follows:

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

Par. 10. Section 48.4101–1 paragraphs (f)(4)(ii)(B) and (l)(5) are revised to read as follows:

§ 48.4101–1 Taxable fuel; registration.

* * * * *

(f) * * *

(4) * * *

(ii) * * *

(B) [The text of the proposed amendments to § 48.4101–1(f)(4)(ii)(B) is the same as the text of § 48.4101–1T(f)(4)(ii)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(l) * * *

(5) [The text of the proposed amendments to § 48.4101–1(l)(5) is the same as the text of § 48.4101–1T(l)(5) published elsewhere in this issue of the **Federal Register**].

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–16857 Filed 7–1–11; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–101826–11]

RIN 1545–BK04

New Markets Tax Credit Non-Real Estate Investments; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking.

SUMMARY: This document contains corrections to a notice of proposed rulemaking (REG–101826–11) that was published in the **Federal Register** on Tuesday, June 7, 2011 (76 FR 32882) modifying the new markets tax credit program to facilitate and encourage investments in non-real estate businesses in low-income communities.

FOR FURTHER INFORMATION CONTACT: Julie Hanlon-Bolton, (202) 622–3040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 45D of the Internal Revenue Code.

Need for Correction

As published, a notice of proposed rulemaking (REG–101826–11) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking (REG–101826–11), which was the subject of FR Doc. 2011–13978, is corrected as follows:

1. On page 32883, column 2, in the preamble, under the paragraph heading ''General Overview'', second paragraph of the column, fourth line, the language ''nonprofit corporation) or partnership if'' is corrected to read ''nonprofit corporation) or partnership, if''.

2. On page 32883, column 3, in the preamble, under the paragraph heading ''Explanation of Provisions'', first paragraph of the column, second line, the language ''amortizing loans) re-invest those'' is corrected to read ''amortizing loans) reinvest those''.

LaNita Van Dyke,

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

[FR Doc. 2011–16825 Filed 7–5–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF EDUCATION

34 CFR Subtitles A and B

[Docket ID ED–2011–OGC–0004]

Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

AGENCY: Department of Education.

ACTION: Request for information.

SUMMARY: The U.S. Department of Education (the Department) requests comments on its preliminary plan for the retrospective analysis of its existing regulations as part of its implementation of Executive Order 13563 ''Improving Regulation and Regulatory Review.'' The purpose of this preliminary plan is to make the Department's regulatory program more effective and less burdensome in achieving the Department's regulatory objectives. The plan, once final, will establish the Department's policy for conducting thorough and meaningful retrospective reviews and analyses of its regulations on an ongoing basis. The Department requests public comment on this preliminary plan to help the Department review its significant existing regulations in order to determine whether any of these regulations should be modified, streamlined, expanded, or repealed.

In addition, pursuant to the ''President's Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments,'' we request comments (including, when applicable, from students, their parents, and consumer and taxpayer representatives) on possible administrative flexibility that the Department may be able to provide to State, local, and tribal governments.

DATES: We must receive your comments on or before July 25, 2011.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID—Docket ID ED–2011–OGC–0004—at the top of your comments.

- *Federal eRulemaking Portal:* Go to www.regulations.gov to submit your comments. Information on using Regulations.gov, including instructions for finding a notice, submitting a comment, finding a comment, and signing up for e-mail alerts, is available

on the site under ''How to Use Regulations.gov'' in the Help section.

• *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments, address them to Elizabeth McFadden, Deputy General Counsel for Ethics, Legislative Counsel, and Regulatory Services, Office of the General Counsel, U.S. Department of Education, 400 Maryland Avenue, SW., room 6E300, Washington, DC 20202–2110.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Elizabeth McFadden, Deputy General Counsel for Ethics, Legislative Counsel, and Regulatory Services, Office of the General Counsel, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–2110. Telephone: 202–401–6000. You may also e-mail your questions to: *Reg-Review@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person listed under this section.

To view Executive Order 13563 go to: *http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.*

To view the ''President's Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments,'' go to: *http://www.whitehouse.gov/the-press-office/2011/02/28/presidential-memorandum-administrative-flexibility.*

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit comments regarding the preliminary plan, which is published in its entirety as an Appendix to this notice, and possible administrative flexibility that the Department may be able to provide to State, local, and tribal governments. Please let us know of any further opportunities we should take to improve any of our regulations by modifying, streamlining, expanding, or repealing them or to provide additional flexibility to entities that receive Department funds.

During and after the comment period, you may inspect all public comments on this notice by accessing Regulations.gov. You may also inspect the comments, in person, in room 6E300, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays. If you want to schedule an appointment to review the comments in person, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Assistance to Individuals With Disabilities in Reviewing the Public Docket

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public docket for this notice. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background

Retrospective Review

On January 18, 2011, President Obama issued Executive Order 13563 (published in the **Federal Register** on January 21, 2011 (76 FR 3821)), which directs agencies to conduct a retrospective analysis of existing significant regulations and to modify, streamline, expand, or repeal those regulations that are outmoded, ineffective, insufficient, or excessively burdensome. Executive Order 13563 supplements and reaffirms the principles of regulatory review enunciated in Executive Order 12866, ''Regulatory Planning and Review'' (published in the **Federal Register** on November 4, 1993 (58 FR 51735)). Some of these principles are that our regulatory system must: (1) Promote economic growth, innovation, competitiveness, and job creation; (2) be based on the best available science; (3) allow for meaningful public participation; (4) consider costs and benefits; (5) promote predictability; and (6) ensure that regulations are accessible and easy to understand. In order to advance these principles, Executive Order 13563 requires agencies to develop and implement a plan for periodically reviewing their existing significant regulations.

Section 6(b) of Executive Order 13563 directs each agency to develop and submit to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs a preliminary plan for reviewing existing significant regulations in order to determine whether any such regulations should be modified, streamlined, expanded, or repealed.

The Department developed a preliminary plan and submitted it to OMB on May 18, 2011. The preliminary plan addresses our plan to review existing significant regulations (and significant guidance documents and existing information collections—to the extent they are associated with existing regulations), and priorities, requirements, definitions, and selection criteria governing discretionary grant programs that are established through rulemaking but that are not codified in the Code of Federal Regulations. More specifically, the plan (1) lists the factors and processes the Department proposes to use to set priorities for the retrospective review of its regulations; (2) identifies an initial list of existing regulations that are candidates for review; (3) explains how the Department intends to coordinate with other Federal agencies that have overlapping jurisdiction or similar interests; and (4) sets forth the proposed components of its retrospective cost-benefit analysis. Through this notice, we request public comment on these particular elements of the preliminary plan as well as all other aspects of the plan. We will consider the feedback we receive through this process when formulating a final retrospective review plan and establishing processes for ongoing review at the Department.

The preliminary plan is included in the Appendix to this notice and is also available on the Department's Open Government Web site at *http://www.ed.gov/open.*

Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments

On February 28, 2011, the President issued a memorandum to Federal agencies entitled ''Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments.'' This memorandum requires Federal agencies to report to OMB on actions taken and plans to offer greater flexibility, where it will yield improved outcomes at lower cost, in Federal programs administered by State, local, and tribal governments.

To implement the President's directive in the memorandum, the Department is working to identify administrative, regulatory, and legislative barriers that currently prevent States, localities, and tribes

from efficiently and effectively using Federal funds to achieve program objectives. We are in the process of identifying a number of high-impact areas in which efforts to increase flexibility and reduce costs could have broad implications for a wide set of stakeholders. Potential actions under consideration include offering additional waiver options that would provide regulatory relief on key provisions, simplifying redundant or overlapping data requirements, providing a better and more transparent process for considering State requests to waive requirements to maintain fiscal effort, and improving interagency collaboration in such areas as early learning, workforce development, and place-based initiatives such as Promise Neighborhoods, which may offer opportunities for achieving additional cross-agency efficiencies.

We would appreciate responses to the following questions:

(1) What administrative, regulatory, and statutory requirements could be changed to help reduce costs and unnecessary burdens, spur innovation, and improve student or program outcomes?

(2) What regulatory requirements should the Department consider waiving, subject to statutory waiver authority?

(3) Should the Department streamline the application and approval process for waivers and, if so, how?

(4) Where could the Department reduce current reporting requirements that are not necessary or useful in measuring program performance, facilitating data-driven program improvements, or ensuring the proper use of taxpayer dollars? Where are there opportunities to consolidate or streamline data collection or submission requirements?

(5) How can the Department streamline or modify the procedures that we use for processing requests for waivers of maintenance-of-effort (MOE) requirements to make them more transparent and uniform across programs with MOE requirements and reduce unnecessary reporting for States?

(6) What cross-agency flexibility or alignment is needed to allow States, local, and tribal governments to improve their early learning, workforce, and place-based efforts? (This could include consideration of how we might provide additional flexibility in such areas as performance measurement, application requirements, or uses of funds, or might encourage cross-agency funding opportunities, etc.)

(7) What flexibility can the Department offer to help facilitate collaboration at and across the State, local, and tribal levels?

(8) Where could increased flexibility drive the most improvements in program and student outcomes?

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site. You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 29, 2011.

Arne Duncan,

Secretary of Education.

United States Department of Education

Preliminary Plan for Retrospective Analysis of Existing Rules

May 18, 2011.

I. Executive Summary of Preliminary Plan and Compliance With Executive Order 13563

Executive Order 13563 (Executive Order) recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Determining the costs and benefits of a regulation before it is implemented is a challenging task and it often cannot be accomplished with perfect precision. The U.S. Department of Education's (ED) plan is designed to create a defined policy, method, and schedule for identifying certain significant rules that may be outmoded, ineffective, insufficient, or excessively burdensome. The review processes described in this plan are intended to facilitate the identification of regulations that warrant repeal or modification, or the strengthening, complementing, or modernizing of regulations, where necessary or appropriate.

II. Scope of Plan

a. *Background:* ED supports States, local communities, institutions of higher education, and others in improving education nationwide and in helping to ensure that all Americans receive a quality education. We provide leadership and financial assistance pertaining to education at all levels to a wide range of stakeholders and individuals, including State educational agencies, early childhood programs, elementary and secondary schools, institutions of higher education, career and technical schools, nonprofit organizations, members of the public, and many others. These efforts are helping to ensure that all students will be ready for college and careers, and that all K–12 students have an open path towards postsecondary education. We also vigorously monitor and enforce the implementation of Federal civil rights laws in education programs and activities that receive Federal financial assistance, and support innovation, research, evaluation, and dissemination of findings to improve the quality of education. Overall, the programs we administer affect nearly every American during his or her life.

In developing and implementing regulations, guidance, technical assistance, and approaches to compliance related to our programs, we are guided by the following three principles. First, we are committed to working closely with affected persons and groups. Specifically, we work with a broad range of interested parties and the general public, including parents, students, and educators; State, local, and tribal governments; and neighborhood groups, schools, colleges, rehabilitation service providers, professional associations, advocacy organizations, businesses, and labor organizations.

Secondly, we are committed to ensuring our regulations are concise and minimize burden to the greatest extent possible while still helping ensure the achievement of program outcomes. And finally, we continue to seek greater and more useful public participation in our rulemaking activities through the use of transparent and interactive rulemaking procedures and new technologies. If we determine that it is necessary to develop regulations, we seek public participation at all key stages in the rulemaking process.

These three guiding principles will be incorporated fully into our retrospective analyses of ED regulations.

b. List all subagencies within the Department that are included in this plan:

The following offices within ED are included in this plan:

Office of the Secretary
Office of the Deputy Secretary

Office of the Under Secretary
Office of the Chief Financial Officer
Office of the Chief Information Officer
Office of Management
Office of Elementary and Secondary Education
Office of Postsecondary Education
Office of Federal Student Aid
Office of English Language Acquisition
Office of Special Education and Rehabilitative Services, including the Office of Special Education Programs, the National Institute on Disability and Rehabilitation Research, and the Rehabilitation Services Administration
Office of Inspector General
Office of Innovation and Improvement
Office of Safe and Drug-Free Schools
Office of Vocational and Adult Education
Office of the General Counsel
Office for Civil Rights
Office of Planning, Evaluation, and Policy Development

c. *The following types of documents are covered under this plan:*

- Existing regulations
- Significant guidance documents (to the extent they are associated with existing regulations)
- Existing information collections (to the extent they are associated with existing regulations)
- Priorities, requirements, definitions, and selection criteria governing discretionary grant programs that are established through rulemaking but are not codified in the Code of Federal Regulations [1]

III. Public Access and Participation

a. *Did the agency publish a notice in the* ***Federal Register*** *seeking public input on developing plans? If yes, please provide a link to the notice.*

No. However, ED will soon be publishing a notice requesting public comment on our preliminary plan in the **Federal Register** and posting it on our Open Government Web site. Through these notices, and pursuant to the President's Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local, and Tribal Governments, ED will solicit feedback (including, when applicable, from students, their parents, and consumer and taxpayer representatives) on possible administrative flexibilities that ED may be able to provide to State, local, and tribal governments; non-profit organizations; institutions of higher education; community-based organizations; and other entities that receive funds under our programs. ED believes it will receive more meaningful feedback from the public and stakeholders by providing a specific draft plan for retrospective review and by including in that notice questions on possible administrative flexibilities that may be accomplished through regulatory revisions as well as through other methods. ED also intends to solicit this feedback on an ongoing basis through meetings with stakeholders.

b. *Brief summary of public comments to notice seeking input:* N/A.

c. *Did the agency reach out to the public in addition to the public notice?* N/A.

IV. Current Agency Efforts Already Underway Independent of E.O. 13563

a. Summary of pre-existing agency efforts (independent of E.O. 13563) to conduct retrospective analysis of existing rules:

ED has long been committed to ensuring that its regulations are reviewed and updated as necessary and appropriate. As outlined each year in ED's Regulatory Plan,[2] and through consistent application of the key principles outlined below, we have eliminated unnecessary regulations and identified situations in which major programs could be implemented without regulations or with limited regulatory action.

In deciding when to regulate, we consider:

- Whether regulations are essential to promote quality and equality of opportunity in education;
- Whether a demonstrated problem can be resolved without regulation;
- Whether regulations are necessary in order to provide a legally binding interpretation that resolves ambiguity;
- Whether entities or situations subject to regulation are so diverse that a uniform approach through regulation would do more harm than good; and
- Whether regulations are needed to protect the Federal interest; that is, to ensure that Federal funds are used for their intended purpose and to eliminate fraud, waste, and abuse.

In deciding how to regulate, we are mindful of the following principles:

- Regulate no more than necessary;
- Minimize burden to the extent possible, and promote multiple approaches to meeting statutory requirements when possible;
- Encourage coordination of federally funded activities with State and local reform activities;
- Ensure that the benefits justify the costs of regulating;
- To the extent possible, establish performance objectives rather than specify compliance behavior; and
- Encourage flexibility, to the extent possible, so institutional forces and incentives achieve desired results.

Additionally, we routinely review the priorities and requirements governing our discretionary grant competitions following the completion of those competitions to determine whether changes should be made for future competitions.

Over the past two years, and operating under these principles, we have engaged in retrospective review of several key regulations that required updating to reflect changes in the authorizing statute, Administration priorities, or ED policies. We also began the process of developing a broader plan for a retrospective review of our regulations. Some examples of those efforts are as follows:

- ED recently reviewed and revised its Freedom of Information Act (FOIA) regulations to implement changes made to FOIA in recent years. These amended regulations also took into account public guidance regarding FOIA issued by the White House and the Department of Justice. The revised regulations articulate more clearly to the public how ED processes FOIA requests for publicly available records, thereby promoting equality of opportunity and decreasing ambiguity.
- In 2009 and 2010, ED reviewed and subsequently modified, following notice and public comment, its Education Department Acquisition Regulations (EDAR) to bring those regulations into alignment with changes to the Federal Acquisition Regulations. These modifications will increase the efficiency with which ED manages contracts.
- Upon reauthorization of the Federal TRIO discretionary grant programs in the Higher Education Opportunity Act of 2008, ED reviewed its existing TRIO regulations and conducted negotiated rulemaking in 2009 and 2010 to comprehensively update and amend the regulations governing these programs. These amended regulations will help ensure that Federal funds are used for their intended purpose and resolve ambiguity for potential applicants, thereby ensuring that all eligible applicants have an opportunity to participate in the program.
- Over the past two years, ED reviewed and revised a number of program integrity regulatory provisions associated with the Federal student aid programs authorized under Title IV of

[1] When referring to the review of regulations throughout this plan, that review includes review of significant guidance documents and information collections associated with the regulations under review.

[2] *See* U.S. Department of Education, Statement of Regulatory Priorities, 75 FR 79509 (Dec. 20, 2010).

the Higher Education Act of 1965, as amended (HEA). ED conducted this review in recognition of the fact that the student financial aid programs have grown dramatically in recent years, placing significantly more taxpayer funding at risk. In response to this dramatic growth in aid, we tightened our regulatory requirements in some areas (*e.g.,* misrepresentation, State authorization, credit hours, and incentive compensation) while relaxing them in others (*e.g.,* verification). This balanced approach, combined with our work on the ''gainful employment'' issue, will allow for additional growth in the aid programs while ensuring that we have appropriate safeguards in place to protect taxpayer funds.

• In January 2011, ED successfully completed its 2010 Burden Reduction Initiative to reduce Free Application for Federal Student Aid (FAFSA) burden by at least five percent. In fact, ED decreased the FAFSA burden by 5,405,813 hours, or more than 14 percent. As part of accomplishing this impressive burden reduction, ED also realized the other goals included as part of the initiative: (a) Consolidation of the FAFSA and SAR into one ICR to better reflect that the two are part of one business process—applying for Federal student financial aid; and (b) Simplifying the application experience for student aid applicants by shortening completion times, primarily through the use of improved technology such as ''skip and assumption logic.''

• In preparation for conducting a retrospective review of ED's regulations, we have reviewed plans and strategies used by other agencies, journal articles, and Administrative Conference of the United States (ACUS) Recommendation 95–3, ''Review of Existing Agency Regulations.'' We also began considering methods for determining which regulations should be reviewed, strategies for engaging senior leadership, and how best to allocate resources for such a review.

b. *What specific rules, if any, were already under consideration for retrospective analysis?*

Prior to issuance of the Executive Order, and in establishing ED's regulatory priorities for 2011, we identified several specific regulations for retrospective review and determined that, based on that review, further amendments to these regulations are necessary. These regulations are as follows:

• *The Federal Family Education Loan (FFEL) program regulations in 34 CFR part 682 and the William D. Ford Federal Direct Loan (Direct Loan) program regulations in 34 CFR part 685.* In the SAFRA Act, Title II of the Health Care and Education Reconciliation Act of 2010, Congress ended the making of new loans in the FFEL program, effective July 1, 2010. As a result, the Direct Loan program has expanded to be the single source of new Federal student loans. ED is evaluating to what extent some of the FFEL program regulations are no longer needed and what changes are needed within the Direct Loan program regulations to improve efficiency and modernize the operations of that program. ED has begun the negotiated rulemaking process for these regulations.

• *Regulations in 34 CFR parts 607, 608, 609, 628, and 637, governing the institutional development programs authorized by Titles III and V of the HEA.* These regulations govern existing discretionary grant programs for minority-serving institutions. The Higher Education Opportunity Act of 2008 and the SAFRA Act created several new programs for minority-serving institutions; these new programs, however, are not covered by the existing regulations. We need to review and amend the existing regulations in order to streamline them across the different programs, to the extent feasible, and to ensure that they cover the newly authorized programs. Through these amendments, we plan to simplify the application process, thereby reducing burden on potential applicants.

• *ED's regulations governing its direct grant and State-administered grant programs in 34 CFR parts 74 through 99, also known as the Education Department General Administrative Regulations (EDGAR).* Over the last several years, we have identified provisions within these regulations that are obsolete or that require updating to take into account developments in technology and streamlined application submission processes, thereby reducing burden on our applicants and grantees. Additionally, in implementing several new grant programs under the American Recovery and Reinvestment Act of 2009 (ARRA), we have identified key provisions in EDGAR that require substantive changes to improve transparency and improve the efficiency of our grant-making functions.

• *Regulations in 34 CFR part 99 regarding the Family Educational Rights and Privacy Act (FERPA).* On April 8, 2011, ED issued a notice of proposed rulemaking to amend these regulations. These proposed amendments are necessary to ensure that ED's implementation of FERPA continues to protect the privacy of education records, as intended by Congress, while allowing for the effective use of data in statewide longitudinal data systems (SLDS) as envisioned in the America COMPETES Act and under the ARRA. Improved access to data contained within an SLDS will reduce burden on States and greatly facilitate States' efforts to evaluate education programs, to build upon what works and discard what does not, to increase accountability and transparency, and to contribute to a culture of innovation and continuous improvement in education.

V. Elements of Preliminary Plan/ Compliance With E.O. 13563

a. *How does the agency plan to develop a strong, ongoing culture of retrospective analysis?*

This plan, once finalized, will establish ED's policy for conducting thorough and meaningful retrospective reviews and analyses of our regulations on an ongoing basis. This plan will be disseminated to all offices within ED, and all offices will participate in implementing the plan.

ED has established a retrospective review team that is responsible for developing this plan and for coordinating the retrospective reviews going forward. This team will regularly report its progress in implementing the plan and conducting the retrospective reviews to Deputy Secretary Miller and other senior officials. As indicated below, ED intends to conduct its retrospective reviews biennially. Thus, retrospective reviews will become standard operating procedure in the agency.

b. *Prioritization. What factors and processes will the agency use in setting priorities?*

The factors ED will use in setting priorities for the retrospective review of its regulations are:

• Have regulated parties expressed confusion about the regulations or requested changes to the regulations?

• Can the regulations be understood and implemented without extensive legal interpretation, non-regulatory guidance, or technical assistance?

• Have regulated parties expressed concern about unwarranted regulatory burden? Do the regulations create an unnecessary administrative burden?

• What is the estimated timeline for reviewing and possibly amending the regulations? For instance, will ED need to conduct negotiated rulemaking to amend the regulations, and does ED need amended regulations in place by a certain date?

• Has Congress amended the authorizing statute such that prompt review of existing regulations is necessary?

• Does ED anticipate reauthorization of the authorizing statute in the near term such that prompt review of existing regulations would likely be disrupted or not lead to regulatory revisions that could be implemented before reauthorization?

• Are the regulations outmoded, unnecessary, or out of date? If so, are they impeding the proper administration of the relevant program?

• Are the current regulations sufficient to administer the applicable programs?

• Are the regulations necessary to conduct the grant program or can the program be implemented based entirely on the statutory provisions or through using appropriate provisions of EDGAR?

• Have issues with the regulations been identified in audits (Office of Inspector General (OIG), Government Accountability Office (GAO), Single Audits)? Are there repeat audit findings or conflicting views on what the regulations mean?

• Are the regulations essential for program effectiveness and financial integrity? For example, does ED or another oversight entity monitor compliance with the regulations?

c. *Initial list of candidate rules for review over the next two years:*

In addition to those regulations currently under review, we have preliminarily identified a number of other regulatory provisions that we believe warrant retrospective review. As indicated below, program offices will be asked to conduct a retrospective review of these and other regulatory provisions in the next several months. These are as follows:

• *Regulations in 34 CFR part 300 under Part B of the Individuals with Disabilities Education Act (IDEA) and reporting requirements under Part B of IDEA.* We have heard from a number of States about burden associated with some provisions of our current Part B, IDEA regulations and annual reporting requirements. We intend to conduct a thorough review of these regulations and requirements to assess their effectiveness and determine whether burden can be reduced, without diminishing the rights of students with disabilities.

• *Regulations in 34 CFR part 350 relating to programs administered by the National Institute on Disability and Rehabilitation Research (NIDRR).* In reviewing these regulations, ED seeks to identify regulatory changes that could improve the process for awarding grants and reduce the burden for eligible entities who apply for discretionary funds under the programs administered by NIDRR.

• *Regulations in 34 CFR 388.21 for the State Vocational Rehabilitation Unit In-Service Training Program.* The Department is concerned that the current formula may lead to inequitable or inefficient distribution of funding among eligible entities and is interested in identifying changes that might increase the effectiveness of this program.

• *Regulations in 34 CFR parts 400 through 491 governing career and technical education programs.* These regulations have not been updated since the most recent reauthorization in the Carl D. Perkins Career and Technical Education Improvement Act of 2006. We will consider whether regulations are needed to improve the administration and effectiveness of the program.

• *Regulations in 34 CFR part 104 implementing section 504 of the Rehabilitation Act of 1973.* These regulations, which are designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance, have not been updated since 2000. We will consider whether changes are needed to improve the administration and implementation of the regulations.

• *Regulations in 34 CFR parts 655, 656, 657, 658, 660, 661, 662, 663, 664, and 669 governing the postsecondary international education programs.* Following reauthorization of the HEA in 2008, ED made limited technical amendments to these regulations. However, a more comprehensive review of these regulations is necessary. Specifically, ED needs to review and amend these regulations to streamline them across the different programs to reduce burden on potential applicants, to the extent feasible, and to ensure that they provide the flexibility necessary to address emerging issues in international education.

• *Regulations in 34 CFR parts 673, 674, 675, and 676 governing the campus-based Federal Student Aid programs.* ED has regulations governing these formula grant programs that require updating and streamlining. We will consider changes that are needed to improve the administration and efficiency of these programs, while reducing burden on regulated parties.

• *Regulations governing discretionary grant programs for which the authorization has been repealed or for which Congress has not provided funding in some time.* These include regulations for the Endowment Challenge Grant program in 34 CFR part 628, the Urban Community Service Program in 34 CFR part 636, the Christa McAuliffe Fellowship Program in 34 CFR part 237, and in the Bilingual Education: Graduation Fellowship Program 34 CFR part 535. We will repeal the regulations for the programs that are no longer authorized and consider whether the regulations for authorized but no longer funded programs are still necessary.

d. *Structure and Staffing. High-level agency official responsible for retrospective review.*

Name/Position Title: Tony Miller, Deputy Secretary.

E-mail address: tony.miller@ed.gov.

e. *How does the agency plan to ensure that the agency's retrospective team and process maintain sufficient independence from the offices responsible for writing and implementing regulations?*

The retrospective review team will include representatives of the following offices: Office of the Deputy Secretary; Office of the Under Secretary; Office of Planning, Evaluation, and Policy Development; Budget Service; and the Office of the General Counsel. These offices do not have primary responsibility for drafting or implementing regulations. Additionally, the team will consult, as appropriate, with other offices that have agency-wide responsibilities, such as the Office of Inspector General.

f. *Describe agency actions, if any, to strengthen internal review expertise. This could include training staff, regrouping staff, hiring new staff, or other methods.*

The review team will be trained on the prioritization factors that ED has identified above and on our principles for regulating. The principles and the prioritization factors will be used as the key criteria in conducting the review.

g. *How will the agency plan for retrospective analysis over the next two years, and beyond?*

ED will be publishing the preliminary plan for public comment and, following the receipt of public comment, will revise the plan accordingly. At the same time, the retrospective review team will be asking program offices, budget analysts, and program attorneys to complete a retrospective review survey that requests information on existing regulations (see response to question VI(c) below). The team will coordinate the retrospective reviews and provide periodic reports to Deputy Secretary Miller and other senior officials on the progress and results of those reviews.

Once these reviews have been completed, the retrospective review team will analyze the results and develop recommendations to senior officials about which regulations should be amended (or what other actions other

than regulation could be taken to reduce burden). Taking into account the prioritization factors listed above and agency resources, and working with senior officials, ED will develop a schedule for the amendment of those regulations identified for revision.

While ED is conducting these reviews, it will analyze the public comments that it receives on the draft plan and incorporate any changes into the final plan. ED intends to conduct its retrospective reviews biennially.

h. *How will the agency decide what to do with the analysis?*

The retrospective review team will use the results of the analysis to develop recommendations for senior officials regarding whether regulations should be amended and whether alternatives to regulating, such as updating guidance or modifying reporting requirements, should instead be used to reduce burden, simplify program implementation, or improve understanding of the regulations.

i. *What are the agency's plans for revising rules? How will agencies periodically revisit rules (e.g., through sunset provisions, during regular intervals)?*

ED will revise regulations based on the results of the retrospective reviews, the recommendations of the retrospective review team, and the decisions of senior officials. As indicated above, ED intends to conduct its retrospective reviews biennially.

j. *Describe how the agency will coordinate with other Federal agencies that have jurisdiction or similar interests:*

ED will work through the Office of Information and Regulatory Affairs within the Office of Management and Budget and with its existing contacts at other agencies as it is conducting its retrospective reviews and any subsequent amendments to our regulations. These agencies include the U.S. Department of Justice, the U.S. Department of Labor, the U.S. Department of Health and Human Services, the Social Security Administration, and the U.S. Small Business Administration. With respect to our discretionary grant programs, we have consulted and will continue to consult with other Federal agencies engaged in similar activities to assess ways in which we can reduce overlap and redundancy and share best practices, including in such areas as pre-award risk assessments and audit reviews.

k. *Will the plan be peer reviewed?*

There has been a thorough internal review of the preliminary plan by all offices within ED and any revisions made as a result of the public comment we receive on the draft plan will undergo a similarly thorough review.

If yes, please describe those plans:

The preliminary plan has undergone several levels of Departmental review. We have actively engaged and sought input from ED's senior leaders in developing the plan. The plan was presented to ED's Policy Committee for input and recommendations by senior policy officials. Based on recommendations from the Policy Committee, changes were made to the plan, and further changes were made as a result of the review by a larger group of ED staff who are directly responsible for administering the programs that would be affected by any changes to the regulations. As necessary, meetings were held to answer questions and reconcile differences.

ED will soon be publishing the preliminary plan for public comment and will seek informal feedback from stakeholders. Following receipt of public and stakeholder input, ED will consider further revisions to the plan. The final plan will undergo a similar internal review as the preliminary plan.

VI. Components of Retrospective Cost-Benefit Analysis

a. *What metrics will the agency use to evaluate regulations after they have been implemented? For example, will the agency use increases in net benefits, increases in cost effectiveness ratios, or something else?*

ED will use several metrics to evaluate regulations after they have been implemented. These metrics are as follows:

- Have there been numerous questions from stakeholders asking for further clarification of, or further amendment to, the regulations on points it would be feasible or desirable to address or clarify in the regulations?
- What, if any, guidance has ED provided to clarify the regulations following issuance of the regulations and has the guidance provided the clarification needed?
- What does information obtained from ED data collections, including data collected through evaluations, grantee performance reports, and other sources tell us about changes in net benefits, cost-effectiveness ratios, or other financial metrics?
- With respect specifically to ED's regulations implementing Parts B and C of IDEA, ED already publishes a quarterly list of correspondence that it sends in response to requests from stakeholders. This correspondence provides guidance and interpretations of the IDEA and its implementing regulations. We will continue to monitor the substance of this correspondence and the number of inquiries received to assess whether regulatory changes may be necessary.
- Has implementation of the regulations led to unfair or unequal access to funding?

b. *What steps has the agency taken to ensure that it has the data available with which to conduct a robust retrospective analysis?*

The retrospective review team will develop a template for offices to use in collecting data on the metrics identified above. ED also is exploring using a customer survey on an ongoing basis to obtain feedback and data from the public on ED regulations.

c. *How, if at all, will the agency incorporate experimental designs into retrospective analyses?*

Although ED will not be incorporating experimental designs into its analyses, its retrospective analysis of a given set of regulations will begin with independent reviews from the following: (1) Program staff who are responsible for overseeing the implementation of the regulations; (2) the program attorney who advises the program staff on the legal aspects of administering the program; and (3) budget staff who are knowledgeable about the allowable uses of program funds. Each individual will independently complete a review survey that requests information on at least the following questions (which correspond to the prioritization factors described above):

- Have regulated parties identified a lack of clarity or need for changes in the regulations? If so, what regulatory provisions cause confusion or need change?
- Can the regulations be understood and implemented without extensive legal interpretation, non-regulatory guidance, or technical assistance?
- Have regulated parties expressed concern about unwarranted regulatory burden? Do the regulations create an unnecessary administrative burden? If so, what regulatory provisions might be unduly burdensome and why?
- What is the estimated timeline for reviewing and possibly amending the regulations? For instance, will ED need to conduct negotiated rulemaking to amend the regulations and does ED need amended regulations in place by a certain date?
- Has Congress amended the authorizing statute such that prompt review of existing regulations is necessary?
- Does ED anticipate reauthorization of the authorizing statute in the near

term? If yes, how will reauthorization affect existing regulations?

• Are the regulations outmoded, unnecessary, or out of date? If so, are they impeding the proper administration of the relevant program? Please identify specific regulatory provisions that are obsolete or out of date and provide a brief explanation.

• What does the evidence from program evaluations, including those that use experimental designs, reveal about the efficacy of the regulations and the need for changes?

• Are the current regulations sufficient to administer the applicable programs? If not, what specific changes would you recommend to update the existing regulations?

• Are regulations necessary to conduct the grant program or can the program be implemented based on the statutory provisions? If regulations are necessary, what specific areas need to be covered in the regulations?

• Have issues with the regulations been identified in audits (OIG, GAO, Single Audits)? Are there repeat audit findings or conflicting views on what the regulations mean?

• Are the regulations essential for program effectiveness and financial integrity? For example, does ED or any other oversight entity monitor compliance with the regulations?

• What are the costs and benefits of removing a regulatory requirement, and what would be the effect on students and program accountability?

VII. Publishing the Agency's Plan Online

a. Will the agency publish its retrospective review plan and available data on its Open Government Web site (*http://www.agency.gov/open*). If yes, please provide the name of a technical staff person who will be charged with updating the plans online.

ED will publish its plan on its Open Government website (*http://www.ed.gov/open*). As indicated above, ED intends to solicit public comment on its plan as well. The technical person who will be charged with updating the plan online is Kirk Winters, who can be reached at *kirk.winters@ed.gov.*

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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AD85

Special Regulations, Areas of the National Park System, Cape Hatteras National Seashore

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service (NPS) proposes to designate routes where off-road vehicles (ORVs) may be used within Cape Hatteras National Seashore (Seashore), North Carolina. Under NPS general regulations, the operation of motor vehicles off of roads within areas of the national park system is prohibited unless otherwise provided for by special regulation. The proposed rule would authorize ORV use at the Seashore, manage it to protect and preserve natural and cultural resources and natural processes, and provide a variety of safe visitor experiences while minimizing conflicts among various users.

DATES: Comments must be received on or before midnight (Eastern Daylight Time) Tuesday September 6, 2011. The NPS does not anticipate extending the public comment period beyond the stated deadline due to a court imposed deadline for completing the final rule.

ADDRESSES: You may submit comments, identified by the Regulation Identifier Number (RIN) 1024–AD85, by any of the following methods:

—*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

—*Mail or hand deliver to:* Superintendent, Cape Hatteras National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954.

—For additional information see ''Public Participation'' under **SUPPLEMENTARY INFORMATION** below.

Comments submitted through Federal eRulemaking Portal: *http://www.regulations.gov* or submitted by mail must be entered or postmarked before midnight (Eastern Daylight Time) September 6, 2011. Comments submitted by hand delivery must be received by the close of business hours (5 p.m. Eastern Daylight Time) September 6, 2011. Comments will not be accepted by fax, e-mail, or in any way other than those specified above, and bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.

FOR FURTHER INFORMATION CONTACT: Mike Murray, Superintendent, Cape Hatteras National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954. Phone: (252) 473–2111 (ext 148).

SUPPLEMENTARY INFORMATION:

Background

Description of Cape Hatteras National Seashore

Officially established in 1937 along the Outer Banks of North Carolina, Cape Hatteras is the nation's first national seashore. Consisting of more than 30,000 acres distributed along approximately 67 miles of shoreline, the Seashore is part of a dynamic barrier island system.

The Seashore serves as a popular recreation destination where visitors participate in a variety of recreational activities. The Seashore also contains important habitat for wildlife created by the Seashore's dynamic environmental processes. Several species, listed under the Endangered Species Act (ESA), including the piping plover, seabeach amaranth, and three species of sea turtles, are found within the park.

Authority and Jurisdiction

In enacting the National Park Service Organic Act of 1916 (Organic Act) (16 U.S.C. 1 *et seq.*), Congress granted the NPS broad authority to regulate the use of areas under its jurisdiction. Section 3 of the Organic Act specifically authorizes the Secretary of the Interior, acting through the NPS, to ''make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks. * * *''

Off-Road Motor Vehicle Regulation

Executive Order 11644, Use of Off-Road Vehicles on the Public Lands, was issued in 1972 in response to the widespread and rapidly increasing off-road driving on public lands ''often for legitimate purposes but also in frequent conflict with wise land and resource management practices, environmental values, and other types of recreational activity.'' Executive Order 11644 was amended by Executive Order 11989 in 1977, and together they are collectively referred to in this rule as ''E.O.''. The E.O. requires Federal agencies that allow motorized vehicle use in off-road areas to designate specific areas and routes on public lands where the use of motorized vehicles may be permitted.

Specifically, section 3 of the E.O. requires agencies to develop and issue regulations and administrative instructions to provide for

administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and areas in which the use of off-road vehicles is prohibited. Those regulations shall direct that the designation of such areas and trails will be based upon the protection of the resources of the public lands, promotion of the safety of all users of those lands, and minimization of conflicts among the various uses of those lands. The regulations shall further require that the designation of such areas and trails shall be in accordance with the following—

(1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands.

(2) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats.

(3) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

(4) Areas and trails shall not be located in officially designated Wilderness Areas or Primitive Areas. Areas and trails shall be located in areas of the National Park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.

The NPS regulation at 36 CFR 4.10(b) implements the E.O. and requires that routes and areas designated for ORV use be promulgated as special regulations and that the designation of routes and areas shall comply with 36 CFR 1.5 and the E.O. It also states that such routes and areas may be designated only in national recreation areas, national seashores, national lakeshores, and national preserves. The proposed rule is consistent with these authorities and with NPS Management Policies 2006, available at: *http://www.nps.gov/policy/MP2006.pdf.*

ORV Use at Cape Hatteras National Seashore

Following the establishment of the Seashore in 1937, beach driving was primarily for the purpose of transportation, not recreation. Because the area was sparsely populated, the number of ORVs on the beach was much smaller than it is today. The paving of NC Highway 12, the completion of the Bonner Bridge connecting Bodie and Hatteras islands in 1963, and the introduction of the State of North Carolina ferry system to Ocracoke Island facilitated visitor access to the sound and ocean beaches. Improved access, increased population, and the popularity of the sport utility vehicle have resulted in a dramatic increase in vehicle use on Seashore beaches.

Since the 1970s, ORV use at the Seashore has been managed through various draft or proposed plans, none were completed or published as a special regulation as required by 36 CFR 4.10(b). Motivated in part by a decline in most beach nesting bird populations on the Seashore since the 1990s, in July 2007 the NPS completed the Cape Hatteras National Seashore Interim Protected Species Management Strategy/Environmental Assessment (Interim Strategy) to provide resource protection guidance with respect to ORVs and other human disturbance until the long-term ORV management plan and regulation could be completed. In October 2007, a lawsuit was filed by Defenders of Wildlife and the National Audubon Society against the NPS and the US Fish and Wildlife Service, challenging the Interim Strategy. The lawsuit alleged the Federal defendants failed to implement an adequate plan to govern off-road vehicle use at the Seashore that would protect the Seashore's natural resources while minimizing conflicts with other users, and that the Federal defendants failed to comply with the requirements of the E.O. and NPS regulations regarding ORV use. The lawsuit was resolved in April 2008 by a consent decree agreed to by the plaintiffs, the NPS, and the interveners, Dare and Hyde counties and a coalition of local ORV and fishing groups. ORV use is currently managed pursuant to the consent decree, which also established deadlines of December 31, 2010 and April 1, 2011, respectively, for completion of an ORV management plan/EIS and a final special regulation. On December, 20 2010, the Cape Hatteras ORV Plan/Final Environmental Impact Statement (plan/FEIS) was completed, and the Record of Decision (ROD) selecting the NPS preferred alternative was signed by the NPS Southeast Regional Director. The public was informed of the availability of the plan/FEIS and ROD through notice in the **Federal Register** on December 28, 2010. The plan/FEIS, the ROD, and other supporting documentation can be found online at *http://www.parkplanning.nps.gov/caha.* The NPS has notified the parties to the litigation and the US District Court for Eastern District of North Carolina (Court) that the final rule will not be completed until late summer 2011 with implementation planned for fall 2011. On April 12, 2011, the Court issued an order modifying the consent decree, extending the deadline for promulgation of the final rule until November 15, 2011.

The Proposed Rule

This proposed rule establishes a special regulation pursuant to 36 CFR 4.10(b) to manage ORV use at the Seashore. The special regulation will implement portions of the selected action alternative, as described in the ROD, by designating ORV routes at the Seashore, establishing requirements to obtain a permit, and imposing date and time and other restrictions related to operation of ORVs, including vehicle and equipment standards. In addition, the proposed rule would correct a drafting error at § 7.58(b)(1) to clarify that the definitions only apply to § 7.58 and not to the entirety of 36 CFR Part 7. Further the rule would delete the definition of permittee at § 7.58(b)(1)(ii) as it is unnecessary and potentially confusing to the public, as the term could be applied to individuals holding different types of permits for different activities. The deletion consequently requires redesignation of the structure of paragraph (b). The addition of paragraph (c) would implement portions of the selected action alternative as described in the ROD, by designating ORV routes at the Seashore, establishing requirements to obtain a permit, and imposing date and time and other restrictions related to operation of ORVs, including vehicle and equipment standards.

The following explains some of the principal elements of the proposed rule in a question and answer format:

What is an ''Off-Road Vehicle'' (ORV)?

For the purposes of this regulation, an ''off-road vehicle'' or ''ORV'' means a motor vehicle used off of park roads (off-road). Not all ORVs are authorized for use at the Seashore; however, all ORVs are subject to the vehicle requirements, prohibitions, and permitting requirements described below in this regulation.

Do I need a permit to operate a vehicle off road?

Yes. To obtain an ORV permit, you must complete a short education program, acknowledge in writing that you understand and agree to abide by the rules governing ORV use at the Seashore, and pay the applicable permit

fee. Both weekly (7-day, valid from the date of issuance) and annual (calendar year) ORV permits would be available.

Is there a limit to the number of ORV permits available?

No. There would be no limit to the number of permits that the Superintendent could issue. However, use restrictions may limit the number of vehicles on a particular route at one time.

Several of my family members have ORVs that we would like to use on Seashore beaches. Do we need to get a permit for each vehicle?

Yes. You would need to get a permit for each vehicle that you want to use for driving on designated ORV routes. A permit would need to be affixed to all vehicles operated on designated ORV routes within the Seashore.

Where can I operate my vehicle off road?

Once you obtain an ORV permit, you may operate a vehicle off road only on designated routes described in the tables located in § 7.58(c)(9). The tables also provide dates for seasonal restrictions on driving these designated routes. Maps of designated ORV routes would be available in the Office of the Superintendent and on the Seashore Web site.

Does the ORV permit guarantee that all designated ORV routes will be open for me to use?

No. In addition to the referenced seasonal restrictions, ORV routes are also subject to temporary resource and safety closures. However, past experience indicates that substantial sections of the beach that are designated as ORV routes would remain open for ORV use when other sections are temporarily closed.

Are there any requirements for my vehicle?

Yes. To receive a permit to operate a vehicle on designated ORV routes, your vehicle must be registered, licensed, and insured for highway use and comply with inspection regulations within the state, country, or province where the vehicle is registered. It must have no more than two axles and its tires must be U.S. Department of Transportation listed or approved, as described at: *http://www.safercar.gov/Vehicle+Shoppers/Tires/Tires+Rating/Passenger+Vehicles.* You would also be required to carry in your vehicle a low-pressure tire gauge, shovel, jack, and jack stand.

Can I drive my two-wheel-drive vehicle on designated ORV routes?

Yes. Four-wheel-drive vehicles are recommended, but two-wheel-drive vehicles would be allowed if, in the judgment of the vehicle operator, the vehicle is capable of over-sand travel.

Can I tow a boat or utility trailer with my vehicle on designated ORV routes?

Yes. Towed boat and utility trailers with one or two axles would be allowed. Boat and utility trailers with more than two axles would be prohibited.

Can I tow a travel trailer (camping trailer) on designated ORV routes?

No. Travel trailers (*i.e.,* camping trailers) would be prohibited on designated ORV routes, as camping at the Seashore is prohibited except in designated campgrounds.

Can I ride my motorcycle off of Seashore roads?

No. The operation of motorcycles would be prohibited on designated ORV routes.

Motorcycles are generally not capable of travelling through the deep, soft sand or carrying the requisite equipment for self extraction should they become stuck.

Can I ride my all-terrain vehicle (ATV), or utility vehicle (UTV) off of Seashore roads?

No. Vehicles not registered, licensed and insured for highway use, including ATVs and UTVs, cannot lawfully be operated to ORV access points, and adequate parking for trailers or other transport vehicles is not readily available adjacent to ORV access points. Further, these vehicles have historically not been allowed to operate within the Seashore, and authorizing such use would limit the capacity for and interfere with the more significant and traditional use of four-wheel drive pick-up trucks, sport utility vehicles and other passenger vehicles for off-road access associated with fishing, picnicking, sun bathing, surfing, wading and swimming.

What is the speed limit on designated ORV routes?

The speed limit would be 15 miles per hour (unless otherwise posted), except for emergency vehicles when responding to a call.

Are there right-of-way rules for ORV drivers in addition to those already in effect at the Seashore?

Yes. Vehicles must yield to pedestrians and move to the landward side of the ORV corridor when approaching or passing a pedestrian on the beach. When traveling within 100 feet of pedestrians, ORVs must slow to 5 mph.

Can I drive on designated ORV routes at night?

Yes, but not at all times on all routes. ORVs would be allowed on designated ORV routes 24 hours a day from November 16 to April 30, subject to the terms and conditions established under an ORV permit. However, from May 1 to November 15, designated ORV routes in potential sea turtle nesting habitat (ocean intertidal zone, ocean backshore, and dunes) would be closed to ORVs from 9:00 p.m. until 7:00 a.m. However, from September 15 to November 15, the Superintendent may reopen designated ORV routes at night if there are no turtle nests remaining. This is a minor change to the dates in the ROD. The NPS has decided it would be easier for the public to understand and more convenient to administer if the night driving dates coincided with some of the seasonal ORV route dates. Therefore, as described, night driving may be allowed beginning on September 15 instead of September 16. Routes that are subject to these night driving restrictions, as well as routes identified as having no turtle nests remaining, will be depicted on maps available in the Office of the Superintendent and on the Seashore Web site.

Can I leave my ORV parked on the beach if I don't drive it between 9 p.m. and 7 a.m. during the dates night driving restrictions are in effect?

No. During the restricted hours, all vehicles would be prohibited on designated ORV routes, including the beach.

Is a separate permit required for night driving?

No. It would be covered by the ORV permit required to drive on the designated ORV routes in the Seashore.

I have a family member who is disabled or mobility-impaired. Can I use my ORV to drive that family member to the beach where we are gathering, even if it is not designated as an ORV route?

Yes, such use would be accommodated on a case-by-case basis in front of villages only, and would be subject to the conditions of a special use permit issued by the Superintendent. The permit would allow you to transport mobility-impaired individuals to a predetermined location in an otherwise vehicle-free area (VFA) in front of the villages. After transporting the person to the beach, you would have

to immediately return the vehicle to the nearest ORV route or Seashore road. Additionally, you should keep in mind that there would be many miles of beach open to ORVs year-round or seasonally that will be accessible by ORV for family gatherings and other activities. In those areas, vehicles may simply be parked in the ORV corridor.

Do commercial use authorization holders and commercial fisherman need a separate ORV permit?

No. Commercial Use Authorizations (CUAs) would, as appropriate, also authorize ORV use by the CUA holder but not their clients. ORV use by commercial fisherman who are actively engaged in a commercial fishing activity would be authorized ORV use under the terms of their commercial fishing special use permit.

Can commercial fishermen drive in the vehicle-free areas (VFA)?

Yes. In keeping with the current practice, commercial fishermen when actively engaged in their authorized commercial fishing activity would be allowed to enter VFAs, except for resource closures and lifeguarded beaches. Lifeguarded beaches would be closed seasonally by the Superintendent. Commercial fishing activities and use of associated fishing gear conflicts with the significant, concentrated beach use and associated swimming use of these areas by visitors.

Commercial fishermen while actively engaged in authorized commercial fishing activity and who are able to present a fish-house receipt from the previous 30 days would be allowed to enter the beach at 5 a.m. on days when night driving restrictions are in effect for the general public.

Compliance With Other Laws and Executive Orders

Use of Off-Road Vehicles on the Public Lands (Executive Order 11644)

Section 3(4) of E.O. provides that ORV ''areas and trails shall be located in areas of the National Park system, Natural Areas, or National Wildlife Refuges and Game Ranges only if the respective agency head determines that off-road vehicle use in such locations will not adversely affect their natural, aesthetic, or scenic values.'' Since the E.O. clearly was not intended to prohibit all ORV use everywhere in these units, the term ''adversely affect'' does not have the same meaning as the somewhat similar terms ''adverse impact'' or ''adverse effect'' commonly used in the National Environmental Policy Act of 1969 (NEPA) . Under NEPA, a procedural statute that provides for the study of environmental impacts, the term ''adverse effect'' refers to any effect, no matter how minor or negligible. Section 3(4) of the E.O. by contrast, does not prescribe procedures or any particular means of analysis. It concerns substantive management decisions, and must instead be read in the context of the authorities applicable to such decisions. The Seashore is an area of the National Park System. Therefore, the NPS interprets the E.O. term ''adversely affect'' consistent with its NPS Management Policies 2006. Those policies require that NPS only allows ''appropriate use'' of parks, and avoids ''unacceptable impacts.''

Specifically, this rule will not impede the attainment of the Seashore's desired future conditions for natural and cultural resources as identified in the plan/FEIS. We have determined this rule will not unreasonably interfere with the atmosphere of peace and tranquility, or the natural soundscape maintained in natural locations within the Seashore. Therefore, we have determined that within the context of E.O., the resources and values of the Seashore, ORV use on the ORV routes designated by this rule (which are also subject to resource closures and other species management measures that will be implemented under the selected action in the ROD) will not adversely affect the natural, aesthetic, or scenic values of the Seashore.

Section 8(a) of the E.O. requires the respective agency head to monitor the effects of the use of off-road vehicles on lands under their jurisdictions. On the basis of the information gathered, such agency head shall from time to time amend or rescind designations of areas or other actions taken pursuant to the E.O. as necessary to further the policy of the E.O. The selected action for the plan/EIS, as described in the ROD, identifies monitoring and resource protection procedures, periodic review, and desired future condition to provide for the ongoing and future evaluation of impacts of ORV use on protected resources. The park Superintendent has the existing authority under both this proposed regulation and under 36 CFR § 1.5 to close portions of the Seashore as needed to protect park resources.

Regulatory Planning and Review (Executive Order 12866)

This document is a significant rule and the Office of Management and Budget (OMB) has reviewed this rule under Executive Order 12866. The assessments required by Executive Order 12866 and the details of potential beneficial and adverse economic effects of the proposed rule can be found in the report entitled ''Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore'' which is available online at *http://www.parkplanning.nps.gov/caha.*

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) OMB has determined this rule raises novel legal or policy issues. ORV use at the Seashore has been the subject of litigation in the past; a settlement agreement between the parties was reached in May 2008 and ORV use at the Seashore is currently managed under a court order/consent decree until the final rule is promulgated.

Regulatory Flexibility Act (RFA)

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the report entitled ''Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore'', available for review online at *http://www.parkplanning.nps.gov/caha.* According to that report, no entities, small or large, are directly regulated by the proposed rule, which only regulates visitors' use of ORVs.

As part of the socio-economic impact analysis for the plan/EIS, and based on suggestions from negotiated rulemaking advisory committee members, NPS conducted a small business survey, a visitor intercept survey, and a vehicle count study to supplement the existing sources of socio-economic data that were available in the public domain. We carefully considered his information in analyzing the rule's costs, benefits and impact.

While close to 100 percent of the rule's impacts would fall on small businesses, some popular areas, such as Cape Point, South Point, and Bodie Island spit, would have designated year-round or seasonal ORV routes. The presence of more Vehicle Free Areas (VFAs) for pedestrians, combined with increased parking for pedestrian access,

could increase overall visitation and thereby help businesses to recoup some of the revenues lost as a result of ORV restrictions.

The proposed rule includes a number of measures designed to mitigate effect on the number of visitors as well as the potential for indirect economic effects on village businesses that profit from patronage by Seashore visitors using ORVs. These include: New pedestrian and ORV beach access points, parking areas, pedestrian trails, routes between dunes, and ORV ramps to enhance ORV and pedestrian access; a designated year-round ORV route at Cape Point and South Point, subject to resource closures when breeding activity occurs; and pedestrian shoreline access along ocean and inlet shorelines adjacent to shorebird pre-nesting areas until breeding activity is observed. In addition, we will seek funding for an alternative transportation study and consider applications for businesses to offer beach and water shuttle services. These extra efforts to increase overall access and visitor use under the Selected Action, which we developed with extensive public involvement, should increase the probability that the economic impacts are on the low rather than high end of the range.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under the SBREFA, 5 U.S.C. 804(2). This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This determination is based on information contained in the report titled ''Benefit-Cost Analysis of Proposed ORV Use Regulations in Cape Hatteras National Seashore'', available for review online at *http://www.parkplanning.nps.gov/caha.* This action will result in increased costs to those visitors desiring to operate ORVs on the beach, due to the requirement for an ORV special use permit. However, the price of the permit would be based on a cost recovery system and would not result in a major increase in costs to visitors. Businesses operating in the Seashore under a commercial use authorization or commercial fishermen operating under a commercial fishing special use permit would not need an ORV permit.

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. The designated ORV routes are located entirely within the Seashore, and will not result in direct expenditure by State, local, or Tribal governments. This rule addresses public use of NPS lands, and imposes no requirements on other agencies or governments. Therefore, a statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

Under the criteria in E.O. 12630, this rule does not have significant takings implications. No taking of personal property will occur as a result of this rule. Access to private property located within or adjacent to the Seashore will not be affected by this rule. This rule does not regulate uses of private property. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. This rule only affects use of NPS-administered lands and imposes no requirements on other agencies or governments. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies With the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175)

Under the criteria in E.O. 13175 we have evaluated this rule and determined that it would have no potential effect on Federally recognized Indian Tribes.

On August 27, 2010, the NPS sent a letter to the Tuscarora Nation requesting information on any historic properties of religious or cultural significance to the Tribe that would be affected by the plan/FEIS. The Tuscarora Nation has not informed the Seashore of any such properties.

Paperwork Reduction Act (PRA)

This rule does not contain any new collection of information that requires approval by OMB under the PRA of 1995 (44 U.S.C. 3501 *et seq.*). OMB has approved the information collection requirements associated with NPS special use permits and has assigned OMB control number 1024–0026 (expires 06/30/2013). 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.

National Environmental Policy Act (NEPA)

This rule implements portions of the plan/FEIS and ROD which is a major Federal action significantly affecting the quality of the human environment. In accordance with NEPA, the NPS prepared a Draft Environmental Impact Statement (DEIS) and a Final Environmental Impact Statement for the plan/FEIS. The plan/FEIS was released on November 15, 2010. The NPS Notice of Availability and the EPA Notice of Availability for the plan/FEIS were published in the **Federal Register** on November 15 and November 19, 2010, respectively. The plan/FEIS evaluated six alternatives for managing off-road motorized vehicle access and use at the Seashore, including two no-action alternatives. The ROD, which selected Alternative F, was signed on December 20, 2010, and a notice of the decision was published in the **Federal Register** on December 28, 2010. This rule is proposed for the purpose of implementing the selected action as described in the ROD. A full description of the alternatives that were considered, the environmental impacts associated with the project, and public involvement is contained in the plan/FEIS available for review online at: *http://www.parkplanning.nps.gov/caha.*

Information Quality Act (IQA)

Information presented in the plan/FEIS is based on a wide range of scientific and peer reviewed data which was used to determine potential impacts and to develop a range of alternatives. Studies, surveys, or reports used or referenced are listed in the Reference section of the plan/FEIS, available for review at *http://www.parkplanning.nps.gov/caha.* The NPS believes that the information used

in preparing the plan/FEIS and the subsequent decision to issue this proposed rule is of sufficient quality, objectivity, utility, and integrity to comply with the IQA (Pub. L. 106–554).

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

Clarity of This Rule

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 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 rule, your comments should be as specific as possible. For example, you should tell us the numbers of 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.*

Public Participation

All submissions received must include the agency name and RIN for this rulemaking: 1024–AD85. All comments received through the Federal eRulemaking portal at *http://www.regulations.gov* will be available without change. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information, we cannot guarantee that we will be able to do so. To view comments received through the Federal eRulemaking portal, go to *http://www.regulations.gov* and enter 1024–AD85 in the Keyword or ID search box.

List of Subjects in 36 CFR Part 7

District of Columbia, National Parks, Reporting and recordkeeping requirements.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 16 U.S.C. 1, 3, 9a, 462(k); Sec. 7.96 also issued under 36 U.S.C. 501–511, DC Code 10–137 (2001) and DC Code 50–2201 (2001).

2. In § 7.58,

A. Revise the introductory language in paragraph (b)(1).

B. Remove paragraph (b)(1)(ii),

C. Redesignate paragraphs (b)(1)(iii) through (b)(1)(v) as (b)(1)(ii) through (b)(1)(iv).

D. Add paragraph (c).

The revisions to read as follows:

§ 7.58 Cape Hatteras National Seashore.

* * * * *

(b) * * *

(1) *Definitions.* As used in this section:

* * * * *

(c) *Off-road motor vehicle use.*

(1) *Definitions.* In addition to the definitions found in § 1.4 of this chapter, the following terms apply in this paragraph (c):

ORV means a motor vehicle used off of park roads (off-road), subject to the vehicle requirements, prohibitions, and permitting requirements described in this regulation.

ORV corridor means the actual physical limits of the designated ORV route in the Seashore. The ORV corridor generally runs from the toe of the dune or the vegetation line on the landward side to the water line on the seaward side. Where the ocean beach is at least 30 meters wide above the high tide line, the landward side of the corridor will be 10 meters seaward of the toe of the dune. The ORV corridor will usually be marked by posts on the landward side (the seaward side of the corridor usually will not be posted).

(2) *ORV permits.* The Superintendent administers the NPS special park use permit system at the Seashore, including permits for ORV use, and charges fees to recover NPS administrative costs.

(i) A permit issued by the Superintendent is required to operate a vehicle on designated ORV routes at the Seashore.

(ii) Operation of a motor vehicle authorized under an ORV permit is limited to those routes designated in this paragraph (c).

(iii) There is no limit to the number of ORV permits that the Superintendent may issue.

(iv) Annual ORV permits are valid for the calendar year for which they are issued. Seven-day ORV permits are valid from the date of issue.

(v) In order to obtain a permit, an applicant must comply with vehicle and equipment requirements, complete a short education program in person, acknowledge in writing an understanding of the rules governing ORV use at the Seashore, and pay the permit fee.

(vi) Each permit holder must affix the permit in a manner and location specified by the Superintendent to the vehicle authorized for off-road use.

(3) *Vehicle and equipment requirements.* The following requirements apply for driving off-road:

(i) The vehicle must be registered, licensed, and insured for highway use and must comply with inspection regulations within the state, country, or province where the vehicle is registered.

(ii) The vehicle must have no more than two axles.

(iii) A towed boat or utility trailer must have no more than two axles.

(iv) Vehicle tires must be listed or approved by the U.S. Department of Transportation.

(v) The vehicle must carry a low-pressure tire gauge, shovel, jack, and jack stand.

(4) *Vehicle inspection.* Authorized persons may inspect the vehicle to determine compliance with the requirements of paragraphs (c)(3)(i) through (c)(3)(v).

(5) The off-road operation of a motorcycle, all-terrain vehicle (ATV) or utility vehicle (UTV) is prohibited.

(6) The towing of a travel trailer (*i.e.* camping trailer) off-road is prohibited.

(7) *Special use permits for off-road driving, temporary use.* The Superintendent may issue a special use permit for temporary off-road vehicle use to:

(i) Authorize the North Carolina Department of Transportation to use Seashore beaches as a public way, when necessary, to bypass sections of NC Highway 12 that are impassable or closed for repairs; or

(ii) Allow participants in regularly scheduled fishing tournaments to drive in an area if such tournament use was allowed in that area for that tournament before January 1, 2009; or

(iii) Allow vehicular transport of mobility impaired individuals via the shortest, most direct distance from the nearest designated ORV route or Seashore road to a predetermined location in a designated vehicle-free

area in front of a village; *provided that,* the vehicle must return to the designated ORV route or Seashore road immediately after the transport.

(8) *Commercial fishing vehicles.* The Superintendent may authorize a commercial fishing permit holder when actively engaged in authorized commercial fishing to operate a vehicle on a beach:

(i) Not designated for ORV use, provided the beach is not subject to a resource closure and is not lifeguarded; and

(ii) Beginning at 5 a.m. on days when night driving restrictions are in effect, to set or tend haul seine or gill nets, if the permit holder is carrying and able to present a fish-house receipt from the previous 30 days.

(9) *ORV routes.* The following tables indicate designated ORV routes. The following ramps are designated as open to ORV use (subject to resource, safety, seasonal, or other closures) to provide access to ocean beaches: 2.5, 4, 23, 25.5, 27, 30, 32.5, 34, 38, 43, 44, 47.5, 49, 55, 59.5, 63, 67, 68, 70, 72. Soundside ORV access ramps are described in the table below. For a village beach to be open to ORV use during the winter season, it must be at least 20 meters (66 feet) wide from the toe of the dune seaward to mean high tide line. Maps depicting designated routes and ramps are available in the Office of the Superintendent and for review on the Seashore Web site.

BODIE ISLAND—DESIGNATED ROUTES

YEAR ROUND	Ramp 2.5 (0.5 miles south of the southern boundary of Coquina Beach) to 0.2 miles south of ramp 4.
SEASONAL—September 15 to March 14	0.2 miles south of ramp 4 to the eastern confluence of the Atlantic Ocean and Oregon Inlet.

HATTERAS ISLAND—DESIGNATED ROUTES

YEAR ROUND	1.5 miles south of ramp 23 to ramp 27.
	Ramp 30 to ramp 32.5.
	The following soundside ORV access routes from NC Highway 12 to Pamlico Sound between the villages of Salvo and Avon: soundside ramps 46, 48, 52, 53, 54 and the soundside ORV access at Little Kinnakeet.
	Ramp 38 to 1.5 miles south of ramp 38.
	The following soundside ORV access routes from NC Highway 12 to Pamlico Sound between the villages of Avon and Buxton: soundside ramps 57, 58, 59, and 60.
	0.4 miles north of ramp 43 to Cape Point to 0.3 miles west of ''the hook''.
	Interdunal route from intersection with Lighthouse Road (*i.e.,* ramp 44) to ramp 49, with one spur route from the interdunal route to the ORV route below.
	Ramp 47.5 to east Frisco boundary.
	A soundside ORV access route from Museum Drive to Pamlico Sound near Coast Guard Station Hatteras Inlet.
	Pole Road from Museum Drive to Spur Road, with two spur routes to Pamlico Sound (one at the terminus of Spur Road and one commonly known as Cable Crossing) and four spur routes to the ORV route below.
	Ramp 55 southwest along the ocean beach for 1.6 miles, ending at the intersection with the route commonly known as Bone Road.
SEASONAL—November 1 to March 31	0.1 mile south of Rodanthe Pier to ramp 23.
	Ramp 34 to ramp 38 (Avon).
	East Frisco boundary to west Frisco boundary (Frisco village beach).
	East Hatteras boundary to ramp 55 (Hatteras village beach).
September 15 to March 14	Interdunal route south of the intersection of Pole Road and Spur Road stopping at least 100 meters from the ocean or inlet shoreline.

OCRACOKE ISLAND—DESIGNATED ROUTES

YEAR ROUND	Ramp 59.5 to ramp 63.
	Three routes from NC Highway 12 to Pamlico Sound located north of the Pony Pens, commonly known as Prong Road, Barrow Pit Road, and Scrag Cedar Road.
	1.0 mile northeast of ramp 67 to 0.5 mile northeast of ramp 68.
	A route from NC Highway 12 to Pamlico Sound located near Ocracoke Campground, commonly known as Dump Station Road.
	0.4 miles northeast of ramp 70 to Ocracoke inlet.
	A route from ramp 72 to a pedestrian trail to Pamlico Sound, commonly known as Shirley's Lane.
SEASONAL—September 15 to March 14	A seasonal route 0.6 mile south of ramp 72 from the beach route to a pedestrian trail to Pamlico Sound.
	A seasonal route at the north end of South Point spit from the beach route to Pamlico Sound.
November 1 to March 31	0.5 mile northeast of ramp 68 to ramp 68 (Ocracoke Campground area).

(10) *Superintendent's closures.* The Superintendent may temporarily limit, restrict, or terminate access to routes or areas designated for off-road use after taking into consideration public health and safety, natural and cultural resource protection, carrying capacity and other management activities and objectives, such as those described in the plan/FEIS. The public will be notified of such closures through one or more of the methods listed in § 1.7(a) of this chapter. Violation of any closure is prohibited.

(11) *Rules for Vehicle Operation.* (i) Notwithstanding the definition of ''Public Vehicular Area'' (PVA) in North Carolina law, the operator of any motor vehicle anywhere in the Seashore, whether in motion or parked, must at all times comply with all North Carolina traffic laws that would apply if the operator were operating the vehicle on a North Carolina highway.

(ii) In addition to the requirements of Part 4 of this chapter, the following restrictions apply:

(A) A vehicle operator must yield to pedestrians on all designated ORV routes.

(B) When approaching or passing a pedestrian on the beach, a vehicle operator must move to the landward side to yield the wider portion of the ORV corridor to the pedestrian.

(C) A vehicle operator must slow to 5 mph when traveling within 30.5 meters (100 feet) or less of pedestrians at any location on the beach at any time of year.

(D) An operator may park on a designated ORV route, but no more than one vehicle deep, and only as long as the parked vehicle does not obstruct two-way traffic.

(E) When driving on a designated route, an operator must lower the vehicle's tire pressure sufficiently to maintain adequate traction within the posted speed limit.

(F) The speed limit for off road driving is 15 mph, unless otherwise posted.

(12) *Night Driving Restrictions.*

(i) Hours of operation and night driving restrictions are listed in the following table:

HOURS OF OPERATION/NIGHT DRIVING RESTRICTIONS

November 16–April 30	All designated ORV routes are open 24 hours a day.
May 1–September 14	Designated ORV routes in sea turtle nesting habitat (ocean intertidal zone, ocean backshore, dunes) are closed from 9 p.m. to 7 a.m.
September 15–November 15	Designated ORV routes in sea turtle nesting habitat (ocean intertidal zone, ocean backshore, dunes) are closed from 9 p.m. to 7 a.m., but the Superintendent may open designated ORV routes in sea turtle nesting habitat (if no turtle nests remain), 24 hours a day.

(ii) Maps available in the office of the Superintendent and on the Seashore's Web site will show routes closed due to night driving restrictions, and routes the Superintendent opens because there are no turtle nests remaining.

(13) *Vehicle carrying capacity.* The maximum number of vehicles allowed on any particular ORV route, at one time, is the linear distance of the route divided by 6 meters (20 feet).

(14) Violating any of the provisions of this paragraph, or the terms, conditions, or requirements of an ORV or other permit authorizing ORV use is prohibited. A violation may also result in the suspension or revocation of the applicable permit by the Superintendent.

(15) *Information Collection.* As required by 44 U.S.C. 3501 *et seq.* The Office of Management and Budget has approved the information collection requirements contained in this paragraph. The OMB approval number is 1024–0026. The NPS is collecting this information to provide the Superintendent data necessary to issue ORV special use permits. The information will be used to grant a benefit. The obligation to respond is required to order to obtain the benefit in the form of the ORV permit.

Dated: May 16, 2011.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–16878 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–X6–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0198; FRL–9425–5]

Revisions to the California State Implementation Plan, Imperial County Air Pollution Control District, Kern County Air Pollution Control District, and Ventura County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Imperial County Air Pollution Control District (ICAPCD), Kern County Air Pollution Control District (KCAPCD), and Ventura County Air Pollution Control District (VCAPCD) portions of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from architectural coating operations. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by *August 5, 2011.*

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2011–0198, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: David Grounds, EPA Region IX, (415) 972–3019, *grounds.david@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: ICAPCD Rule 424, KCAPCD Rule 410.1A, and VCAPCD Rule 74.2.In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: May 19, 2011.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2011–16740 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0082; FRL–8875–6]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 5, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

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

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI

information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP 0E7754.* (EPA–HQ–OPP–2010–0820). Quimica Agronomica de Mexico, S. de R.L. MI., Calle 18 N° 20501, Colonia Impulso, C.P. 31183, Chihuahua, Chih., Mexico c/o Gowan Company, P.O. Box 5569, Yuma, AZ 85366, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide gentamicin, in or on cucurbits (crop group 9) at 0.05 parts per million (ppm) and fruiting vegetables (crop group 8) at 0.05 ppm. An analytical method was developed and used to quantitate residues of gentamicin and oxytetracycline. Briefly, residues of gentamicin were extracted from samples. The extraction was conducted with a homogenizer and extracts were centrifuged and decanted into a mixing cylinder. Extraction buffer and methanol were added to the centrifuge tube, centrifuged, and shaken a total of two times, with each extract combined in the mixing cylinder. The sample was brought to final volume with water and mixed in preparation for liquid chromatography/tandem mass spectrometry (LC/MS/MS) analysis. *Contact:* Shaunta Hill, (703) 347–8961, *e-mail address: hill.shaunta@epa.gov.*

2. *PP 0E7818.* (EPA–HQ–OPP–2011–0086). Interregional Research Project No. 4 (IR–4), 500 College Rd. East, Suite 201W, Princeton, NJ 08540, proposes to establish a tolerance in 40 CFR part 180 for residues of the fungicide acibenzolar S-methyl, in or on low growing berry subgroup 13–07G at 0.15 ppm. The analytical method involves extraction, solid phase cleanup of samples with analysis by high performance liquid chromatography (HPLC) with ultraviolet (UV) detection or confirmatory LC/MS. *Contact:* Sidney C. Jackson, (703) 305–7610, *e-mail address: jackson.sidney@epa.gov.*

3. *PP 1E7847.* (EPA–HQ–OPP–2010–0904). IR–4, 500 College Rd. East, Suite 201W, Princeton, NJ 08540, proposes to establish tolerances in 40 CFR part 180 for residues of the insecticide bifenazate (hydrazine carboxylic acid, 2-(4-methoxy-[1,1′-biphenyl]-3-yl) 1-methylethyl ester) in or on herb subgroup 19A, fresh leaves at 30 ppm; herb subgroup 19A, dried leaves, except chervil, dried and chive, dried at 140 ppm; fruit, pome, group 11–10 at 0.75 ppm; vegetable, fruiting, group 8–10 at 2.0 ppm; timothy, forage at 140 ppm; and timothy, hay at 120 ppm. Chemtura Corporation has developed practical analytical methodology for detecting and measuring residues of bifenazate in or on raw agricultural commodities. *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

4. *PP 1F7838.* (EPA–HQ–OPP–2011–0427). FMC Corporation, 1735 Market St., Philadelphia, PA 19103, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide sulfentrazone (N-[2,4-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-1,2,4-triazol-1-yl]phenyl]-methanesulfonamide) and its metabolites 3-hydroxymethyl-sulfentrazone (N-[2,4-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-hydroxymethyl-5-oxo-1H-1,2,4-triazol-1-yl]phenyl]methanesulfonamide) and 3-desmethyl sulfentrazone (N-[2,4-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-5-oxo-1H-1,2,4-triazol-1-yl]phenyl]methanesulfonamide), in or on crop group10-10 citrus fruit at 0.15 ppm; crop group 13–07 berry and small fruit at 0.15 ppm; crop group14 tree nut and pistachio at 0.15 ppm; and crop group 18 non-grass animal feed (forage, fodder, straw, and hay): Alfalfa, forage

at 5 ppm; alfalfa, hay at 20 ppm; alfalfa, seed at 3 ppm; clover, forage at 5 ppm; clover, hay at 20 ppm; and clover, seed at 3 ppm. The analytical enforcement method for sulfentrazone was used with minor modification that eliminated several cleanup and derivatization steps that was required for gas chromatography/mass spectrometry detection (GC/MSD) but not for LC/MS/MS. The analytical method for sulfentrazone involves separate analyses for parent and its metabolites. The parent is analyzed by evaporation and reconstitution of the sample prior to analysis by LC/MS/MS GC/electron capture detection (ECD). The metabolites samples were refluxed in the presence of acid and cleaned up with solid phase extraction prior to analysis by LC/MS/MS. *Contact:* Bethany Benbow, (703) 347–8072, *e-mail address: benbow.bethany@epa.gov.*

5. *PP 1F7839.* (EPA–HQ–OPP–2011–0428). FMC Corporation, 1735 Market St., Philadelphia, PA 19103, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide carfentrazone-ethyl (ethyl-alpha-2-dichloro-5-[-4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1 H -1,2,4-triazol-1-yl]-4-fluorobenzene propanoate) and its metabolite: Carfentrazone-chloropropionic acid (alpha, 2-dichloro-5-[-4-difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1 H -1,2,4-triazol-1-yl]-4-fluorobenzenepropanoic acid) in or on crop group 18 non-grass animal feed (forage, fodder, straw, and hay): Alfalfa, forage at 5 ppm; alfalfa, hay at 18 ppm; alfalfa, seed at 10 ppm; clover, forage at 5 ppm; clover, hay at 18 ppm; and clover, seed at 10 ppm. The analytical enforcement method for carfentrazone-ethyl was used with minor modification that eliminated several clean-up and derivatization steps that was required for GC/MSD but not for LC/MS/MS. The analytical method for carfentrazone-ethyl involves separate analyses for parent and its metabolite. The parent is analyzed by evaporation and reconstitution of the sample prior to analysis by LC/MS/MS GC/ECD. The metabolite samples were refluxed in the presence of acid and cleaned up with solid phase extraction prior to analysis by LC/MS/MS. *Contact:* Bethany Benbow, (703) 347–8072, *e-mail address: benbow.bethany@epa.gov.*

6. *PP 1F7841.* (EPA–HQ–OPP–2011–0357). Valent U.S.A. Company, 1600 Riviera Ave., Walnut Creek, CA 94596–8025, proposes to establish tolerances in 40 CFR part 180 for residues of the fungicide fenpyrazamine in or on almond at 0.02 ppm; almond, hulls at 1.5 ppm; small fruit vine climbing (except fuzzy kiwifruit) subgroup 13–07F at 3.5 ppm; raisin at 4.5 ppm; grape, juice at 7.0 ppm; lettuce, head at 2.5 ppm; lettuce, leaf lettuce at 2.5 ppm; and low growing berry subgroup 13–07G at 3.0 ppm. A practical analytical method utilizing LC/MSD is available and has been validated for detecting and measuring residues of fenpyrazamine (fenpyrazamine and S–2188–DC) in and on crops. *Contact:* Gene Benbow, (703) 347–0235, *e-mail address: benbow.gene@epa.gov.*

7. *PP 1F7844.* (EPA–HQ–OPP–2011–0403). Nippon Soda Co., Ltd., c/o Nisso America, Inc., 45 Broadway, Suite 2120, New York, NY 10006, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide acetamiprid, in or on soybean, seed at 0.02 ppm; and soybean, hulls at 0.04 ppm. A method was developed that involves extraction of acetamiprid from soybean matrices with a solvent followed by a decantation and filtration and finally, analysis by a LC/MS/MS method. *Contact:* Jennifer Urbanski, (703) 347–0156, *e-mail address: urbanski.jennifer@epa.gov.*

Amended Tolerances

1. *PP 0E7818.* (EPA–HQ–OPP–2011–0086). IR–4, 500 College Rd. East, Suite 201W, Princeton, NJ 08540, proposes to amend the tolerance in 40 CFR 180.561 for residues of the fungicide acibenzolar-S-methyl by combining the tables for paragraphs (a)(1) and (a)(2) into one table under paragraph (a)(1), and by removing paragraph (a)(2). The petition further proposes to revise the tolerance expression under paragraph (a)(1) to read as follows: ''Tolerances are established for residues of acibenzolar-S-methyl, benzo(1,2,3)thiadiazole-7-carbothioic acid-S-methyl ester, including its metabolites and degradates, in or on the commodities in the table below. Compliance with the tolerance levels specified below is to be determined by measuring only those acibenzolar-S-methyl residues convertible to benzo(1,2,3)thiadiazole-7-carboxylic acid (CGA–210007), expressed as the stoichiometric equivalent of acibenzolar-S-methyl, in or on the commodity.'' The analytical method involves extraction and solid phase cleanup of samples with analysis by HPLC with UV detection or confirmatory LC/MS. *Contact:* Sidney C. Jackson, (703) 305–7610, *e-mail address: jackson.sidney@epa.gov.*

2. *PP 1E7847.* (EPA–HQ–OPP–2010–0904). IR–4, 500 College Rd. East, Suite 201W, Princeton, NJ 08540, proposes to delete tolerances in 40 CFR 180.572 for residues of the insecticide bifenazate: Hydrazine carboxylic acid, 2-(4-methoxy-[1,1′-biphenyl]-3-yl)-methylethyl ester for vegetable, fruiting, group 8 and fruit, pome, group 11 upon approval of the proposed tolerances listed in this petition under ''New Tolerance.'' *Contact:* Andrew Ertman, (703) 308–9367, *e-mail address: ertman.andrew@epa.gov.*

New Tolerance Exemptions

1. *PP 1E7835.* (EPA–HQ–OPP–2011–0333). Akzo Nobel Surface Chemistry LLC, 909 Mueller Ave., Chattanooga, TN 37406, proposes to establish an exemption from the requirement of a tolerance for methacrylic acid sodium salt (CAS No. 1260001–65–7) when used as a pesticide inert ingredient as a dispersant in pesticide formulations under 40 CFR 180.960. This petition requests the elimination of the need to establish a maximum permissible level for residues of acrylic acid-benzyl methacrylate-1-propanesulfonic acid, 2-methyl-2-[(1-oxo-2-propenyl)amino]-, monosodium salt copolymer acid version in or on all raw agricultural commodities. The petitioner believes no analytical method is needed because this is for an exemption from the requirement of a tolerance without any numerical limitations and this information is generally not required when all the criteria for polymer exemption per 40 CFR 723.250 are met. *Contact:* William Cutchin, (703) 305–7990, *e-mail address: cutchin.william@epa.gov.*

2. *PP 1E7837.* (EPA–HQ–OPP–2011–0376). Huntsman Corporation, 10003 Woodloch Forest Dr., The Woodlands, TX 77380, requests to establish an exemption from the requirement of a tolerance in 40 CFR 180.950 for butylene carbonate (1, 3-dioxolan-2-one, 4-ethyl) (CAS No. 4437–85–8) in or on all raw agricultural commodities when used as a pesticide inert ingredient in pesticide formulations. The petitioner believes no analytical method is needed because they are not applicable or required for the establishment of a tolerance exemption for inert ingredients. *Contact:* William Cutchin, (703) 305–7990, *e-mail address: cutchin.william@epa.gov.*

3. *PP 1E7862.* (EPA–HQ–OPP–2011–0430). BASF Corporation, 100 Campus Dr., Florham Park, NJ 07932, requests to establish an exemption from the requirement of a tolerance for 2-Propenoic acid, polymer with ethenylbenzene and (1-methylethenyl) benzene, sodium salt (CAS No. 129811–24–1) under 40 CFR 180.960 when used as a pesticide inert ingredient as a dispersant in pesticide formulations without limitation. The petitioner believes no analytical method is needed because they are not applicable or

required for the establishment of a tolerance exemption for inert ingredients. *Contact:* Alganesh Debesai, (703) 308–8353, *e-mail address: debesai.alganesh@epa.gov.*

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 24, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–16873 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2510, 2540, 2551, 2552

RIN 3045–AA56

AmeriCorps State/National, Senior Companions, Foster Grandparents, and Retired and Senior Volunteer Program

AGENCY: Corporation for National and Community Service.

ACTION: Proposed rule with request for comments.

SUMMARY: The Corporation for National and Community Service (the Corporation) proposes amendments to its National Service Criminal History Check regulations to require grantees to conduct and document criminal history checks (including both state criminal history checks and FBI fingerprint checks) on Senior Companions, Foster Grandparents, Retired Senior Volunteer Program grant-funded staff, Learn and Serve America, AmeriCorps State/National (including Education Award Program) participants, and other Corporation grant-funded participants and grant-funded staff in all Corporation programs, who, on a recurring basis, have access to children, persons age 60 and older, or individuals with disabilities.

DATES: To be certain your comments are considered, they must reach the Corporation on or before August 5, 2011.

ADDRESSES: You may send your comments electronically through the Federal government's one-stop rulemaking Web site at *http://www.regulations.gov.* You may also mail or deliver your comments to Amy Borgstrom, Docket Manager, Corporation for National and Community Service, 1201 New York Ave., NW., Washington, DC 20525. Members of the public may review copies of all communications received on this rulemaking at *http://www.regulations.gov* or at the Corporation's Washington, DC headquarters.

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom at (202) 606–6930. The TDD/TTY number is (202) 606–3472. You may request this notice in an alternative format for the visually impaired.

SUPPLEMENTARY INFORMATION:

List of Topics

I. Invitation To Comment

We invite you to submit comments about these proposed regulations online at *http://www.regulations.gov.* To ensure that your comments have maximum value in helping us develop the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each comment addresses and to arrange your comments in the same order as the proposed regulations. During and after the comment period, you may inspect public comments about these proposed regulations submitted online at *http://www.regulations.gov*, or in person in room 10615, 1201 New York Avenue, NW., Washington, DC, between the hours of 9 a.m. and 4:30 p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

II. Background

(a) Prior to Passage of the Kennedy Serve America Act of 2009

The Corporation initially engaged in rulemaking concerning the requirement for grantees to conduct criminal history checks on national service participants and grant-funded staff in 2007. In that rule, the Corporation required programs to conduct National Service Criminal History Checks—consisting of a statewide search of a state's criminal registry (for both the state where the individual resides at the time of application and the state where the individual will be serving) and a check of the Department of Justice's National Sex Offender Public Web site (NSOPW)—on all ''covered individuals.'' Covered individuals were those program staff and participants who had recurring access to children, the elderly, and to individuals with disabilities. Recurring access was defined as having contact with individuals from one or more of the above groups on more than one occasion. The regulations did not cover the RSVP and Learn and Serve programs, nor did they cover the NCCC and VISTA programs, which are Federally operated programs that have their own criminal history requirements.

Those regulations offered the option of requesting approval of an alternative search procedure (also known as an ''alternative screening protocol'' or ''ASP''), which would permit an entity that could demonstrate that it was ''prohibited or otherwise precluded under state law from complying with a Corporation requirement relating to criminal history checks or that [it] could obtain substantially equivalent or better information through an alternative process'' to use a process other than the one outlined by the Corporation. (45 CFR 2540.206). Under this rule, an entity had the option of using a national FBI fingerprint-based check in lieu of the state criminal registry check without obtaining prior Corporation approval.

(b) Expanded Definition of ''Covered Individuals''

In 2009, Congress passed the Kennedy Serve America Act of 2009 (Pub. L. 111–13) (SAA), which amended the National and Community Service Act of 1990 (42 U.S.C. 12501 *et seq.*) (NCSA) by codifying the Corporation's regulatory National Service Criminal History Check requirements, and by expanding the categories of individuals required to undergo criminal history checks. Under the new statutory requirements, as of October 1, 2009 (the effective date of the SAA), any entity selecting an individual to serve in a position in which the individual receives a living allowance, stipend, national service educational award or salary through a program receiving assistance under the national service laws must conduct a criminal history check on that individual. Accordingly, the SAA expanded the definition (and consequently the number) of ''covered individuals'' to those individuals described above without regard to their access to vulnerable populations.

As directed by the SAA, the Corporation issued new regulations in 2009, expanding coverage to any national service participant or grant-funded employee who received one of the above-described payments for his or her service or employment. (74 FR 46495). Now included in this group of covered individuals are grant-funded staff serving in any Corporation-funded national service program, including RSVP and Learn and Serve grant-funded staff, as well as participants in all Corporation grant programs, if the individual receives one of the types of remuneration described above. This includes the Non-profit Capacity Building and Social Innovation Fund grant programs.

Pursuant to these regulations, each individual meeting the amended description of a ''covered individual'' hired or enrolled in a program on or after October 1, 2009, is required to undergo a full National Service Criminal History Check including: (a) A search of either (1) the state criminal registry in the state in which the program is operating and the state in which the individual resides at the time of application, *or* (2) a Federal Bureau of Investigation (FBI) fingerprint check; and (b) a nationwide check of the NSOPW.

In addition to expanding the definition of ''covered individuals,'' the Serve America Act expanded the types of offenses that would render an individual ineligible to serve in a covered position to include individuals who had been convicted of murder.

(c) Heightened Standard for Individuals With Recurring Access to Vulnerable Populations

Under section 189D(d) of the NCSA, as amended by the SAA, beginning April 21, 2011, entities that select covered individuals over the age of 18 who will have recurring access to vulnerable populations as part of their position must conduct both a statewide criminal history check and an FBI fingerprint-based check. As described herein, section 189D(d)(3) of the NCSA permits limited exceptions to this heightened requirement.

III. Contents of Proposed Rule

The Corporation is undertaking this rulemaking to implement the amendments made by the SAA with regard to heightened screening requirements for covered individuals with recurring access to vulnerable populations. In addition, this proposed rule clarifies several existing requirements, and makes several minor technical corrections for clarity.

(a) Definitions

(1) Definition of ''program.'' (§ 2510.20)

The SAA amended the definition of ''program'' in the NCSA to include newly-authorized programs such as Campuses of Service, Serve America and Encore Fellows, Silver Scholars, the Social Innovation Fund, and activities funded under programs such as the Volunteer Generation Fund. This proposed rule corrects the definition of ''program'' in regulation to align with the definition in statute.

(2) Definition of ''covered individual.'' (§ 2540.200)

To clarify that it is not necessary to conduct checks on individuals whose connection to the program is tangential (such as an individual who provides training to participants and volunteers on occasion but is otherwise not integral to the operation of the program) or who is intended as a beneficiary (such as a child who receives a cash prize for completing a service-learning project hosted by the program), this rule proposes to amend the definition of ''covered individual'' by removing the clause ''or other remuneration.'' A covered individual is any individual who receives a Corporation grant-funded living allowance, stipend, national service education award, or salary for participation in or employment by a program. An individual who receives some financial benefit through a national service program but who does not otherwise perform any service to implement the program is not a covered individual.

(b) Eligibility Criteria—AmeriCorps State and National

The Serve America Act expanded the list of offenses that would render an individual ineligible for service to include conviction for murder. The Corporation amended its regulations to align with this statutory change in 2009, but through that rulemaking inadvertently neglected to amend the regulation on eligibility to serve in an AmeriCorps State and National position. This rule amends § 2522.200 to expand the list of eligibility criteria to serve in an AmeriCorps State and National to include satisfaction of the National Service Criminal History Check eligibility criteria.

(c) National Service Criminal History Checks Generally (§ 2540.202)

In practice, the National Service Criminal History Check for covered individuals includes: (1) a name or fingerprint-based state registry check of the state where the program is operating and the state where the individual resides at the time of application *or* nationwide check by submitting fingerprints to the FBI; and (2) a check of the NSOPW. This proposed rule makes technical edits to the regulatory language to conform to current practice.

Since promulgating criminal history check rules in 2007, the Corporation has applied the first prong of this test to programs operating in more than one state by requiring such programs to conduct the state registry check in the state where the covered individual will be primarily serving or working. This proposed rule would also codify this clarification.

(d) Special Rule for Individuals With Recurring Access to Vulnerable Populations (§ 2540.202)

As required by section 189D of the NCSA, as amended by the SAA, under this rule, unless the Corporation approves an alternative screening protocol under § 2540.206, for each covered individual a program hires or enrolls on or after April 21, 2011, who is age 18 or older and whose position will involve recurring access to vulnerable populations, in addition to a National Sex Offender Public Web site (*http://www.nsopw.gov*) check, the program must conduct: (1) A search (by name or fingerprint) of the state criminal registry for the state in which the program operates and the state in which the individual resides at the time of application; and (2) a national search

by submitting fingerprints to the Federal Bureau of Investigation.

''Recurring access'' is defined as ''the ability on more than one occasion to approach, observe, or communicate with, an individual, through physical proximity or other means, including but not limited to, electronic or telephonic communication.'' (45 CFR 2510.20).

In anticipation of this heightened requirement, current grantees have inquired into whether the Corporation would be developing a centralized mechanism for conducting FBI checks for national service participants. While the Corporation is committed to identifying ways to decrease burden on grantees, at this time no such centralized mechanism is available.

(e) Alternative Screening Protocol for Individuals With Recurring Access to Vulnerable Populations (§ 2540.206)

Under this proposed rule, an entity may apply to the Corporation for approval of an ASP that would relieve the entity from the requirement to conduct both the statewide and national checks on a covered individual with recurring access to vulnerable populations.

The Corporation will approve an ASP for this requirement if the entity demonstrates: (1) The service provided by the individual serving with the entity to a vulnerable population is episodic in nature or for a 1-day period; (2) the cost to the program of complying with § 2540.202(b) of this chapter is prohibitive; (3) the program is not authorized, or is otherwise unable, under state or Federal law, to access the national criminal history background check system of the FBI; or (4) the program cannot comply with the requirement for good cause, as determined and approved by the Corporation.

(1) Episodic Access (§ 2540.206)

Congress specifically exempted from heightened coverage those individuals whose access to vulnerable populations is ''episodic in nature or for a 1-day period.'' While the heightened coverage applies to all individuals with ''recurring access,'' or access on more than one occasion, it will not apply to those individuals whose recurring access is ''episodic in nature.''

For the purposes of this rule, the Corporation proposes to define ''episodic'' as access that is not a regular, scheduled, and anticipated component of an individual's position description. If access to vulnerable populations is not a regular, scheduled, and anticipated component of the position description, the program is not required to conduct both an FBI and a state check on the individual.

For example, consider an individual who is applying for an AmeriCorps position with an environmental program that involves volunteer coordination. If the program anticipates that the position will involve coordinating high school student volunteers on a regular basis, the individual will need the heightened check. However, if the program has no reason to expect that the position will involve coordinating 17-year-old and younger volunteers because the program has never operated in a youth environment and does not have any youth engagement goals, and does not recruit high school age volunteers, any contact with a child volunteer would be irregular, unscheduled, and unanticipated, and thus, episodic. Therefore, it would be unnecessary to conduct a heighted check on the individual.

The Corporation does not propose a numeric component for the determination of whether or not access is episodic. In other words, if a program does not anticipate that a member will have access to vulnerable populations, the requirement would not materialize after a specific number of incidents of access occur.

The Corporation expects that in the majority of cases it will be clear whether or not access to vulnerable populations is an anticipated, regular component of a position description. Nevertheless, the Corporation recommends that programs specifically address contact with vulnerable populations in each position description. If incidental access becomes unexpectedly regular or frequent, a program may want to take additional precautionary measures based on the circumstances.

(2) Alternative Search Protocols Approved for ''Good Cause''

The Corporation will publish on its Web site those scenarios for which the Corporation has approved ASPs for ''good cause'' based on requests received following the publication of this rule. This list may be expanded and codified in regulation in the future.

(f) Consecutive Terms (§ 2540.203)

Under current 45 CFR 2540.203(c), (redesignated as 2540.203(b) under this proposed rule) it is not necessary to perform an additional check on an individual who serves in consecutive terms of service with a program with a break in service of fewer than 30 days. This section permits a program to forego additional checks for individuals serving consecutive terms, but is based upon a presumption that the additional check would essentially replicate the original check.

Each individual hired or enrolled into a covered position that involves recurring access to vulnerable populations after April 21, 2011, is required to undergo the enhanced criminal history check. The fact that an individual met the criminal history check requirements at the time the individual was hired or enrolled in a prior term of service does not excuse the individual from the enhanced requirements at the time the individual is hired or enrolled in a subsequent term, even if there has been a break in service of fewer than 30 days.

If a program can demonstrate that the check performed on an individual during the previous term would meet the current requirements, it is not necessary to perform an additional check. For example, if, at the time the covered individual was hired or enrolled in a prior term, the program conducted the NSOPR check, a state check, and an FBI check, it is unnecessary to replicate the entire process for the subsequent term if there is a break in service of fewer than 30 days.

(g) No Unaccompanied Access to Vulnerable Populations Pending Criminal History Results (§ 2540.204)

Under current rules, an individual for whom the results of a required state criminal registry check are pending is not permitted access to vulnerable populations ''without being accompanied by an authorized program representative who has previously been cleared for such access.'' 45 CFR 2540.204(g). Since the initial promulgation of this rule, it has come to our attention that it is common for the vulnerable beneficiary in question to be accompanied by a parent, legal guardian, teacher, doctor, nurse, or other individual responsible for his or her care.

The Corporation does not believe it is necessary for a selected individual with pending criminal history results to be accompanied by an authorized program representative who has received the appropriate criminal history check when the vulnerable individual is accompanied by an individual responsible for his or her care. Thus, under this proposed rule, a covered individual may be selected and placed while state or FBI criminal history checks are pending, so long as the individual is not permitted access to vulnerable populations without being accompanied by: (1) An authorized program representative who has previously been cleared for such access;

(2) a family member or legal guardian of the vulnerable individual; or (3) an individual authorized by the nature of his or her profession to have recurring access to the vulnerable individual, such as an education or medical professional.

For example, a covered individual who occasionally gives nature tours to schoolchildren as part of an environmental program would not be required to be accompanied by an authorized program representative on the tour if the students are accompanied by teachers or parents.

(h) Documentation Requirements (§ 2540.205)

This proposed rule clarifies that it is not necessary to retain the actual documents produced as a result of conducting the statewide or FBI criminal registry search component of the check. Rather, it is sufficient to retain a summary of the results certified by an authorized program representative, along with written documentation that the results were considered in selecting the individual. The program must have reviewed and determined that the criteria used by the issuing governmental body meets or exceeds the Corporation's standards for eligibility. For example, if a program receives a document from the statewide criminal registry that indicates the individual has been ''cleared'' for service based upon an agreement that describes the offenses that would result in ineligibility, that clearance document may be retained as the result of the criminal registry check.

(i) Costs (§ 2540.204)

The proposed rule requires grantees to obtain and document a baseline criminal history check for covered individuals. The Corporation considers the cost of this required criminal history check a reasonable and necessary program grant expense, such costs being presumptively eligible for reimbursement. In any event, a grantee should include the costs associated with its screening process in the grant budget it submits for approval to the Corporation.

The proposed rule codifies the Corporation's guidance that, except where approved by the Corporation, a grantee may not charge an individual for the cost of a National Service Criminal History Check. In addition, because criminal history checks are inherently attributable to operating a program, such costs may not be charged to a state commission administrative grant.

We will monitor compliance with the rules and requirements associated with National Service Criminal History Checks as a material condition of receiving a Corporation grant. A grantee's failure to comply with this requirement may adversely affect the grantee's access to grant funds or ability to obtain future grants from the Corporation. In addition, a grantee jeopardizes eligibility for reimbursement of costs related to a disqualified individual if it fails to perform or properly document (as described herein) the required National Service Criminal History Check on covered individuals.

IV. Non-Regulatory Matters

Coverage Based on Start Date

The table below illustrates which requirements apply to various program types.

TABLE 1

Recurring access to vulnerable populations		Date individual hired or enrolled: Before November 23, 2007 *			November 23, 2007–September 30, 2009			October 1, 2009–April 20, 2011			On or after April 21, 2011		
		N	S	F	N	S	F	N	S	F	N	S	F
Program:													
AmeriCorps S & N	Yes	X			X	X		X	X		X	X	X
	No							X	X		X	X	
FGP	Yes	X			X	X		X	X		X	X	X
	No							X	X		X	X	
Senior Companions	Yes	X			X	X		X	X		X	X	X
	No							X	X		X	X	
RSVP staff	Yes							X	X		X	X	X
	No							X	X		X	X	
VISTA program grants	Yes							X	X		X	X	X
	No							X	X		X	X	
Learn & Serve	Yes							X	X		X	X	X
	No							X	X		X	X	
Other Grant Programs	Yes							X	X		X	X	X
	No							X	X		X	X	

N = NSOPW; S = State registry check; F = FBI fingerprint check

* This applies to individuals who were enrolled or employed as of November 23, 2007, but were hired or enrolled prior to that date.

V. Effective Dates

The Corporation intends to make any final rule based on this proposal effective no sooner than 60 days after the final rule is published in the **Federal Register**. The requirement applies to any covered individual hired or enrolled on or after April 21, 2011. However, programs have until 60 days after the publication of the final rule to complete the heightened check.

VI. Regulatory Procedures

Executive Order 12866 and Executive Order 13563

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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of 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.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605 (b)), the Corporation certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. This regulatory action will not result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, the Corporation has not performed the initial regulatory flexibility analysis that is required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) for major rules that are expected to have such results.

Unfunded Mandates

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, as well as Executive Order 12875, this regulatory action does not contain any Federal mandate that may result in increased expenditures in either Federal, state, local, or Tribal governments in the aggregate, or impose an annual burden exceeding $100 million on the private sector.

Paperwork Reduction Act

This proposed rule contains no information collection requirements and is therefore not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132, 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. The proposed rule does not have any Federalism implications, as described above.

List of Subjects

45 CFR Part 2510

Grant programs—social programs.

45 CFR Part 2522

Grant programs—social programs, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2540

Administrative practice and procedure, Grant programs—social programs, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2551

Aged, Grant programs—social programs, Volunteers.

45 CFR Part 2552

Aged, Grant programs—social programs, Volunteers.

For the reasons stated in the preamble, the Corporation for National and Community Service proposes to amend chapter XXV, title 45 of the Code of Federal Regulations as follows:

PART 2510—OVERALL PURPOSES AND DEFINITIONS

1. The authority citation for Part 2510 continues to read as follows:

Authority: 42 U.S.C. 12511.

2. Amend § 2510.20 by revising the definition of ''program'' to read as follows:

§ 2510.20 Definitions.

* * * * *

Program. The term *program,* unless the context otherwise requires, and except when used as part of the term *academic prog*ram, means a program described in section 112(a) (other than a program referred to in paragraph (3)(B) of that section), 118A, or 118(b)(1), or subsection (a), (b), or (c) of section 122, or in paragraph (1) or (2) of section 152(b), section 198B, 198C, 198H, or a98K, or an activity that could be funded under section 179A, 198, 198O, 198P, or 199N.

PART 2522—AMERICORPS PARTICIPANTS, PROGRAMS, AND APPLICANTS

1. The authority citation for Part 2522 continues to read as follows:

Authority: 42 U.S.C. 12571–12595; 12651b–12651d; E.O. 13331, 69 FR 9911

2. Amend § 2522.200 by:

a. Removing the period at the end of paragraph (a)(3) and adding a semicolon in its place; and

b. Adding a new paragraph (a)(4) to read as follows:

§ 2522.200 What are the eligibility requirements for an AmeriCorps participant?

(a) * * *

(4) Satisfy the National Service Criminal History Check eligibility criteria pursuant to 45 CFR § 2540.201.

* * * * *

3. Revise § 2522.205 to read as follows:

§ 2522.205 To whom must I apply eligibility criteria relating to criminal history?

You must apply eligibility criteria relating to criminal history to a participant or staff position for which an individual receives a Corporation grant-funded living allowance, stipend, education award, or salary for participation in or employment by a program as defined in § 2510.20 of this chapter.

§ 2522.206 [Removed and Reserved]

4. Remove and reserve § 2522.206.

5. Revise § 2522.207 to read as follows:

§ 2522.207 What are the procedures I must follow to determine an individual's eligibility to serve in a covered position?

In determining an individual's eligibility to serve in a covered position, you must follow the procedures in part 2540 of this title.

PART 2540—GENERAL ADMINISTRATIVE PROVISIONS

6. The authority citation for Part 2540 continues to read as follows:

Authority: E.O. 13331, 69 FR 9911; 18 U.S.C. 506, 701, 1017; 42 U.S.C. 12653, 12631–12637; 42 U.S.C. 5065.

7. Revise § 2540.200 to read as follows:

§ 2540.200 To whom must I apply eligibility criteria relating to criminal history?

You must apply eligibility criteria relating to criminal history to an individual applying for, or serving in, a position for which the individual receives a Corporation grant-funded living allowance, stipend, education award, or salary for participation in or employment by a program as defined in § 2510.20 of this chapter.

8. Revise § 2540.201 to read as follows:

§ 2540.201 What eligibility criteria must I apply to a covered position in connection with the National Service Criminal History Check?

In addition to eligibility criteria established by the program, an individual shall be ineligible to serve in a covered position if the individual—

(a) Refuses to consent to a criminal registry check described in § 2540.202 of

this chapter or makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history;

(b) Is registered, or required to be registered, on a state sex offender registry or the National Sex Offender Registry; and

(c) Has been convicted of murder, as defined in section 1111 of title 18, United States Code.

9. Revise § 2540.202 to read as follows:

§ 2540.202 What search components of the National Service Criminal History Check must I satisfy to determine an individual's suitability to serve in a covered position?

(a) *In general.* Unless the Corporation approves an alternative screening protocol under § 2540.206 of this chapter, in determining an individual's suitability to serve in a covered position, you are responsible for conducting and documenting a National Service Criminal History Check, which consists of the following two search components:

(1) *State or FBI criminal registry search.*

(i) A search (by name or fingerprint) of the state criminal registry for

(A) The state in which the program operates (for multi-state programs, the state where the individual will be primarily serving or working) and

(B) The state in which the individual resides at the time of application; or

(ii) Submitting fingerprints to the Federal Bureau of Investigation for a national criminal history background check; and

(2) *National Sex Offender Public Website.* A name-based search of the Department of Justice (DOJ) National Sex Offender Public Website (NSOPW).

(b) *Special rule for individuals working with vulnerable populations.* Unless the Corporation approves an alternative screening protocol under § 2540.206, for each covered individual you hire or enroll on or after April 21, 2011, who is age 18 or older and whose position will involve recurring access to vulnerable populations, in addition to an NSOPW check described in paragraph (a)(2) of this section, you must conduct both a state and nationwide FBI criminal registry search, consisting of—

(1) A search (by name or fingerprint) of

(A) The state criminal registry for the state in which your program operates and

(B) The state in which the individual resides at the time of application; and

(2) Submitting fingerprints to the Federal Bureau of Investigation for a national criminal history background check.

10. Revise § 2540.203 to read as follows:

§ 2540.203 When must I conduct a National Service Criminal History Check on an individual in a covered position?

(a) *New Staff and Participants.* You must conduct a National Service Criminal History Check upon selection and before enrolling or hiring any new covered individual. You must review the results of the NSOPW prior to enrolling or hiring the covered individual. You may permit the covered individual to commence grant-funded work or service pending receipt of the state or FBI criminal registry check results so long as the individual is not permitted access to vulnerable populations without being accompanied by an appropriate individual, as described in § 2540.204(f) of this chapter.

(b) *Recurring Service.* For an individual who serves consecutive terms of service in your program with a break in service of no more than 30 days, no additional check is required after the first term.

11. Amend § 2540.204 by:

a. Revising paragraph (f); and

b. Adding a new paragraph (g).

The revision and addition will read as follows:

§ 2540.204 What procedures must I follow in conducting a National Service Criminal History Check for a covered position?

* * * * *

(f) Ensure that an individual, for whom the results of a required state or FBI criminal registry check are pending, is not permitted to have access to children, persons age 60 and older, or individuals with disabilities without being accompanied by:

(1) An authorized program representative who has previously been cleared for such access;

(2) A family member or legal guardian of the vulnerable individual; or

(3) An individual authorized by nature of his or her profession to have recurring access to the vulnerable individual, such as an education or medical professional.

(g) Unless specifically approved by the Corporation, a grantee may not charge an individual for the cost of any component of a National Service Criminal History Check.

12. Revise § 2540.205(b) to read as follows:

§ 2540.205 What documentation must I maintain regarding a National Service Criminal History Check for a covered position?

* * * * *

(b) Maintain the results of the NSOPW check, and the results or a summary of the results issued by a state or Federal government body of the state or FBI searches performed for each National Service Criminal History check (unless precluded by state law), and document in writing that an authorized program representative considered the results in selecting the individual.

13. Revise § 2540.206 to read as follows:

§ 2540.206 Under what circumstances may I follow alternative procedures in conducting a National Service Criminal History Check for a covered position?

(a) *In general.* If you demonstrate that you are prohibited or otherwise precluded under state law from complying with a Corporation requirement relating to criminal history checks or that you can obtain substantially equivalent or better information through an alternative process, the Corporation will consider approving an alternative search protocol that you submit in writing to the Corporation's Office of Grants Management. The Office of Grants Management will review the alternative protocol to ensure that it:

(1) Verifies the identity of the individual; and

(2) Includes a search of an alternative criminal database that is sufficient to identify the existence, or absence of, the criminal offenses listed in § 2540.208 of this chapter.

(b) *Alternative Procedures for Individuals With Recurring Access to Vulnerable Populations.* The Corporation may exempt a program from conducting either the statewide and or FBI criminal history checks on covered individuals with recurring access to vulnerable populations, as described in § 2540.202 of this chapter, if the program demonstrates that:

(1) The service provided by the individual serving with the entity to a vulnerable population is episodic in nature or for a 1-day period;

(2) The cost to the program of complying with § 2540.202(b) of this chapter is prohibitive;

(3) The program is not authorized, or is otherwise unable, under state or Federal law, to access the state registry or the national criminal history background check system of the FBI; or

(4) The program cannot comply with § 2540.202(b) of this chapter for good cause, as determined and approved by the Corporation.

(c) *Episodic Access.* For the purposes of this section, an individual's service to a vulnerable population is considered to be episodic in nature if the service is not

a regular, scheduled, and anticipated component of the individual's position description.

§ 2540.207 [Removed and reserved].

14. Remove and reserve § 2540.207.

PART 2551—SENIOR COMPANION PROGRAM

15. The authority citation for part 2551 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.;* 42 U.S.C. 12651b–12651d; E.O. 13331, 69 FR 9911.

16. Amend § 2551.23 by adding a new paragraph (l) to read as follows:

§ 2551.23 What are the sponsor's program responsibilities?

* * * * *

(l) Conduct criminal history checks on all Senior Companions and Senior Companion grant-funded employees who enroll in, or are hired by, your program after November 23, 2007, in accordance with the National Service Criminal History Check requirements in 45 CFR §§ 2540.200–207.

§§ 2551.26, 2551.27, 2551.28, 2551.29, 2551.30, 2551.31, 2551.32 [Removed and Reserved].

17. Remove and reserve §§ 2551.26, 2551.27, 2551.28, 2551.29, 2551.30, 2551.31, 2551.32.

PART 2552—FOSTER GRANDPARENT PROGRAM

18. The authority citation for Part 2552 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.,* 42 U.S.C. 12651b–12651d; E.O. 13331, 69 FR 9911.

19. Amend § 2552.23 by adding a new paragraph (l) to read as follows:

§ 2552.23 What are a sponsor's program responsibilities?

* * * * *

(l) Conduct criminal history checks on all Foster Grandparents and Foster Grandparent grant-funded employees who enroll in, or are hired by, your program after November 23, 2007, in accordance with the National Service Criminal History Check requirements in 45 CFR §§ 2540.200–207.

§ 2552.26, 2552.27, 2552.28, 2552.29, 2552.30, 2552.31, 2552.32 [Removed and Reserved]

20. Remove and reserve § 2552.26, 2552.27, 2552.28, 2552.29, 2552.30, 2552.31, 2552.32.

Dated: June 24, 2011.

Valerie Green,

General Counsel.

[FR Doc. 2011–16509 Filed 7–5–11; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–R9–MB–2011–0020; 91200–1231–9BPP]

RIN 1018–AX78

Migratory Bird Permits; Changes in the Regulations Governing Raptor Propagation

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We solicit recommendations on whether the bald eagle (*Haliaeetus leucocephalus*) and the golden eagle (*Aquila chrysaetos*) should be included among other raptors that may be propagated in captivity under Federal raptor propagation permits.

DATES: We will accept comments received or postmarked by the end of the day on October 4, 2011.

ADDRESSES: You may submit comments by either one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–R9–MB–2011–0020.
- *U.S. mail or hand delivery:* Public Comments Processing, Attention: FWS–R9–MB–2011–0020; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042–PDM; Arlington, VA 22203–1610.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information that you provide. See the Public Comments section below for more information.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen, 703–358–1825.

SUPPLEMENTARY INFORMATION:

Public Comments

Propagation of bald eagles and golden eagles has not been allowed under the raptor propagation permit regulations at 50 CFR 21.30. We are now considering whether to permit this activity. We request comments and suggestions on this topic from the public, other concerned governmental agencies, the scientific community, industry, and other interested parties.

You may submit your comments and supporting materials only by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax, or written comments sent to an address other than the one listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request that we withhold this information from public review, but we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Background

The U.S. Fish and Wildlife Service is the Federal agency with the primary responsibility for managing migratory birds. Our authority is based on the Migratory Bird Treaty Act (MBTA, 16 U.S.C. 703 *et seq.*) and the Bald and Golden Eagle Protection Act (BGEPA, 16 U.S.C. 668). Regulations governing the issuance of permits for bald eagles and golden eagles are in 50 CFR part 22 and certain sections of 50 CFR part 21.

The MBTA allows the Secretary of the Interior to issue permits for take and possession of migratory birds for many purposes. The BGEPA allows bald eagles and golden eagles to be taken and possessed under more restricted circumstances. For example, only golden eagles that are depredating on livestock or wildlife may be taken from the wild by falconers, and bald eagles, no matter what their origin, cannot be held for falconry. Eagles may not be sold, purchased, or bartered under any circumstances, regardless of whether they are wild or captive-bred in origin.

Bald and golden eagles are the only raptor species protected by the MBTA that are not allowed under the current raptor propagation permit regulations at 50 CFR 21.30 because those regulations do not apply to these two species that are also protected under the Bald and Golden Eagle Protection Act (see 50 CFR 21.2(b)). We are evaluating whether to amend the regulations to allow some holders of valid raptor propagation permits to propagate eagles as they can many other raptor species. Most eagles in captivity are held under permits for exhibition/education, eagle falconry, and Native American eagle aviaries. All

eagles held for falconry are golden eagles, and most were removed from the wild due to livestock depredation. Most eagles held for exhibition/education and Native American aviaries are nonreleasable bald eagles and golden eagles obtained from permitted rehabilitators. We are assessing whether captive-bred eagles should be available for these or other purposes. We solicit comments and suggestions on all aspects of bald eagle and golden eagle propagation and potential regulations to govern Federal permitting of this activity.

We particularly solicit comments on the topics listed below. Explaining your reasons and rationale for your comments will help as we consider them.

(1) Whether to allow propagation of bald eagles and golden eagles under raptor propagation permits.

(2) Qualifications and experience necessary to propagate eagles.

(3) Limits or restrictions that should apply to propagation of eagles.

(4) Special restrictions that should apply with regard to imprinting.

(5) Whether propagators should be allowed to hybridize bald eagles and golden eagles with other species of eagles.

(6) Restrictions on purposes for which captive-bred eagles may be held.

(7) Qualifications and experience necessary to possess a captive-bred bald eagle or golden eagle.

(8) Special facilities requirements for propagation of golden eagles and bald eagles.

(9) Report information that should be required from a permit holder, if any.

(10) Other conditions that should apply to these permits.

Dated: June 27, 2011.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–16877 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket Number FWS–R9–MB–2009–0045; 91200–1231–9BPP]

RIN 1018–AW75

Migratory Bird Permits; Abatement Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are considering promulgating migratory bird permit regulations for a permit to use raptors (birds of prey) in abatement activities. Abatement means the use of trained raptors to flush, scare (haze), or take birds or other wildlife to mitigate damage or other problems, including risks to human health and safety. We have permitted this activity under special purpose permits since 2007 pursuant to a migratory bird permit policy memorandum. We now intend to prepare a specific permit regulation to authorize this activity. We seek information and suggestions from the public to help us formulate any proposed regulation.

DATES: We must receive any comments or suggestions by October 4, 2011.

ADDRESSES: You may only submit comments or suggestions by the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. We will not post duplicate comments from any entity, nor will they be put into our administrative record for this issue.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attention FWS–R9–MB–2009–0045; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203–1610.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Susan Lawrence at 703–358–2016.

SUPPLEMENTARY INFORMATION:

Public Comments

We request comments and suggestions on this topic from the public, other concerned governmental agencies, the scientific community, industry, or any other interested parties. You may submit your comments and materials concerning this issue by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we use in preparing a proposed rule, will be available for public inspection at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Background

In response to public interest in the use of trained raptors to haze (scare) depredating and other problem birds from airports and agricultural crops, we drafted policy to establish a migratory bird abatement permit. On January 12, 2007, we published a **Federal Register** notice (72 FR 1556–1557) containing draft permit conditions for abatement permits for public comment. On December 10, 2007, we published a **Federal Register** notice (72 FR 69705–69706) announcing final permit conditions. This was accompanied by Migratory Bird Permit Memorandum Number 5, Abatement Activities Using Raptors, issued August 22, 2007, available at *http://www.fws.gov/migratorybirds/mbpermits/Memorandums/Abatement Activities Using Raptors.pdf.*

The policy memorandum and conditions govern current administration of Federal Migratory Bird Special Purpose Abatement permits (Federal abatement permit). Applicants for a Federal abatement permit complete and submit Service application form 3–200–79 (*http://www.fws.gov/forms/3-200-79.pdf*) to their Regional Migratory Bird Permit Office. The permit provides the public with a nonlethal management tool to mitigate problems caused by birds and other wildlife. The use of raptors in abatement continues to expand, and we intend to develop a specific permit regulation to govern the activity, rather than continue to administer the permits under Special Purpose permit authority (50 CFR 21.27) and Migratory Bird Permit Memorandum Number 5.

A Federal abatement permit authorizes the use of trained raptors protected under the Migratory Bird Treaty Act (MBTA) to abate problems caused by migratory birds or other wildlife. Under the current policy, an individual must be a Master Falconer in good standing under the Federal falconry regulations (50 CFR 21.29) to

qualify for an abatement permit. A General or Apprentice Falconer may conduct abatement activities under the permit holder's Federal abatement permit if the permit holder designates them as a subpermittee. Only raptors that belong to the abatement permit holder may be used under his or her abatement permit.

Raptors used under a Federal abatement permit must be captive-bred and banded with a Service-issued seamless band. Any MBTA-protected raptor species (including legally held threatened or endangered species) may be used for abatement, except for golden eagles and bald eagles. There is currently no limit to the number of raptors an abatement permit holder may hold under a Federal abatement permit provided that they are properly cared for and each raptor is used for abatement activities. Facilities and equipment must meet standards described in 50 CFR 21.29.

A Federal abatement permit holder may use captive-bred raptors held under his or her migratory bird master falconry permit for abatement activities without transferring them to his or her abatement permit, provided the applicable State falconry permitting authority allows this. The falconry bird used must be a species authorized for use per the conditions of the Federal abatement permit. Only the permit holder may use his or her falconry birds for abatement activities. Raptors held under a Federal abatement permit may not be used for falconry unless they are transferred to a falconry permit.

Abatement permit holders must submit a completed 3–186A form (Migratory Bird Acquisition and Disposition Report) to the issuing Migratory Bird Permit Office for each raptor he or she acquires or disposes of under the permit, but they have no other reporting requirements. Among other things, we solicit suggestions as to whether reporting will have value, and what level of reporting should be required.

A Federal abatement permit, by itself, does not authorize the general killing, injuring, or take of migratory birds or other wildlife. Any take of protected migratory birds by an abatement permit holder must be authorized by a Federal depredation order or depredation permit. Any harassment, disturbance, or take of bald eagles, golden eagles, or endangered or threatened species by an abatement permit holder must be authorized by the applicable Federal permit. Abatement activities must also be in accordance with any other applicable Federal, State, or Tribal law.

However, no additional Federal permit is required to take species that are not protected under the MBTA or any other applicable Federal law. In addition, no Federal permit is required to conduct abatement activities directed at protected migratory birds that do not amount to a take. We do not consider flushing, scaring, or hazing to meet the definition of take under the MBTA.

Possession and use for abatement of exotic raptor species that are not on the list of MBTA-protected species at 50 CFR 10.13, such as Barbary falcon, Lanner falcon, and Saker falcon, is not regulated under the MBTA and is outside the scope of this notice. Hybrid raptors of MBTA-protected species would still be subject to this proposed permit regulation. Though an abatement permit would not be required for use of such species in abatement activities, any resulting take of protected migratory birds or other protected wildlife must still be authorized under the applicable Federal, State, or Tribal law or regulation.

A Federal abatement permit will allow the permittee to conduct abatement at the locations identified and under the conditions listed on his or her abatement permit. A State abatement permit also may be required of an abatement practitioner.

We solicit comments and suggestions on any aspect of the use of trained MBTA-protected raptors for abatement activities and potential regulations to govern Federal permitting. We particularly solicit comments on the topics listed below. Explaining the reasons and rationale for your comments where appropriate will help as we consider them in the preparation of a proposed rule.

(1) Qualifications and experience necessary to qualify for a Federal abatement permit.

(2) Limits on the species that should be authorized for use in abatement activities.

(3) Limits on the numbers of raptors that should be authorized for use in abatement activities.

(4) Qualifications and experience of subpermittees (both those authorized to fly the permit holder's raptors and those allowed to care for birds).

(5) Caging requirements for birds, while traveling, being transported and held in ''temporary'' caging for extended periods of time, i.e., multiple birds held in a trailer while conducting seasonal abatement activities at multiple locations.

(6) The use of falconry birds held by subpermittees for abatement.

(7) Any other considerations relating to subpermittees conducting abatement activities under a permit holder's permit, including their business relationship to the permit holder. For example, should falconers located elsewhere in the United States be allowed to conduct abatement activities in their own locale as subpermittees under a permit holder's abatement permit? Why or why not?

(8) Comments on what has worked well under existing permits and what has not worked well.

(9) Report information that should be required from a permit holder, if any.

(10) Other conditions that should apply to these permits.

(11) Examples of situations where raptors are used for abatement and information or documentation of success or lack of success in accomplishing abatement objectives.

Authority: The authorities for this notice are the Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703–712); Pub. L. 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Pub. L. 106–108, 113 Stat. 1491, and Note Following 16 U.S.C. 703.

Dated: June 27, 2011.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–16880 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100903433–1349–01]

RIN 0648–BA22

Fisheries of the Northeastern United States; Atlantic Deep-Sea Red Crab Fishery; Amendment 3

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 3 to the Atlantic Deep-Sea Red Crab Fishery Management Plan (Red Crab FMP). The New England Fishery Management Council (Council) developed Amendment 3 to bring the Red Crab FMP into compliance with the annual catch limit (ACL) and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Although

recommended by the Council as part of Amendment 3, this proposed rule announces NMFS' intention to disapprove a proposed measure to modify the existing trap restrictions and a proposed measure to remove the prohibition on landing more than one standard tote of female red crabs.

DATES: Written comments must be received no later than 5 p.m. eastern standard time, on August 5, 2011.

ADDRESSES: An environmental assessment (EA) was prepared for Amendment 3 that describes the proposed action and other considered alternatives, and provides an analysis of the impacts of the proposed measures and alternatives. Copies of Amendment 3, including the EA and the Initial Regulatory Flexibility Analysis (IRFA), are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.*

You may submit comments, identified by RIN 0648–BA22, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Fax:* (978) 281–9135, Attn: Moira Kelly.
- *Mail:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on Red Crab Amendment 3 Proposed Rule.''

Instructions: All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, (978) 281–9218.

SUPPLEMENTARY INFORMATION:

Background

The Council developed Amendment 3 with the primary goal of bringing the Red Crab FMP into compliance with the requirements of the reauthorized Magnuson-Stevens Act that FMPs include ACLs and AMs. The Red Crab FMP was implemented in October 2002. Since implementation, the red crab fishery has been managed under a target TAC and DAS system that allocated DAS equally across the fleet of limited access permitted vessels. The fleet DAS allocation was calculated by determining how many DAS would be required to reach the target TAC based on recent average landings-per-DAS by the active vessels. The FY 2010 target TAC was 3.91 million lb and fleet DAS allocation was 665 DAS. The FY 2010 specifications will remain in place until replaced by the proposed specifications in Amendment 3, if approved.

Proposed Management Measures

1. Biological and Management Reference Points

The biological and management reference points currently in the Red Crab FMP are used to determine if overfishing is occurring or if the stock is overfished. However, these reference points for red crab are currently not sufficient to comply with the Magnuson-Stevens Act and the National Standard 1 (NS1) guidelines. As a result, the Council intended to establish new estimates for maximum sustainable yield (MSY), optimum yield (OY), overfishing limit (OFL), and acceptable biological catch (ABC) for red crab. However, there is still insufficient information on the species to establish the MSY, OY, or OFL, and ABC is defined in terms of landings instead of total catch (*i.e.,* landings plus dead discards).

MSY is defined under the Magnuson-Stevens Act as ''the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (*e.g.,* gear selectivity), and the distribution of catch among fleets.'' However, the Council's Scientific and Statistical Committee (SSC) determined that the model results from the December 2008 Data Poor Stocks Working Group (DPSWG) are an underestimate of MSY for red crab, but could not determine by how much, and so the SSC did not recommend an estimate of MSY. As a result, the MSY estimated in the FMP was rejected, but a new estimate could not be determined. Because the SSC could not determine MSY, a new value for OY could not be developed.

The OFL is an estimate of the catch level above which overfishing is occurring, but based on the available information, the SSC determined that an OFL could not be estimated for the red crab fishery at this time.

ABC is defined under the Magnuson-Stevens Act as ''a level of stock or stock complex's annual catch that accounts for the scientific uncertainty in the estimate of OFL and any other scientific uncertainty, and should be specified based on the ABC control rule.'' The NS1 guidelines further state that ''ABC may not exceed OFL,'' and that ''the determination of ABC should be based, when possible, on the probability that an actual catch equal to a stock's ABC would result in overfishing.'' These guidelines also require that the Council's ABC control rule be based on scientific advice provided by its SSC and that the SSC recommend the ABC to the Council.

At its March 16, 2010, meeting, the SSC determined that the available information for red crab provided an insufficient basis on which to recommend an ABC control rule, and that ''an interim ABC based on long-term average landings is safely below an overfishing threshold and adequately accounts for scientific uncertainty.'' The SSC reviewed information on historical dead discards of red crab in the directed trap fishery and in bycatch fisheries at its June 22, 2010, meeting in an effort to recommend an ABC that includes both landings and dead discards. However, the SSC determined that there was insufficient information to specify dead discards, but that the long-term average landings, and the presumed discarding practices associated with those landings, were sustainable, and maintained its recommendation of specifying the interim red crab ABC in terms of landings only. Based on this approach, the long-term average landings for 1974–2008 result in an ABC of 3.91 million lb (1,775 mt), represented in terms of commercial landings.

2. ACL

Under section 303(a)(15) of the Magnuson-Stevens Act, any FMP must establish a mechanism for specifying ACLs at a level that prevents overfishing. The NS1 guidelines further state that the ACL for a given stock or stock complex cannot exceed the ABC, that it serves as the basis for invoking AMs, and that ACLs in coordination with AMs must prevent overfishing. Based on the requirements of the Magnuson-Stevens Act and the NS1

guidelines with respect to ACLs and AMs, Amendment 3 proposes that the ACL for red crab be set equal to the ABC, because scientific uncertainty has been accounted for in establishing the ABC. This rule also proposes to set the ACL equal to the total allowable landings (TAL) for FYs 2011–2013, because the management uncertainty in the red crab fishery is minimal and the SSC determined that there was insufficient information to specify dead discards.

3. Accountability Measures

The NS1 guidelines describe AMs as management controls aimed at preventing the ACL from being exceeded, and to correct or mitigate overages of the ACL. The Council proposes both proactive and reactive AMs for the red crab fishery in Amendment 3. The proactive AM would grant the Regional Administrator the authority to close the red crab fishery when the TAL is projected to be harvested. The reactive AM would be a pound-for-pound payback of any overage, should the TAL be exceeded. In any year in which the ACL and TAL are not equal, if any overage of the ACL is not accounted for through the AM that applies to an overage of the TAL (*e.g.,* higher than expected discards, or an unexpected increase in incidental landings by vessels with open access red crab permits), then the unaccounted-for amount by which the ACL was exceeded will be deducted from the subsequent single fishing year's ACL.

4. FYs 2011–2013 Specifications

The Council proposes the following specifications for red crab for FYs 2011–2013:

	mt	Million lb
MSY	undetermined	
OFL	undetermined	
OY	undetermined	
ABC	1,775	3.91
ACL	1,775	3.91
TAL	1,775	3.91

5. TAL; Eliminate DAS

This measure would replace the DAS and target TAC management scheme with a TAL. The Council intends this measure to work in conjunction with the in-season closure authority AM, which would grant the Regional Administrator the authority to close the fishery when the TAL is project to be harvested. This measure is being proposed to simplify the management measures for red crab, provide increased flexibility to the red crab fleet, and ensure more accurate accounting of the catch limits.

6. Eliminate Trip Limits

Red crab vessels qualified for a trip limit during the initial limited access qualification process. The FMP originally specified a trip limit of 75,000 lb (34,019 kg), unless a vessel owner could demonstrate he or she landed more than 75,000 lb (34,019 kg) on a trip during the qualification period, in which case the owner was granted a trip limit equal to that higher level, rounded to the nearest 5,000 lb (2,268 kg). Only one vessel qualified under that provision, and it has operated with a trip limit of 125,000 lb (56,699 kg) since 2002. The proposed rule would eliminate these trip limits to simplify the management measures for red crab and provide increased flexibility to the red crab fleet.

7. Modify Trap Limit Regulations

The current trap limit regulations state that red crab may not be harvested from gear other than a marked red crab trap; no more than 600 traps may be used when fishing for red crab; and lobster, red crab, or fish may not be harvested from a parlor trap while on a red crab DAS. The proposed measure would modify the regulation to prohibit more than 600 traps being deployed in water deeper than 400 m; prohibit a limited access red crab vessel from harvesting red crab in water shallower than 400 m; and prohibit parlor traps from being deployed at water shallower than 400 m. This measure was proposed by the Council to allow red crab vessels that also fish for lobster to do so on the same trip. However, the proposed modifications may be unenforceable. They would require an enforcement agent to witness the deployment of traps beyond the recommended depth range and/or witness the at-sea retrieval of the traps to determine compliance with the regulations. As this is not practical, NMFS proposes to disapprove this measure because of the inability to effectively enforce these regulations.

8. Remove Prohibition on Landing Female Red Crab

The Council has also proposed a measure that would remove the current prohibition on landing more than one standard tote (100 lb (45.4 kg)) of female red crab, conditional on a scientific recommendation from the SSC. The Council proposed this measure to allow the future expansion of the fishery to include female red crab. However, NMFS considers this proposal to be administratively unnecessary and inconsistent with the best available science.

Administratively, modifying the regulations to allow landing female red crabs could be done through a framework adjustment, as specified in the FMP, and the analytical requirements to implement such a change to the male-only fishery would be the same with or without the approval of this measure. Amendment 3 did not recommend any specific management measures or monitoring protocol that would potentially need to be implemented in conjunction with implementing this change. Scientifically, the SSC determined that at this time there is insufficient scientific information available to make any determination as to the potential impact on red crab of landing more than an incidental amount of female red crab. Further, analysis of the impacts of landing female red crabs was not included in the FMP and none is included in Amendment 3. If sufficient scientific information becomes available, and the Council determines it is interested in removing this prohibition once specific management measures to accommodate this change are developed, additional Council action and analysis would be required, regardless of whether this measure is implemented in Amendment 3. Therefore, NMFS proposes to disapprove this measure. NMFS seeks comments on all of the proposed measures in Amendment 3, as well as on its intention to disapprove two of the Council's proposed measures.

As required under section 303(c) of the Magnuson-Stevens Act, the Council reviewed the draft regulations and deemed them necessary and appropriate for implementation of Amendment 3. Technical changes to the regulations deemed necessary by the Secretary for clarity may be made, as provided under section 304(b) of the Magnuson-Stevens Act.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Red Crab FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

The Office of Management and Budget has determined that this proposed rule is not significant for the purposes of Executive Order 12866.

The Council prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act (RFA),

included in Amendment 3 and supplemented by information contained in the preamble to this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section of the preamble and in the **SUMMARY** of this proposed rule. A summary of the IRFA follows. A copy of this analysis is available from the Council (see **ADDRESSES**).

All of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration size standards for small fishing businesses (*i.e.,* they have less than $4.0 million in annual gross sales). Therefore, there are no disproportionate effects on small versus large entities.

This action does not introduce any new reporting, recordkeeping, or other compliance requirements. This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The participants in the commercial red crab fishery were defined as those vessels issued limited access red crab permits. Although some firms own more than one vessel, available data make it difficult to reliably identify ownership control over more than one vessel. As of December 2011, there were four vessels with limited access red crab permits actively operating in the red crab fishery. For this analysis, the number of permitted vessels is considered to be a maximum estimate of the number of small business entities. The total value of landings in the red crab fishery averaged $3.44 million, so all business entities in the harvesting sector can be categorized as small businesses for purpose of the RFA, even if the assumption overstates the number of business entities.

Economic Impacts of the Proposed Action Compared to Significant Non-Selected Alternatives

The proposed action will affect all four active vessels in the directed red crab fishery. However, it is not expected to have any impact on the gross or average revenues for the fishery because it does not change the total allowable landings level for red crab from the FY 2010 level of 3.913 million lb (1,775 mt). This harvest level is substantially higher than the average landings in recent years (2.588 million lb (1,174 mt) from FY 2007–2009), and is not expected to constrain landings unless markets for red crab substantially improve or major new markets develop. The FY 2007–2009 landings were low due to market conditions, and were not constrained by the total catch limit during 2007–2009.

Information on costs in the fishery is not readily available and individual vessel profitability cannot be determined directly; therefore, expected changes in gross revenues were used as a proxy for profitability. For the four participating vessels in 2009, average total sales were $534,602 per vessel. Because the proposed action would not directly constrain the gross revenues per vessel, it would not directly affect the profits of individual vessels, and, therefore, it is not necessary to analyze impacts according to the dependence of each vessel in the red crab fishery.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: June 29, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.2, the definition for ''Day(s)-at-Sea'' is revised, and the definition for ''Red crab trip'' is added, in alphabetical order, to read as follows:

§ 648.2 Definitions.

* * * * *

Day(s)-at-Sea (DAS), with respect to the NE multispecies and monkfish fisheries (except as described in § 648.82(k)(1)(iv)), and the Atlantic sea scallop fishery, means the 24-hr period of time or any part thereof during which a fishing vessel is absent from port to fish for, possess, or land, or fishes for, possesses or lands, regulated species, monkfish, or scallops.

* * * * *

Red crab trip, with respect to the Atlantic deep-sea red crab fishery, means a trip on which a vessel fishes for, possesses, or lands, or intends to fish for, possess, or land red crab in excess of the incidental limit, as specified at § 648.263(b)(1).

3. In § 648.4, paragraphs (a)(13)(i)(E)(*3*), (a)(13)(i)(M), and (a)(13)(i)(N) are removed; and paragraphs (a)(13)(i)(A) and (B) are revised to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(13) * * *

(i) *Limited access red crab permit*—(A) *Eligibility.* Any vessel of the United States that possesses or lands more than the incidental amount of red crab, as specified in § 648.263(b), per red crab trip must have been issued and carry on board a valid limited access red crab permit.

(B) *Application/renewal restrictions.* The provisions of paragraph (a)(1)(i)(B) of this section apply.

* * * * *

§ 648.7 [Amended]

4. In § 648.7, paragraph (b)(2)(iii) is removed.

5. In § 648.10, paragraphs (h) introductory text, (h)(4), and (h)(8) are revised to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(h) *Call-in notification.* The owner of a vessel issued a limited access monkfish permit who is participating in a DAS program and who is not required to provide notification using a VMS, and a scallop vessel qualifying for a DAS allocation under the occasional category that has not elected to fish under the VMS notification requirements of paragraph (e) of this section and is not participating in the Sea Scallop Area Access program as specified in § 648.60, and any vessel that may be required by the Regional Administrator to use the call-in program under paragraph (i) of this section, are subject to the following requirements:

* * * * *

(4) The vessel's confirmation numbers for the current and immediately prior NE multispecies or monkfish fishing trip must be maintained on board the vessel and provided to an authorized officer immediately upon request.

* * * * *

(8) Any vessel that possesses or lands per trip more than 400 lb (181 kg) of scallops; any vessel issued a limited access NE multispecies permit subject to the NE multispecies DAS program requirements that possesses or lands regulated NE multispecies, except as provided in §§ 648.10(h)(9)(ii), 648.17, and 648.89; and any vessel issued a limited access monkfish permit subject to the monkfish DAS program and call-in requirement that possess or lands monkfish above the incidental catch trip limits specified in § 648.94(c) shall be

deemed to be in its respective DAS program for purposes of counting DAS and will be charged DAS from its time of sailing to landing, regardless of whether the vessel's owner or authorized representative provides adequate notification as required by paragraphs (e) through (h) of this section.

* * * * *

6. In § 648.14, paragraphs (t)(2)(iii) and (t)(3)(iv) are added; paragraphs (t)(2)(ii) and (t)(4) through (6) are revised; and paragraph (t)(7) is removed to read as follows:

§ 648.14 Prohibitions.

* * * * *

(t) * * *

(2) * * *

(ii) *Restriction on female red crabs.* Fish for, catch, possess, transport, land, sell, trade, or barter; or attempt to fish for, catch, possess, transport, land, sell, trade, or barter; female red crabs in excess of one standard U.S. fish tote in a fishing year in which female red crabs were not specified in the ABC and authorized to be landed.

(iii) Fish for, possess, or land red crab, in excess of the incidental limit specified at § 648.263(b)(1), after determination that the TAL has been reached and notice of the closure date has been made.

* * * * *

(3) * * *

(iv) Purchase or otherwise receive for a commercial purpose in excess of the incidental limit specified at § 648.263(b)(1), after determination that the TAL has been reached and notice of the closure date has been made.

(4) *Prohibitions on processing and mutilation.* (i) Retain, possess, or land red crab claws and legs separate from crab bodies in excess of one standard U.S. fish tote, if fishing on a red crab trip with a valid Federal limited access red crab permit.

(ii) Retain, possess, or land any red crab claws and legs separate from crab bodies if the vessel has not been issued a valid Federal limited access red crab permit or has been issued a valid Federal limited access red crab permit, but is not fishing on a dedicated red crab trip.

(iii) Retain, possess, or land more than two claws and eight legs per crab if the vessel has been issued a valid Federal red crab incidental catch permit, or has been issued a valid Federal limited access red crab permit and is not fishing on a dedicated red crab trip.

(iv) Possess or land red crabs that have been fully processed at sea, *i.e.,* engage in any activity that removes meat from any part of a red crab, unless a preponderance of available evidence shows that the vessel fished exclusively in state waters and was not issued a valid Federal permit.

(5) *Gear requirements.* Fail to comply with any gear requirements or restrictions specified at § 648.264.

(6) *Presumption.* For purposes of this part, the following presumption applies: All red crab retained or possessed on a vessel issued any permit under § 648.4 are deemed to have been harvested in or from the Red Crab Management Unit, unless the preponderance of all submitted evidence demonstrates that such red crab were harvested by a vessel fishing exclusively outside of the Red Crab Management Unit or in state waters.

* * * * *

7. Section 648.260 is revised to read as follows:

§ 648.260 Specifications.

(a) *Annual review and specifications process.* The Council, the Red Crab Plan Development Team (PDT), and the Red Crab Advisory Panel shall monitor the status of the red crab fishery and resource.

(1) The Red Crab PDT shall meet at least once annually during the intervening years between Stock Assessment and Fishery Evaluation (SAFE) Reports, described in paragraph (b) of this section, to review the status of the stock and the fishery. Based on such review, the PDT shall provide a report to the Council on any changes or new information about the red crab stock and/or fishery, and it shall recommend whether the specifications for the upcoming year(s) need to be modified. At a minimum, this review shall include a review of at least the following data, if available: Commercial catch data; current estimates of fishing mortality and catch-per-unit-effort (CPUE); discards; stock status; recent estimates of recruitment; virtual population analysis results and other estimates of stock size; sea sampling, port sampling, and survey data or, if sea sampling data are unavailable, length frequency information from port sampling and/or surveys; impact of other fisheries on the mortality of red crabs; and any other relevant information.

(2) If new and/or additional information becomes available, the Red Crab PDT shall consider it during this annual review. Based on this review, the Red Crab PDT shall provide guidance to the Red Crab Committee and the Council regarding the need to adjust measures in the Red Crab FMP to better achieve the FMP's objectives. After considering guidance, the Council may submit to NMFS its recommendations for changes to management measures, as appropriate, through the specifications process described in this section, the framework process specified in § 648.261, or through an amendment to the FMP.

(3) Based on the annual review, described above, and/or the SAFE Report described in paragraph (b) of this section, recommendations for acceptable biological catch (ABC) from the Scientific and Statistical Committee (SSC), and any other relevant information, the Red Crab PDT shall recommend to the Red Crab Committee and Council the following specifications for harvest of red crab: An annual catch limit (ACL) set less than or equal to ABC, and total allowable landings (TAL) necessary to meet the objectives of the FMP in each red crab fishing year, specified for a period of up to 3 fishing years.

(4) The PDT, after its review of the available information on the status of the stock and the fishery, may recommend to the Council any measures necessary to assure that the specifications will not be exceeded, as well as changes to the appropriate specifications.

(5) Taking into account the annual review and/or SAFE Report described in paragraph (b) of this section, the advice of the SSC, and any other relevant information, the Red Crab PDT may also recommend to the Red Crab Committee and Council changes to stock status determination criteria and associated thresholds based on the best scientific information available, including information from peer-reviewed stock assessments of red crab. These adjustments may be included in the Council's specifications for the red crab fishery.

(6) *Council recommendation*—(i) The Council shall review the recommendations of the Red Crab PDT, Red Crab Committee, and SSC, any public comment received thereon, and any other relevant information, and make a recommendation to the Regional Administrator on appropriate specifications and any measures necessary to assure that the specifications will not be exceeded.

(ii) The Council's recommendation must include supporting documentation, as appropriate, concerning the environmental, economic, and social impacts of the recommendations. The Regional Administrator shall consider the recommendations and publish a rule in the **Federal Register** proposing specifications and associated measures,

consistent with the Administrative Procedure Act.

(iii) The Regional Administrator may propose specifications different than those recommended by the Council. If the specifications published in the **Federal Register** differ from those recommended by the Council, the reasons for any differences must be clearly stated and the revised specifications must satisfy the criteria set forth in this section, the FMP, and other applicable laws.

(iv) If the final specifications are not published in the **Federal Register** for the start of the fishing year, the previous year's specifications shall remain in effect until superseded by the final rule implementing the current year's specifications, to ensure that there is no lapse in regulations while new specifications are completed.

(b) *SAFE Report.* (1) The Red Crab PDT shall prepare a SAFE Report at least every 3 yr. Based on the SAFE Report, the Red Crab PDT shall develop and present to the Council recommended specifications as defined in paragraph (a) of this section for up to 3 fishing years. The SAFE Report shall be the primary vehicle for the presentation of all updated biological and socio-economic information regarding the red crab fishery. The SAFE Report shall provide source data for any adjustments to the management measures that may be needed to continue to meet the goals and objectives of the FMP.

(2) In any year in which a SAFE Report is not completed by the Red Crab PDT, the annual review process described in paragraph (a) of this section shall be used to recommend any necessary adjustments to specifications and/or management measures in the FMP.

8. Section 648.262 is revised to read as follows:

§ 648.262 Accountability measures for red crab limited access vessels.

(a) *Closure authority.* NMFS shall close the EEZ to fishing for red crab in excess of the incidental limit by commercial vessels for the remainder of the fishing year if the Regional Administrator determines that the TAL has been harvested. Upon notification of the closure, a vessel issued a limited access red crab permit may not fish for, catch, possess, transport, land, sell, trade, or barter, in excess of 500 lb (226.8 kg) of red crab, or its equivalent in weight as specified at § 648.263(a)(2)(i) and (ii), per fishing trip in or from the Red Crab Management Unit.

(b) *Adjustment for an overage.* (1) If NMFS determines that the TAL was exceeded in a given fishing year, the exact amount of the landings overage will be deducted, as soon as is practicable, from a subsequent single fishing year's TAL, through notification consistent with the Administrative Procedure Act.

(2) If NMFS determines that the ACL was exceeded in a given fishing year, the exact amount of an overage that was not already deducted from the TAL under paragraph (b)(i) of this section will be deducted, as soon as is practicable, from a subsequent single fishing year's TAL, through notification consistent with the Administrative Procedure Act.

9. In § 648.263, paragraph (a)(1) is removed and reserved, and paragraphs (a)(3), (a)(5), and (b)(1) are revised to read as follows:

§ 648.263 Red crab possession and landing restrictions.

(a) * * *

(3) *Female red crab restriction.* A vessel may not fish for, catch, possess, transport, land, sell, trade, or barter, female red crabs in excess of one standard U.S. fish tote of incidentally caught female red crabs per trip when fishing on a dedicated red crab trip, unless the Council has recommended, and NMFS has implemented, an ACL and specifications, based on a recommendation from the SSC and the procedures specified in § 648.260, that authorizes the landings of female red crabs for a given fishing year.

* * * * *

(5) *Mutilation restriction.* A vessel may not retain, possess, or land red crab claws and legs separate from crab bodies in excess of one standard U.S. fish tote per trip when fishing on a dedicated red crab trip.

(b) * * *

(1) *Possession and landing restrictions.* A vessel or operator of a vessel that has been issued a red crab incidental catch permit, or a vessel issued a limited access red crab permit not on a dedicated red crab trip, as defined in § 648.2, may catch, possess, transport, land, sell, trade, or barter, up to 500 lb (226.8 kg) of red crab, or its equivalent in weight as specified at paragraphs (a)(1)(i) and (ii) of this section, per fishing trip in or from the Red Crab Management Unit.

* * * * *

10. In § 648.264, paragraphs (a)(1), (a)(2), (a)(3), and (a)(6) are revised to read as follows:

§ 648.264 Gear requirements/restrictions.

(a) * * *

(1) Limited access red crab vessel may not harvest red crab from any fishing gear other than red crab traps/pots, marked as specified by paragraph (a)(5) of this section.

(2) Limited access red crab vessels may not deploy more than 600 traps/pots in water depths greater than 400 m (219 fath), and may not harvest red crab in water depths less than 400 m (219 fath).

(3) *Parlor traps/pots.* Limited access red crab vessels may not deploy parlor traps/pots in water depths greater than 400 meters (219 fathoms).

* * * * *

(6) *Additional gear requirements.* Vessels must comply with the gear regulations found at § 229.32 of this title.

* * * * *

[FR Doc. 2011–16895 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

RIN 0648–AX05

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Amendment 11

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

ACTION: Announcement of availability of fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the Mid-Atlantic Fishery Management Council (Council) has submitted Amendment 11 to the Atlantic Mackerel, Squid, and Butterfish (MSB) Fishery Management Plan (FMP) (Amendment 11), incorporating the Final Environmental Impact Statement (FEIS) and the Initial Regulatory Flexibility Analysis (IRFA), for review by the Secretary of Commerce and is requesting comments from the public.

DATES: Comments must be received on or before September 6, 2011.

ADDRESSES: A final environmental impact statement (FEIS) was prepared for Amendment 11 that describes the proposed action and other considered alternatives and provides a thorough analysis of the impacts of the proposed

measures and alternatives. Copies of Amendment 11, including the FEIS, the Regulatory Impact Review (RIR), and the Initial Regulatory Flexibility Analysis (IRFA), are available from: Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904–6790. The FEIS/RIR/IRFA is accessible via the Internet at *http://www.nero.nmfs.gov.*

You may submit comments on this notice of availability, identified by ''0648–AX05,'' by any one of the following methods:

• *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking portal: *http://www.regulations.gov;*

• *Fax:* (978) 281–9135, Attn: Aja Szumylo;

• Mail to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on MSB Amendment 11.''

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Aja Szumylo, Fishery Policy Analyst, 978–281–9195, fax 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

The goals of Amendment 11 are to: (1) Establish a cap on capacity in the mackerel fishery via a limited access program based on current and historical participation that does not impede optimal U.S. utilization of the fishery; (2) update MSB species' essential fish habitat (EFH) definitions; (3) evaluate fishing-related impacts on *Loligo* egg EFH and, if necessary, minimize any adverse effects on *Loligo* egg EFH caused by fishing; and (4) establish an allocation for the recreational mackerel fishery to facilitate implementation of upcoming Annual Catch Limits (ACLs) and Accountability Measures (AMs).

The Council initially notified the public of its intent to consider the impacts of alternatives for limiting access to the mackerel fishery in a Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS) for Amendment 9 to the MSB FMP (Amendment 9) on March 4, 2005 (70 FR 10605). The Council subsequently conducted scoping meetings on the development of a limited access program through Amendment 9. However, due to unforeseen delays in the development of Amendment 9, the Council notified the public on December 19, 2005 (70 FR 75114), that the mackerel limited access program would instead be analyzed in Amendment 11. The Council notified the public on February 27, 2007 (75 FR 8693), that it would begin the development of Amendment 11 in an SEIS, and finally notified the public on August 11, 2008 (73 FR 46590), that it would be necessary to prepare a full environmental impact statement (EIS) for Amendment 11. During further development of Amendment 11, the Council determined that the additional issues that are listed above would also be considered.

The Council conducted public hearings in February 2010 and was originally scheduled to take final action on Amendment 11 in April of 2010, but decided to revise certain alternatives after reviewing public comment. The revisions were deemed to require a Supplement to the Draft Environmental Impact Statement (SDEIS) and an additional comment period. Following the public comment period that ended on October 12, 2010, the Council adopted Amendment 11 on October 13, 2010. In Amendment 11, measures recommended by the Council would:

• Implement a three-tiered limited access system, with vessels grouped based on the following landings thresholds, with all qualifiers required to have possessed a valid permit on March 21, 2007. A vessel must have landed at least 400,000 lb (181.44 mt) in any one year 1997–2005 to qualify for a Tier 1 permit; at least 100,000 lb (45.36 mt) in any one year March 1, 1994–December 31, 2005, to qualify for a Tier 2 permit; or at 1east 1,000 lb (0.45 mt) in any one year March 1, 1994–December 31, 2005, to qualify for a Tier 3 permit, with Tier 3 allocated up to 7 percent of the commercial quota, through the specifications process;

• Establish an open access permit for all other vessels;

• Establish trip limits for all tiers annually through the specifications process, with possession limits initially set as unlimited for Tier 1; 135,000 lb (61.23 mt) for Tier 2; 100,000 lb (45.36 mt) for Tier 3; and 20,000 lb (9.07 mt) for open access;

• Establish permit application, permit appeal, vessel baseline, and vessel upgrade, replacement, and confirmation of permit history provisions similar to established for other Northeast region limited access fisheries;

• Establish a 10-percent maximum volumetric fish hold upgrade for Tier 1 and Tier 2 vessels;

• Allow vessel owners to retain mackerel fishing history in a purchase and sale agreement and use the history to qualify a different vessel for a mackerel permit (permit splitting);

• Require Tier 3 vessels to submit VTRs on a weekly basis;

• Designate as EFH the area associated with 90 percent of survey catch for each life stage of non-overfished species (i.e., *Loligo* squid) and the area associated with 95 percent of survey catch for each life stage of overfished or status unknown species (i.e., butterfish, mackerel, *Illex* squid); and

• Establish a recreational mackerel allocation equaling 6.2 percent of the mackerel allowable biological catch.

Public comments are solicited on Amendment 11 and its incorporated documents through the end of the comment period stated in this notice of availability (NOA). A proposed rule that would implement Amendment 11 may be published in the **Federal Register** for public comment, following NMFS's evaluation under Magnuson-Stevens Act procedures. Public comments on must be received by the end of the comment period provided in this NOA of Amendment 11 to be considered in the approval/disapproval decision on the amendment. All comments received by the end of the comment period on the NOA of Amendment 11, whether specifically directed to Amendment 11 or the proposed rule, will be considered in the approval/disapproval decision; comments received after that date will not be considered in the approval/disapproval decision of Amendment 11. To be considered, comments must be received by close of business on the last day of the comment period provided in this NOA; that does not mean postmarked or otherwise transmitted by that date.

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

Dated: June 29, 2011.

Margo Schulze-Haugen,

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

[FR Doc. 2011–16964 Filed 7–1–11; 4:15 pm]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 76, No. 129
Wednesday, July 6, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 29, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Importation of Fruits and Vegetables.

OMB Control Number: 0579–0128.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*) (PPA), the Secretary of Agriculture is authorized to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests not known to be widely distributed throughout the United States. The regulations in ''Subpart-Fruits and Vegetables'' (7 CFR 319.56 through 319.56–50), referred to as the regulations, all a number of fruits and vegetables to be imported into the United States, under specified conditions, from certain parts of the world. The Animal and Plant Health Inspection Service (APHIS) requires that some plants or plant products be accompanied by a phytosanitary inspection certificate that is completed by plant health officials in the originating or transiting country.

Need and Use of the Information: APHIS will use the collected information on the Phytosanitary Certificate to determine the pest condition of the shipment at the time of inspection in the foreign country. This information is used as a guide to the intensity of the inspection that APHIS must conduct when the shipment arrives. Without the information, all shipments would need to be inspected very thoroughly, thereby requiring considerably more time. This would slow the clearance of international shipments.

Description of Respondents: Business or other for profit; Federal Government.

Number of Respondents: 135.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 200.

Animal Plant and Health Inspection Service

Title: Importation of Hass Avocado from Michoacán Mexico.

OMB Control Number: 0579–0129.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, or movement of plants and plant pests, to prevent the introduction of plant pests into the United States or their dissemination within the United States. The Animal and Plant Health Inspection Service (APHIS) regulations allow fresh Hass Avocado fruit grown in approved orchards in Michoacan, Mexico to be imported into the United States under certain conditions.

Need and Use of the Information: APHIS will collect information using form PPQ 587 ''Application for Permit to Import Plants or Plant Products,'' to ensure that fresh Hass Avocados from Mexico do not harbor insect pests (including Avocado stem weevils, seed weevils, and seed moths). The information collected will ensure that fresh Hass Avocados from Mexico do not harbor exotic insect pests that, if introduced into the United States, could inflict severe damage upon U.S. agriculture.

Description of Respondents: Business or other for profit; Federal Government.

Number of Respondents: 20,178.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 123,986.

Ruth Brown,

Departmental Information Collection Clearance Officer .

[FR Doc. 2011–16817 Filed 7–5–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Glenn/Colusa County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: The Glenn/Colusa County Resource Advisory Committee (RAC) will meet in Willows, California. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to travel to

and discuss current Glenn/Colusa RAC projects for monitoring purposes. Public wishing to attend the monitoring trip will need to provide own transportation to the project sites.

DATES: The meeting will be held on July 25, 2011 from 8 a.m. and end at approximately 4:30 p.m.

ADDRESSES: The meeting will be held in the field during the monitoring trip beginning at the Mendocino NF Supervisor's Office, 825 North Humboldt Ave., Willows, CA. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 825 N. Humboldt Ave., Willows, CA 95988. Please call ahead to (530) 934–1269 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave., Willows, CA 95988. (530) 934–1269; e-mail *rjero@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed For Further Information.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Agenda items to be covered include: (1) Introductions, (2) Approval of Minutes, (3) Public Comment, (4) Field Monitoring and Discussion at Project Area, (5) Next Agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by July 18, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Randy Jero, Committee Coordinator, USDA, Mendocino National Forest, Grindstone Ranger District, 825 N. Humboldt Ave, Willows, CA 95988 or by e-mail to *rjero@fs.fed.us* or via facsimile to 530–934–1212.

Dated: June 29, 2011.

Lori Cayo,

Acting District Ranger.

[FR Doc. 2011–16851 Filed 7–5–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Suspend the July Sheep and Goat Survey, and Postpone the Renewal of the Census of Aquaculture, and the Tenure, Ownership and Transition of Agricultural Land (TOTAL) Surveys

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice of suspension of data collection and publication.

SUMMARY: This notice announces the intention of the National Agricultural Statistics Service (NASS) to suspend one currently approved information collection, (July Sheep and Goat Survey), and to indefinitely postpone the renewal of two periodic data collections (Census of Aquaculture and the Tenure, Ownership and Transition of Agricultural Land (TOTAL) survey formerly known as the Agricultural Economics and Land Ownership Survey (AELOS)) and their associated publications due to budgetary cutbacks.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Suspension of July Sheep and Goat Survey and postponement of Census of Aquaculture and TOTAL surveys.

OMB Control Numbers: 0535–0213, 0535–0237, 0535–0240.

Expiration Dates of Approval: July Sheep and Goat survey—March 31, 2014, Census of Aquaculture and TOTAL are both currently inactive.

Type of Request: To suspend one currently approved information collection and to indefinitely postpone the renewal of two periodic data collections.

Abstract: The primary functions of the National Agricultural Statistics Service (NASS) include the collection of data and the preparation and issuance of State and national estimates of crop and livestock production, disposition, prices, and environmental and economic factors.

The July Sheep and Goat survey is a follow on survey to the January Sheep and Goat survey. These two surveys are included in a larger group of monthly and quarterly crop and livestock surveys included in the Agricultural Surveys Program (0535–0213) docket. Only the July Sheep and Goat survey will be suspended from this docket.

The Census of Aquaculture is a follow on survey to the Census of Agriculture. This survey is normally conducted every five years. The last time this survey was conducted was in 2006 for the reference year of 2005. NASS will postpone the renewal of this data collection indefinitely.

The Tenure, Ownership and Transition of Agricultural Land (TOTAL) survey, (formerly known as the Agricultural Economics and Land Ownership Survey (AELOS) is also a follow on survey to the Census of Agriculture. This survey is normally conducted once about every ten years. The last time this survey was conducted was in 2000 for the reference year of 1999.

NASS will suspend these information collections as of July 6, 2011 due to budget constraints. NASS will not publish the Sheep and Goat report for July or any reports for the Census of Aquaculture or TOTAL survey unless there is a change in the anticipated budget shortfall.

Authority: These data were collected under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents.

Estimate of Burden: There will be no further public reporting burden for any of these three information collections.

Signed at Washington, DC, on June 16, 2011.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. 2011–16803 Filed 7–5–11; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; 2012 Survey of Income and Program Participation Event History Calendar (SIPP–EHC) Instrument—Computer Audio Recorded Interviewing (CARI) Field Test

AGENCY: U.S. Census Bureau, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before September 6, 2011.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Patrick J. Benton, Census Bureau, Room HQ–6H045, Washington, DC 20233–8400, (301) 763–4618.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to conduct a CARI technology field test using the 2012 SIPP–EHC platform from March to May of 2012. The SIPP–EHC is an experimental household-based survey designed as a continuous series of national panels molded around an annual interview structured with an event history calendar and collecting detailed monthly data for a central ''core'' of labor force and income questions. CARI is a data collection method that captures audio along with response data during computer-assisted personal and telephone interviews (CAPI & CATI). A portion of each interview is recorded unobtrusively, with the respondent's consent, and the sound file and screen images are returned with the response data to a central location for coding.

By reviewing the recorded portions of the interview, quality assurance analysts can evaluate the likelihood that the exchange between the field representative and respondent is authentic and follows critical survey protocol as defined by the sponsor and based on best practices. The 2012 SIPP–EHC CARI test instrument will utilize the CARI Interactive Data Access System (CARI System), an innovative, integrated, multifaceted monitoring system that features a configurable Web-based interface for behavior coding, quality assurance and coaching. This system assists in coding interviews for measuring question and interviewer performance and the interaction between interviewers and respondents.

The 2012 SIPP–EHC CARI Field Test will visit survey respondents never before interviewed in SIPP. The 2012 SIPP–EHC CARI test will interview respondents using the previous calendar year, 2011, as the reference period. The content of the 2012 SIPP–EHC CARI test will match that of the 2012 SIPP–EHC test conducted as a wave 2 reinterview from January to March of 2012 with the addition of the recording consent question. In addition to the activation of the recording capabilities of the 2012 SIPP–EHC instrument, the 2012 SIPP–EHC CARI test adds the consent question to the questionnaire which will record the respondent's permission to audio record responses. Additionally, approximately 20 specific questions are programmed to be recorded during each person's interview. Based on sponsor requirements related to interviewer critical performance behaviors, the CARI technology would be used in addition to other measures of interviewer performance.

This is the second CARI field test conducted by the Census Bureau. The first CARI field test was used to conduct behavior-coding for the 2010 American Community Survey Content Test in early 2011. The Census Bureau is conducting this test to determine if the deployment of CARI will have any significant impact on response rates and item level responses. The primary focus will be to examine the impact that recording has on the quality of data. Approximately 1,300 addresses will be selected for the 2012 SIPP–EHC CARI Field Test, yielding about 900 interviewed households. We estimate that each household contains 2.1 people aged 15 and above, yielding approximately 1,890 person-level interviews in this field test. Interviews take 60 minutes on average. The total annual burden hours for 2012 SIPP–EHC CARI Field Test interviews will be 1,890 hours in FY 2012.

II. Method of Collection

The 2012 SIPP–EHC CARI Field Test instrument will reference calendar year 2011. The interview is conducted in person with all household members 15 years old or over using regular proxy-respondent rules. The 2012 SIPP–EHC CARI test will record the respondent's consent to audio record their responses, and will record approximately 20 predetermined questions during each person's interview.

III. Data

OMB Control Number: none.

Form Number: SIPP/CAPI Automated Instrument.

Type of Review: Regular.

Affected Public: Individuals or households.

Estimated Number of Respondents: 1,890 people.

Estimated Time per Response: 60 minutes per person on average.

Estimated Total Annual Burden Hours: 1,890.

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 30, 2011.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–16850 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 46–2011]

Foreign-Trade Zone 215—Sebring, FL; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Sebring Airport Authority, grantee of FTZ 215, requesting authority to reorganize 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 June 29, 2011.

FTZ 215 was approved by the Board on July 26, 1996 (Board Order 835, 61 FR 42832–42833, 08/19/96).

The current zone project includes the following site: *Site 1* (1,893 acres)—Sebring Regional Airport complex, 128 Authority Lane, Sebring, Florida.

The grantee's proposed service area under the ASF would be DeSoto, Glades, Hardee, Hendry, Highlands and Okeechobee Counties and the Cities of Belle Glade and Pahokee, Florida, as described in the application. 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 Port Manatee Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include its existing site as a ''magnet'' site. The ASF allows for the possible exemption of one magnet site from the ''sunset'' time limits that generally apply to sites under the ASF, and the applicant proposed that Site 1 be so exempted. No usage-driven sites are being requested at this time.

In accordance with the Board's regulations, Kathleen Boyce 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 September 6, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to September 19, 2011.

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 Kathleen Boyce at *Kathleen.Boyce@trade.gov* or (202) 482–1346.

Dated: June 29, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–16910 Filed 7–5–11; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1768]

Expansion of Foreign-Trade Zone 78; Nashville, TN

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Metropolitan Government of Nashville and Davidson County, grantee of Foreign-Trade Zone 78, submitted an application to the Board for authority to expand FTZ 78 to include sites in the Nashville, Tennessee, area, adjacent to the Nashville Customs and Border Protection port of entry (FTZ Docket 64–2010, filed November 5, 2010);

Whereas, notice inviting public comment has been given in the **Federal Register** (75 FR 69398, 11/12/10) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, Therefore, the Board hereby orders:

The application to expand FTZ 78 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and to sunset provisions that would terminate authority for existing Sites 1–5 on June 30, 2016 and for Sites 8–12 on June 30, 2018 where no activity has occurred under FTZ procedures before those dates.

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

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

ATTEST:

June 22, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–16906 Filed 7–5–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Request for Nominations for Members To Serve on National Institute of Standards and Technology Federal Advisory Committees

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) invites and requests nomination of individuals for appointment to its nine existing Federal Advisory Committees: Technology Innovation Program Advisory Board, Board of Overseers of the Malcolm Baldrige National Quality Award, Judges Panel of the Malcolm Baldrige National Quality Award, Information Security and Privacy Advisory Board, Manufacturing Extension Partnership Advisory Board, National Construction Safety Team Advisory Committee, Advisory Committee on Earthquake Hazards Reduction, NIST Smart Grid Advisory Committee, and Visiting Committee on Advanced Technology. NIST will consider nominations received in response to this notice for appointment to the Committees, in addition to nominations already received. Registered Federal lobbyists may not serve on the NIST Committees.

DATES: Nominations for all committees will be accepted on an ongoing basis and will be considered as and when vacancies arise.

ADDRESSES: See below.

SUPPLEMENTARY INFORMATION:

Technology Innovation Program (TIP) Advisory Board

Addresses: Please submit nominations to Dr. Robert Sienkiewicz, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 4700, Gaithersburg, MD 20899–4700. Nominations may also be submitted via

FAX to 301–869–1150. Additional information regarding the Board, including its charter may be found on its electronic home page at: *http://www.nist.gov/tip/adv_brd/index.cfm.*

For Further Information Contact: Dr. Robert Sienkiewicz, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 4700, Gaithersburg, MD 20899–4700; telephone 301–975–2162, fax 301–869–1150; or via e-mail at *robert.sienkiewicz@nist.gov.*

Committee Information

The Board will consist of ten members appointed by the Director of NIST, at least seven of whom shall be from United States industry, chosen to reflect the wide diversity of technical disciplines and industrial sectors represented in TIP projects. No member will be an employee of the Federal Government.

The Board will function solely as an advisory body, in compliance with the provisions of the Federal Advisory Committee Act.

Authority: 15 U.S.C 278n(k), as amended by the America COMPETES Act (Pub. L. 110–69), Federal Advisory Committee Act: 5 U.S.C. App. 2.

Board of Overseers of the Malcolm Baldrige National Quality Award

Addresses: Please submit nominations to Harry Hertz, Director, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020. Nominations may also be submitted via FAX to 301–975–4967. Additional information regarding the Committee, including its charter, current membership list, and executive summary may be found at: *http://www.nist.gov/baldrige/community/overseers.cfm.*

For Further Information Contact: Harry Hertz, Director, Baldrige Performance Excellence Program and Designated Federal Officer, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020; telephone 301–975–2361; FAX 301–948–4967; or via e-mail at *harry.hertz@nist.gov.*

Committee Information

The Board was established in accordance with 15 U.S.C. 3711a(d)(2)(B), pursuant to the Federal Advisory Committee Act (5 U.S.C. App. 2).

Objectives and Duties

1. The Board shall review the work of the private sector contractor(s), which assists the Director of the National Institute of Standards and Technology (NIST) in administering the Award. The Board will make such suggestions for the improvement of the Award process as it deems necessary.

2. The Board shall provide a written annual report on the results of Award activities to the Director of NIST, along with its recommendations for the improvement of the Award process.

3. The Board will function solely as an advisory committee under the Federal Advisory Committee Act.

4. The Board will report to the Director of NIST.

Membership

1. The Board will consist of approximately eleven members selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance, and for their preeminence in the field of organizational performance management. There will be a balanced representation from U.S. service, manufacturing, education, health care industries, and the nonprofit sector.

2. The Board will be appointed by the Secretary of Commerce and will serve at the discretion of the Secretary. The term of office of each Board member shall be three years. All terms will commence on March 1 and end on February 28 of the appropriate year.

Miscellaneous

1. Members of the Board shall serve without compensation, but may, upon request, be reimbursed travel expenses, including per diem, as authorized by 5 U.S.C. 5701 *et seq.*

2. The Board will meet twice annually, except that additional meetings may be called as deemed necessary by the NIST Director or by the Chairperson. Meetings are usually one day in duration.

3. Board meetings are open to the public. Board members do not have access to classified or proprietary information in connection with their Board duties.

Nomination Information

1. Nominations are sought from the private and public sector as described above.

2. Nominees should have established records of distinguished service and shall be familiar with the quality improvement operations of manufacturing companies, service companies, small businesses, education, health care, and nonprofits. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the Board, and will actively participate in good faith in the tasks of the Board. Besides participation at meetings, it is desired that members be able to devote the equivalent of seven days between meetings to either developing or researching topics of potential interest, and so forth, in furtherance of their Board duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Board membership.

Judges Panel of the Malcolm Baldrige National Quality Award

Addresses: Please submit nominations to Harry Hertz, Director, Baldrige Performance Excellence Program, NIST, 100 Bureau Drive Mail Stop 1020, Gaithersburg, MD 20899–1020. Nominations may also be submitted via FAX to 301–975–4967. Additional information regarding the Committee, including its charter, current membership list, and executive summary may be found at: *http://patapsco.nist.gov/BoardofExam/Examiners_Judge2.cfm.*

For Further Information Contact: Harry Hertz, Director, Baldrige Performance Excellence Program and Designated Federal Official, NIST, 100 Bureau Drive, Mail Stop 1020, Gaithersburg, MD 20899–1020; telephone 301–975–2361; FAX 301–975–4967; or via e-mail at *harry.hertz@nist.gov.*

Committee Information:

The Judges Panel was established in accordance with 15 U.S.C. 3711a(d)(1) and the Federal Advisory Committee Act (5 U.S.C. App. 2).

Objectives and Duties

1. The Judges Panel will ensure the integrity of the Malcolm Baldrige National Quality Award selection process by reviewing the results of examiners' scoring of written applications, and then voting on which applicants merit site visits by examiners to verify the accuracy of claims made by applicants.

2. The Judges Panel will ensure that individuals on site visit teams for the Award finalists have no conflict of interest with respect to the finalists. The

Panel will also review recommendations from site visits and recommend Award recipients.

3. The Judges Panel will function solely as an advisory body, and will comply with the provisions of the Federal Advisory Committee Act.

4. The Panel will report to the Director of NIST.

Membership

1. The Judges Panel is composed of at least nine, and not more than twelve, members selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. There will be a balanced representation from U.S. service and manufacturing industries, education, health care, and nonprofits and will include members familiar with performance improvement in their area of business.

2. The Judges Panel will be appointed by the Secretary of Commerce and will serve at the discretion of the Secretary. The term of office of each Panel member shall be three years. All terms will commence on March 1 and end on February 28 of the appropriate year.

Miscellaneous

1. Members of the Judges Panel shall serve without compensation, but may, upon request, be reimbursed travel expenses, including per diem, as authorized by 5 U.S.C. 5701 *et seq.*

2. The Judges Panel will meet three times per year. Additional meetings may be called as deemed necessary by the NIST Director or by the Chairperson. Meetings are usually one to four days in duration. In addition, each Judge must attend an annual three-day Examiner training course.

3. Committee meetings are closed to the public pursuant to Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, as amended by Section 5(c) of the Government in the Sunshine Act, Public Law 94–409, and in accordance with Section 552b(c)(4) of Title 5, United States Code. Since the members of the Judges Panel examine records and discuss Award applicant data, the meetings are likely to disclose trade secrets and commercial or financial information obtained from a person that may be privileged or confidential. In addition, meetings may be closed pursuant to Section 552b(c)(9)(B) because for a government agency the meetings are likely to disclose information that could significantly frustrate implementation of a proposed agency action.

Nomination Information

1. Nominations are sought from all U.S. service and manufacturing industries, education, health care, and nonprofits as described above.

2. Nominees should have established records of distinguished service and shall be familiar with the performance improvement operations of manufacturing companies, service companies, small businesses, education, health care, and nonprofit organizations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledge the responsibilities of serving on the Judges Panel, and will actively participate in good faith in the tasks of the Judges Panel. Besides participation at meetings, it is desired that members be either developing or researching topics of potential interest, reading Baldrige applications, and so forth, in furtherance of their Committee duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Judges Panel membership.

Information Security and Privacy Advisory Board (ISPAB)

Addresses: Please submit nominations to Annie Sokol, NIST, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930. Nominations may also be submitted via fax to 301–975–8670, Attn: ISPAB Nominations. Additional information regarding the Board, including its charter and current membership list, may be found on its electronic home page at: *http://csrc.nist.gov/ispab/.*

For Further Information Contact: Annie Sokol, ISPAB Designated Federal Official, NIST, 100 Bureau Drive, Mail Stop 8930, Gaithersburg, MD 20899–8930; telephone 301–975–2006; fax: 301–975–8670; or via e-mail at *annie.sokol@nist.gov.*

Committee Information

The ISPAB was originally chartered as the Computer System Security and Privacy Advisory Board (CSSPAB) by the Department of Commerce pursuant to the Computer Security Act of 1987 (Pub. L. 100–235). As a result of the E-Government Act of 2002 (Pub. L. 107–347), Title III, the Federal Information Security Management Act of 2002, Section 21 of the National Institute of Standards and Technology Act (15 U.S.C. 278g–4) the Board's charter was amended. This amendment included the name change of the Board.

Objectives and Duties

The objectives and duties of the ISPAB are:

1. To identify emerging managerial, technical, administrative, and physical safeguard issues relative to information security and privacy.

2. To advise the NIST, the Secretary of Commerce and the Director of the Office of Management and Budget on information security and privacy issues pertaining to Federal Government information systems, including thorough review of proposed standards and guidelines developed by NIST.

3. To annually report its findings to the Secretary of Commerce, the Director of the Office of Management and Budget, the Director of the National Security Agency, and the appropriate committees of the Congress.

4. To function solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

Membership

The ISPAB is comprised of twelve members, in addition to the Chairperson. The membership of the Board includes:

1. Four members from outside the Federal Government eminent in the information technology industry, at least one of whom is representative of small or medium sized companies in such industries.

2. Four members from outside the Federal Government who are eminent in the field of information technology, or related disciplines, but who are not employed by or representative of a producer of information technology equipment; and

3. Four members from the Federal Government who have information system management experience, including experience in information security and privacy; at least one of these members shall be from the National Security Agency.

Miscellaneous

Members of the ISPAB who are not full-time employees of the Federal government are not paid for their service, but will, upon request, be allowed travel expenses in accordance with Subchapter I of Chapter 57 of Title 5, United States Code, while otherwise

performing duties at the request of the Board Chairperson, while away from their homes or a regular place of business.

Meetings of the Board are usually two to three days in duration and are usually held quarterly. The meetings primarily take place in the Washington, DC metropolitan area but may be held at such locations and at such time and place as determined by the majority of the Board.

Board meetings are open to the public and members of the press usually attend. Members do not have access to classified or proprietary information in connection with their Board duties.

Nomination Information

Nominations are being accepted in all three categories described above.

Nominees should have specific experience related to information security or electronic privacy issues, particularly as they pertain to Federal information technology. Letters of nomination should include the category of membership for which the candidate is applying and a summary of the candidate's qualifications for that specific category. Also include (where applicable) current or former service on Federal advisory boards and any Federal employment. Each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the ISPAB, and that they will actively participate in good faith in the tasks of the ISPAB.

Besides participation at meetings, it is desired that members be able to devote a minimum of two days between meetings to developing draft issue papers, researching topics of potential interest, and so forth in furtherance of their Board duties.

Selection of ISPAB members will not be limited to individuals who are nominated. Nominations that are received and meet the requirements will be kept on file to be reviewed as Board vacancies occur.

Nominees must be U.S. citizens.

The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse ISPAB membership.

Manufacturing Extension Partnership (MEP) Advisory Board

Addresses: Please submit nominations to Ms. Karen Lellock, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800. Nominations may also be submitted via Fax to 301–963–6556. Additional information regarding the Board, including its charter may be found on its electronic home page at: *http://www.nist.gov/mep/advisory-board.cfm.*

For Further Information Contact: Ms. Karen Lellock, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, MD 20899–4800; telephone 301–975–4269, fax 301–963–6556; or via e-mail at *karen.lellock@nist.gov.*

Committee Information

The MEP Advisory Board was established in accordance with the requirements of Section 3003(d) of the America COMPETES Act (Pub. L. 110–69) and the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Objectives and Duties

1. The Board will provide advice on MEP programs, plans, and policies.

2. The Board will assess the soundness of MEP plans and strategies.

3. The Board will assess current performance against MEP program plans.

4. The Board will function solely in an advisory capacity, and in accordance with the provisions of the Federal Advisory Committee Act.

5. The Board shall submit an annual report through the NIST Director to the Secretary for transmittal to Congress within 30 days after the submission to Congress of the President's annual budget request each year. The report will address the status of the MEP and comment on programmatic planning and updates.

Membership

1. The MEP Board is composed of 10 members, broadly representative of stakeholders. At least 2 members shall be employed by or on an advisory board for the Centers, and at least 5 other members shall be from U.S. small businesses in the manufacturing sector. No member shall be an employee of the Federal Government.

2. The Director of the National Institute of Standards and Technology (NIST) shall appoint the members of the Board. Members shall be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance. Members serve at the discretion of the NIST Director.

3. Committee members from the manufacturing industry and those representing specific stakeholder groups shall serve in a representative capacity. Committee members from the academic community shall serve as experts and will be considered Special Government Employees (SGEs) and will be subject to all ethical standards and rules applicable to SGEs.

4. The term of office of each member of the Board shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy.

Miscellaneous

1. Members of the Board will not be compensated for their services but will, upon request, be allowed travel and per diem expenses as authorized by 5 U.S.C. 5701 *et seq.,* while attending meetings of the Board or subcommittees thereof, or while otherwise performing duties at the request of the Chair, while away from their homes or regular places of business.

2. The Board will meet at least two times a year. Additional meetings may be called by the NIST Director.

3. Committee meetings are open to the public.

Nomination Information

Nominations are being accepted in all categories described above.

Nominees should have specific experience related to industrial extension services. Letters of nomination should include the category of membership for which the candidate is applying and a summary of the candidate's qualifications for that specific category. Each nomination letter should state that the person agrees to the nomination and acknowledges the responsibilities of serving on the MEP Advisory Board.

Selection of MEP Advisory Board members will not be limited to individuals who are nominated. Nominations that are received and meet the requirements will be kept on file to be reviewed as Board vacancies occur.

The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse MEP Advisory Board membership.

National Construction Safety Team Advisory Committee

Addresses: Please submit nominations to Eric Letvin, National Construction Safety Team Advisory Committee, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8611, Gaithersburg, MD 20899–8611. Nominations may also be submitted via FAX to 301–975–4032.

For Further Information Contact: Eric Letvin, National Construction Safety Team Advisory Committee, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8611, Gaithersburg, MD 20899–8611, telephone 301–975–5412, fax 301–975–4032; or via e-mail at *eric.letvin@nist.gov.*

Committee Information

The Committee was established in accordance with the National Construction Safety Team Act, Public Law 107–231 and the Federal Advisory Committee Act (5 U.S.C. App. 2).

Objectives and Duties

1. The Committee shall advise the Director of the National Institute of Standards and Technology (NIST) on carrying out the National Construction Safety Team Act (Act), review and provide advice on the procedures developed under section 2(c)(1) of the Act, and review and provide advice on the reports issued under section 8 of the Act.

2. The Committee functions solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. The Committee shall provide a written annual report, through the Director of the NIST Engineering Laboratory (EL) and the Director of NIST, to the Secretary of Commerce for submission to the Congress, to be due on January 1 of each year. Such report will provide an evaluation of National Construction Safety Team activities, along with recommendations to improve the operation and effectiveness of National Construction Safety Teams, and an assessment of the implementation of the recommendations of the National Construction Safety Teams and of the Committee.

Membership

1. The Committee will be composed of not fewer than five nor more than ten members that reflect a wide balance of the diversity of technical disciplines and competencies involved in the National Construction Safety Teams investigations. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting the National Construction Safety Teams.

2. The Director of the NIST shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

Miscellaneous

1. Members of the Committee will not be paid for their services, but will, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

2. The Committee will meet at least once per year at the call of the Chair. Additional meetings may be called whenever one-third or more of the members so request it in writing or whenever the Chair or the Director of NIST requests a meeting.

Nomination Information

1. Nominations are sought from all fields involved in issues affecting National Construction Safety Teams.

2. Nominees should have established records of distinguished service. The field of expertise that the candidate represents he/she is qualified should be specified in the nomination letter. Nominations for a particular field should come from organizations or individuals within that field. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the candidate agrees to the nomination, acknowledges the responsibilities of serving on the Committee, and will actively participate in good faith in the tasks of the Committee.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Committee membership.

Advisory Committee on Earthquake Hazards Reduction (ACEHR)

Addresses: Please submit nominations to Tina Faecke, Administrative Officer, National Earthquake Hazards Reduction Program, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, MD 20899–8604. Nominations may also be submitted via FAX to 301–975–4032 or e-mail at *tina.faecke@nist.gov*. Additional information regarding the Committee, including its charter and executive summary may be found on its electronic home page at: *http://www.nehrp.gov.*

For Further Information Contact: Jack Hayes, Director, National Earthquake Hazards Reduction Program, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8604, Gaithersburg, MD 20899–8604, telephone 301–975–5640, fax 301–975–4032; or via e-mail at *jack.hayes@nist.gov.*

Committee Information

The Committee was established on June 27, 2006 in accordance with the National Earthquake Hazards Reduction Program Reauthorization Act, Public Law 108–360 and the Federal Advisory Committee Act (5 U.S.C. App. 2).

Objectives and Duties

1. The Committee will assess trends and developments in the science and engineering of earthquake hazards reduction, effectiveness of the Program in carrying out the activities under section 103(a)(2) of the Act, the need to revise the Program, the management, coordination, implementation, and activities of the Program.

2. The Committee functions solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. Not later than one year after the first meeting of the Committee, and at least once every two years thereafter, the Committee shall report to the Director of NIST, on its findings of the assessments and its recommendations for ways to improve the Program. In developing recommendations, the Committee shall consider the recommendations of the United States Geological Survey Scientific Earthquake Studies Advisory Committee.

Membership

1. The Committee will consist of not fewer than 11 nor more than 17 members, who reflect a wide diversity of technical disciplines, competencies, and communities involved in earthquake hazards reduction. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting the National Earthquake Hazards Reduction Program.

2. The Director of NIST shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

3. The term of office of each member of the Committee shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy and that the initial members shall have staggered terms such that the committee will have approximately 1/3 new or reappointed members each year.

4. No committee member may be an ''employee'' as defined in subparagraphs (A) through (F) of section 7342(a)(1) of Title 5 of the United States Code.

Miscellaneous

1. Members of the Committee will not be compensated for their services, but will, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

2. Members of the Committee shall serve as Special Government Employees and are required to file an annual Executive Branch Confidential Financial Disclosure Report.

3. The Committee shall meet at least once per year. Additional meetings may be called whenever the Director of NIST requests a meeting.

4. Committee meetings are open to the public.

Nomination Information

1. Nominations are sought from industry and other communities having an interest in the National Earthquake Hazards Reduction Program, such as, but not limited to, research and academic institutions, industry standards development organizations, state and local government bodies, and financial communities, who are qualified to provide advice on earthquake hazards reduction and represent all related scientific, architectural, and engineering disciplines.

2. Nominees should have established records of distinguished service. The field of expertise that the candidate represents should be specified in the nomination letter. Nominations for a particular field should come from organizations or individuals within that field. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the Committee, and will actively participate in good faith in the tasks of the Committee.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Committee membership.

NIST Smart Grid Advisory Committee

Addresses: Please submit nominations to Dr. George W. Arnold, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8100, Gaithersburg, MD 20899–8100. Nominations may also be submitted via e-mail to *nistsgfac@nist.gov.* Information about the committee may be found at: *http://www.nist.gov/smartgrid/.*

For Further Information Contact: Dr. George W. Arnold, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8100, Gaithersburg, MD 20899–8100; telephone 301–975–2232, fax 301–975–4091; or via e-mail at *nistsgfac@nist.gov.*

Committee Information

The Committee was established in accordance with the Federal Advisory Committee Act (5 U.S.C. App.).

Objectives and Duties

1. The Committee shall advise the Director of the National Institute of Standards and Technology (NIST) on carrying out duties authorized by section 1305 of the Energy Independence and Security Act of 2007 (Pub. L. 110–140).

2. The Committee functions solely as an advisory body in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. The Committee shall provide input to NIST on the Smart Grid Standards, Priority, and Gaps. The Committee shall provide input on the overall direction, status and health of the Smart Grid implementation by the Smart Grid industry, including identification of issues and needs. Input to NIST will be used to help guide the Smart Grid Interoperability Panel activities and also assist NIST in directing research and standards activities.

5. Upon request of the Director of NIST, the Committee will prepare reports on issues affecting Smart Grid activities.

Membership

1. The Committee will be composed of not fewer than nine nor more than fifteen members that reflect the wide diversity of technical disciplines and competencies involved in the Smart Grid deployment and operations and will come from a cross section of organizations. Members shall be selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting Smart Grid deployment.

2. The Director of NIST shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

Miscellaneous

1. Members of the Committee will not be paid for their services but will, upon request, be allowed travel and per diem expenses in accordance with 5 U.S.C. 5701 *et seq.* while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

2. The Committee will meet at least twice per year. Additional meetings may be called whenever one-third or more of the members so request in writing or whenever the Director of NIST requests a meeting.

Nomination Information

1. Nominations are sought from all fields involved in issues affecting the Smart Grid.

2. Nominees should have established records of distinguished service. The field of expertise that the candidate represents should be specified in the nomination letter. Nominations for a particular field should come from organizations or individuals within that field. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the person agrees to the nomination, acknowledges the responsibilities of serving on the Committee, and will actively participate in good faith in the tasks of the Committee. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse Committee membership.

Authority: Federal Advisory Committee Act: 5 U.S.C. App.

Visiting Committee on Advanced Technology (VCAT)

Addresses: Please submit nominations to Gail Ehrlich, Executive Director, Visiting Committee on Advanced Technology, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, MD 20899–1060. Nominations may also be submitted via FAX to 301–216–0529 or via e-mail at *gail.ehrlich@nist.gov.* Additional information regarding the Committee, including its charter, current membership list, and executive summary may be found on its electronic homepage at: *http://www.nist.gov/director/vcat/vcat.htm.*

For Further Information Contact: Gail Ehrlich, Executive Director,Visiting Committee on Advanced Technology,

National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, MD 20899–1060, telephone 301–975–2149, fax 301–216–0529; or via e-mail at *gail.ehrlich@nist.gov.*

Committee Information

The VCAT was established in accordance with 15 U.S.C. 278 and the Federal Advisory Committee Act (5 U.S.C. App.).

Objectives and Duties

1. The Committee shall review and make recommendations regarding general policy for NIST, its organization, its budget, and its programs, within the framework of applicable national policies as set forth by the President and the Congress.

2. The Committee functions solely as an advisory body, in accordance with the provisions of the Federal Advisory Committee Act.

3. The Committee shall report to the Director of NIST.

4. The Committee shall provide an annual report, through the Director of NIST, to the Secretary of Commerce for submission to the Congress not later than 30 days after the submittal to Congress of the President's annual budget request in each year. Such report shall deal essentially, though not necessarily exclusively, with policy issues or matters which affect the Institute, or with which the Committee in its official role as the private sector policy advisor of the Institute is concerned. Each such report shall identify areas of program emphasis for the Institute of potential importance to the long-term competitiveness of the United States industry. Such report also shall comment on the programmatic planning document and updates thereto submitted to Congress by the Director under subsections (c) and (d) of section 23 of the NIST Act (15 U.S.C. 278i). The Committee shall submit to the Secretary and Congress such additional reports on specific policy matters as it deems appropriate.

Membership

1. The Committee is composed of 15 members that provide representation of a cross-section of traditional and emerging United States industries. Members shall be selected solely on the basis of established records of distinguished service and shall be eminent in such fields as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. No employee of the Federal Government shall serve as a member of the Committee.

2. The Director of the NIST shall appoint the members of the Committee, and they will be selected on a clear, standardized basis, in accordance with applicable Department of Commerce guidance.

3. The term of the office of each member of the Committee shall be three years, except that vacancy appointments shall be for the remainder of the unexpired term of the vacancy.

Miscellaneous

1. Members of the VCAT will not be compensated for their services, but will, upon request, be allowed travel expenses in accordance with 5 U.S.C. 5701 *et seq.,* while attending meetings of the Committee or of its subcommittees, or while otherwise performing duties at the request of the chairperson, while away from their homes or a regular place of business.

2. Members of the Committee shall serve as Special Government Employees (SGEs) and will be subject to the ethics standards applicable to SGEs. As SGEs, the members are required to file an annual Executive Branch Confidential Financial Disclosure Report.

3. Meetings of the VCAT usually take place at the NIST headquarters in Gaithersburg, Maryland, and may be held periodically in Washington, DC and at the NIST site in Boulder, Colorado. Meetings are usually two days in duration and are held at least twice each year.

4. Generally, Committee meetings are open to the public.

Nomination Information

1. Nominations are sought from all fields described above.

2. Nominees should have established records of distinguished service and shall be eminent in fields such as business, research, new product development, engineering, labor, education, management consulting, environment and international relations. The category (field of eminence) for which the candidate is qualified should be specified in the nomination letter. Nominations for a particular category should come from organizations or individuals within that category. A summary of the candidate's qualifications should be included with the nomination, including (where applicable) current or former service on Federal advisory boards and Federal employment. In addition, each nomination letter should state that the candidate agrees to the nomination, acknowledges the responsibilities of serving on the VCAT, and will actively participate in good faith in the tasks of the VCAT. Besides participation in two-day meetings held at least twice each year, it is desired that members be able to devote the equivalent of two days between meetings to either developing or researching topics of potential interest, and so forth in furtherance of the Committee duties.

3. The Department of Commerce is committed to equal opportunity in the workplace and seeks a broad-based and diverse VCAT membership.

Dated: June 29, 2011.

Charles H. Romine,

Acting Associate Director for Laboratory Programs.

[FR Doc. 2011–16925 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Payment Policy Change for Access to NOAA Environmental Data, Information, and Related Products and Services

AGENCY: National Environmental Satellite, Data and Information Service (NESDIS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of Policy Change.

SUMMARY: NOAA's National Data Centers will not accept checks (nor money orders) in payment for orders. Prepayment is required and the accepted forms of payment are Visa, MasterCard, American Express, Discover, wire transfers and Automated Clearing House. Please refer to the NNDC Non-Federal Customer Payment Policy for additional information.

DATES: *Effective Date:* July 1, 2011.

FOR FURTHER INFORMATION CONTACT: Angel Robinson (301) 713–9230 ext 186.

Dated: June 20, 2011.

Cherish Johnson,

Deputy Chief, Financial Officer (CFO/CAO).

New Payment Policy

NOAA's National Data Centers (NNDC)

[Tax ID 52–0821608]

National Climatic Data Center (NCDC), Asheville, NC

National Geophysical Data Center (NGDC), Boulder, CO

National Oceanographic Data Center (NODC), Silver Spring, MD

Non-Federal Customer Payment Policy

All non-federal customers *must* pay in advance unless this requirement is

specifically waived. *Please include payment for any RUSH, special mailing, or bank transfer fee charges.*

Payment methods

***Charge Card**

NNDC accepts payment in U.S. currency, by VISA, MasterCard, American Express, and Discover. Cardholder's name, charge card number, expiration date, and signature are required. When indicating this method of payment via mail or fax, the cardholder must sign the document authorizing the charge.

***Wire Transfers**

Payments, in *U.S. currency*, should be sent directly to Federal Reserve Bank of New York, 33 Liberty Street, New York, NY 10045 with the following information:

Tag name	Tag number	Required information
Type/Subtype Code	(1,510)	1000
Dollar Amount ON-Y	(2,000)	$9,999,999.99 (EXAMPLE ONLY)
Sender Financial Institution	(3,100)	Sending Fin. Inst's Routing & Transit # and Bank Name
Sender Reference	(3,320)	Completed by Sender
Receiver Financial Institution	(3,400)	021030004 TREAS NYC
Beneficiary	(4,200)	D
	—NOAA National	13140001
		Data Centers
Originator to Beneficiary Info.	(6,000)	Payment Detail (e.g. Order #)
Swift Code (if required)		FRNYUS33

*** Note: In addition to the total cost of your data/product(s) order, you MUST add your bank's wire transfer fee to ensure delays are not incurred in processing your request. Please contact your bank for the correct wire transfer fee amount.***

*** Automated Clearing House (ACH)**

Payments, in U.S. currency, should be sent directly to Federal Reserve Bank of New York, 33 Liberty Street, New York, NY 10045 with the following information:

Company Name	Name of Remitter
Company ID	Tax ID
Company Entry Description	FEE (EXAMPLE ONLY)
Date.	
Receiving Company ABA	0510–3670–6
Account Number	540022
Dollar Amount	Supplied by Remitter
Individual ID Number	Order # or Pro forma #
Agency Name	NOAA National Data Centers

*** Note: In addition to the total cost of your data/product(s) order, you MUST add your bank's ACH transfer fee to ensure delays are not incurred in processing your request. Please contact your bank for the correct ACH transfer fee amount.***

[FR Doc. 2011–16812 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RIN 0648–XA473]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the Port of Anchorage Marine Terminal Redevelopment Project

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of issuance of a Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended and implementing regulations, notification is hereby given that the National Marine Fisheries Service (NMFS) has issued a Letter of Authorization (LOA) to the Port of Anchorage (POA) and the U.S. Department of Transportation Maritime Administration (MARAD), to take four species of marine mammals incidental to the POA's Marine Terminal Redevelopment Project (MTRP).

DATES: Effective July 15, 2011, through July 14, 2012.

ADDRESSES: The LOA and supporting documentation are available for review by writing to P. Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service (NMFS), 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephoning one of the contacts listed below. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address and at the Alaska Regional Office, 222 West 7th Avenue, Anchorage, AK 99513.

FOR FURTHER INFORMATION CONTACT: Brian D. Hopper, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the National Marine Fisheries Service (NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued. Under the MMPA, the term ''take'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture, or kill marine mammals.

Authorization may be granted for periods up to 5 years if NMFS finds, after notification and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species for subsistence uses. The regulations must include requirements for monitoring and reporting of such taking.

Regulations governing the taking of Cook Inlet beluga whales (*Delphinapterus leucas*), harbor porpoises (*Phocoena phocoena*), killer whales (*Orcinus orca*), and harbor seals (*Phoca vitulina*), by Level B harassment, incidental to in-water pile driving were issued on July 15, 2009 (74 FR 35136), and remain in effect until July 14, 2014. These regulations may be found in 50 CFR Part 217 subpart U. For detailed information on this action, please refer to that document. These regulations include mitigation, monitoring, and reporting requirements for the incidental take of marine mammals during the specified activity.

Summary of Request

On May 6, 2011, NMFS received a request for an LOA renewal pursuant to the aforementioned regulations that would authorize, for a period not to exceed 1 year, take of marine mammals, by Level B harassment only, incidental to the POA MTRP. In compliance with the 2010 LOA, POA and MARAD submitted an annual report on POA construction activities, covering the period of July 15 through December 31, 2010. The report also covers the period of January 1 through July 15, 2010, pursuant to the U.S. Army Corps of Engineers' reporting requirement under their permit issued under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. The report can be found on the NMFS Web site at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

Summary of Activity and Monitoring Under the 2010 LOA

During the reporting period covered by the 2010 LOA, in-water construction activities were conducted in the North Extension Bulkhead. In-water construction and construction monitoring for the 2009 season ended on November 20, 2010, when ice formation and poor visibility impeded further activity. These activities were within the scope of those analyzed in the final rule and included in the 2010 LOA.

On-site POA Monitoring

As required by the 2010 LOA, the POA and MARAD established safety and harassment zones at the project site, which were monitored for the presence of marine mammals before, during, and after in-water pile driving. If the applicable safety and harassment zones were not visible because of fog, poor light, darkness, sea state, or any other reason, in-water construction activities were shut down until the area was once again visible. From July 21 to November 20, 2010, 41 in-water pile driving shutdowns were documented due to marine mammal sightings. The peak month for shutdowns and delays during the 2010 construction season was September, when 20 shutdowns and 10 delays were recorded. Most of these occurred when marine mammals were sighted approaching or surfacing just inside the harassment zone.

According to the POA's annual report, within the LOA reporting period (July 21–November 20, 2010), MMOs stationed at the POA recorded 118 marine mammal sighting events in the general area totaling 746 animals. The number of animals is typically greater than the number of sighting events because a single sighting event can (and often does) consist of multiple animals and animals such as beluga whales often travel in groups. There were 731 beluga whales (422 white, 224 gray, and 85 dark gray); 13 harbor seals; and 2 harbor porpoises. The number of reported whales sighted between July 21 and November 20, 2010 includes repeated sightings of individuals during the course of the monitoring period.

The highest number of sightings (44) and number of marine mammals sighted (265) occurred in September (261 of this number were beluga whales: 172 white; 59 gray; and 30 dark gray). The fewest number of sightings for a 30-day period were recorded in August, when 146 marine mammals were sighted. In general, beluga whales showed no observable reaction to pile driving. The only observable reaction which has been documented is beluga whale groups splitting momentarily on three occasions as they maneuver around barges or vessels. In-water pile driving has yet to begin this year, to date; therefore, no MMOs have been required at the POA in 2011.

Independent Scientific Monitoring

POA regulations (50 CFR part 217 subpart U) stipulate that the POA and MARAD employ a scientific marine mammal monitoring team separate from the on-site MMOs to characterize beluga whale frequency, abundance, group composition, movements, behavior, and habitat use around the POA and observe, analyze, and document potential changes in behavior in response to in-water construction work. The POA and MARAD complied with this requirement by assembling a monitoring team from the Alaska Pacific University (APU) to implement a NMFS-approved scientific monitoring plan. The scientific marine mammal monitoring 2010 annual report was attached as an appendix to the annual report submitted by POA and MARAD. This report covers the period of June through November, 2010 (ICRC, 2011). A summary of that report follows.

The APU observers conducted scientific monitoring from the Cairn Point Station on Elmendorf Air Force Base, which directly overlooks the POA. For 87 days, from June 29 through November 19, 2010, trained graduate and undergraduate marine biology students conducted approximately 600 hours of scientific monitoring and documented approximately 115 beluga whales, comprising 42 groups traveling through the study area. Spatial distribution analysis indicates that approximately 21 percent of all groups sighted occurred within (n = 42) or adjacent to (n = 5) the MRTP footprint. There were significant differences in the number of whales observed across tidal stages ($F_{8,45} = 2.94$, p = .02). There were significant peaks in sightings during low (p = .01) and high (p = .03) flood tides and during high ebb tides (p = .03).

Mean beluga whale group size was 2.7 plus or minus .35 individuals. Only three groups contained individuals identified as calves, and groups with calves were larger on average (4.3 plus or minus 1.2 individuals) than those without. All three groups containing calves were sighted within or adjacent to the MTRP footprint. The number of beluga whales sighted, group size, and size of groups with calves in 2010 decreased from those sighted in 2009; however, this difference was not considered significant. The APU team will continue to monitor and report on beluga whale abundance and the various parameters discussed here within lower Knik Arm for the duration of POA construction.

In summary, the scientific monitoring team found that beluga whale habitat use, distribution and movements, and behavior during 2010 were consistent with previous years (2007–2009) with whales primarily traveling through the study area on the incoming and outgoing tides to and from likely foraging areas further up Knik Arm. Similar to accounts from the MMOs stationed at the POA, no observed behavioral changes (*e.g.,* abrupt behavioral changes, rapid descents) or other indicators of response to in-water pile driving or other MTRP in-water construction activities were noted by the APU observers.

Take Summary for 2010 Construction Season

During the 2010 LOA reporting period, the following numbers of marine mammals were identified as taken from in-water pile driving: 13 beluga whales; 1 harbor seal; 0 harbor porpoises; and 0

killer whales. Of the 13 beluga whale takes recorded, 9 were in October and 4 were in November. The recorded takes occurred when marine mammals entered the Level B harassment zone (1,300 m from the point where vibratory pile driving takes place) during in-water (vibratory) pile driving. The number of animals, by species, taken under the 2010 LOA was within the amount authorized.

As discussed in more detail below, the POA has implemented a robust monitoring and mitigation program to minimize harassment and avoid exposing animals to injurious levels of sound produced by pile driving. The POA has also developed a successful communication system between MMOs and engineers to shut down pile driving before whales enter into designated harassment zones, avoiding Level A take and minimizing Level B take.

Planned Activities, Mitigation and Monitoring for 2011

During the 2011 construction season, the POA will be conducting two projects at the North End of the project site. The construction work includes: (1) Partial tail wall sheet pile removal at the Wet Barge Berth; and (2) limited inspection of tail walls at the North Extension. The work involves excavation of fill behind exiting sheet pile prior to removal or inspection. The excavation, tail wall removal, and inspection will be conducted out-of-water, inland of the bulkhead. Mobilization, rigging, and excavation began the week of May 9, 2011. At certain locations, barge-mounted heavy equipment will be required to excavate fill material. When the barge is in use, construction marine mammal monitoring will be conducted in accordance with existing permit requirements (*see* mitigation measure 8, below). It is anticipate that the barge work will commence in July.

As stated in the regulations and LOA, take of marine mammals will be minimized through implementation of the following mitigation measures: (1) If a marine mammal is detected within or approaching the Level A or impact and vibratory pile driving Level B harassment isopleths (200 m, 350 m and 1,300 m, respectively) prior to in-water pile driving, operations shall be immediately delayed or suspended until the marine mammal moves outside these designated zones or the animal is not detected within 15 minutes of the last sighting; (2) if a marine mammal is detected within or approaching 200 m prior to chipping, this activity shall be immediately delayed or suspended until the marine mammal moves outside these designated zones or the animal is not detected within 15 minutes of the last sighting; (3) except in certain circumstances (*see* 8 below), after pile driving activities have commenced, suspension of in-water pile driving is encouraged, but not mandatory, when animals enter the Level B isopleths (350 m from the point where impact pile driving is taking place and 1,300 m from the point where vibratory pile driving takes place); (4) in-water impact pile driving shall not occur during the period from two hours before low tide until two hours after low tide; (5) in-water piles will be driven with a vibratory hammer to the maximum extent possible (*i.e.,* until a desired depth is achieved or to refusal) prior to using an impact hammer; (6) in-water pile driving or chipping shall not occur when conditions restrict clear, visible detection of all waters within harassment zones; (7) a ''soft start'' technique shall be used at the beginning of each day's in-water pile driving activities or if pile driving has ceased for more than one hour to allow any marine mammal that may be in the immediate area to leave before pile driving reaches full energy; (8) if a group of more than 5 beluga whales or group with a calf is sighted within the Level B harassment isopleths, in-water pile driving shall be suspended; and (9) for operated in-water heavy machinery work other than pile driving or chipping (*i.e.,* dredging, dump scowles, linetug boats used to move barges, barge mounted hydraulic excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 50 m, those operations will cease and vessels will reduce to the slowest speed practicable while still maintaining control of the vessel and safe working conditions.

NMFS-approved marine mammal observers (MMOs) will be stationed at the port during all in-water pile driving and chipping and blasting associated with dock demolition, if it occurs. These observers will be responsible for documenting take, marine mammal behavior, and, if necessary, notifying the resident engineer when shut down is necessary. In addition, the POA and MARAD shall employ a scientific marine mammal monitoring team separate from the on-site MMOs to characterize beluga whale abundance, frequency, movements, behavior, group dynamics, and habitat use around the POA and observe, analyze, and document potential changes in behavior in response to in-water construction work. This monitoring team is not required to be present during all in-water pile driving operations but will be on-site 4 days per week, weather permitting. It is anticipated that Alaska Pacific University (APU) will begin the 2011 scientific marine mammal observation program in June. The on-site MMOs and this marine mammal monitoring team shall remain in contact to alert each other to marine mammal presence when both teams are working.

The POA and MARAD shall submit monthly reports summarizing all in-water construction activities and marine mammal sightings. In addition, an annual report shall be due sixty days before expiration of the LOA. This report shall summarize monthly reports and any apparent long or short term impacts the MTRP may be having on marine mammals. This LOA will be renewed annually based on review of the annual monitoring report.

Authorization

The POA and MARAD have complied with the requirements of the 2010 LOA, and NMFS has determined that marine mammal take during the 2010 construction season is within the amount authorized. Accordingly, NMFS has issued a LOA to POA and MARAD authorizing take by harassment of marine mammals incidental to the marine terminal redevelopment project at the POA. Issuance of the 2011–2012 LOA is based on NMFS' review of the annual report submitted by the POA and MARAD, and determination that the observed impacts were within the scope of the analysis and authorization contained in the final rule and previously issued LOA. Specifically, NMFS found that the total taking of marine mammals, in consideration of the required mitigation, monitoring, and reporting measures, will have no more than a negligible impact on the affected species or stocks and will not have an unmitigable adverse impact on their availability for taking for subsistence uses.

Dated: June 28, 2011.

James H. Lecky,

Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–16893 Filed 7–5–11; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, July 13, 2011, 10 a.m.–12 noon.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

Matters To Be Considered

Decisional Matters

(a) Lead 100 ppm.

(b) ASTM F963 Notice of Requirements.

A live Web cast of the Meeting can be viewed at *http://www.cpsc.gov/webcast.*

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: July 1, 2011.

Todd A. Stevenson,

Secretary.

[FR Doc. 2011–16957 Filed 7–1–11; 11:15 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, July 13, 2011; 2 p.m.–3 p.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: July 1, 2011.

Todd A Stevenson,

Secretary.

[FR Doc. 2011–16958 Filed 7–1–11; 11:15 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, July 6, 2011, 10 a.m.–12 Noon.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

Matters To Be Considered

Briefing Matters

(a) ASTM F963 Notice of Requirements; and

(b) Phthalates Enforcement Policy

A live Web Cast of the Meeting can be viewed at *http://www.cpsc.gov/webcast*

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: July 1, 2011.

Todd A. Stevenson,

Secretary.

[FR Doc. 2011–16956 Filed 7–1–11; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0071]

Privacy Act of 1974; System of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Defense Logistics Agency is proposing to amend a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective without further notice on August 5, 2011 unless comments are received which would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/ Regulatory Information Number (RIN) and title, by any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler, Privacy Act Officer, Headquarters Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221, or by phone at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency's system of record notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Dated: June 29, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S125.10

SYSTEM NAME:

Chaplain Care and Counseling Record (June 30, 2009, 74 FR 31259).

CHANGES:

* * * * *

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221. Individuals should provide their name and address.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221. Individuals should provide their name and address.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.''

* * * * *

S125.10

SYSTEM NAME:

Chaplain Care and Counseling Record.

SYSTEM LOCATION:

Office of the Chaplain, Headquarters, Defense Logistics Agency, ATTN: DH, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060–6221.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have received spiritual counseling, guidance, or ministration from the DLA Command Chaplain; and/or individuals who have participated in Chaplain sponsored activities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, home address and telephone number, religion, and details for which the individual sought counseling or assistance.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 3547, Duties: Chaplains, assistance required of commanding officers; 10 U.S.C. 5142, Chaplain Corps and Chief of Chaplains.

PURPOSE(S):

To document spiritual counseling or assistance provided to individuals.

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. 553a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside DoD as a routine use pursuant to 5 U.S.C. 55a(b)(3) as follows:

The DoD ''Blanket Routine Uses'' also apply to this system of records.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records may be stored on paper.

RETRIEVABILITY:

Records are retrieved by individual's name.

SAFEGUARDS:

Records are stored in locked cabinets and are accessible only by the Chaplain.

RETENTION AND DISPOSAL:

Information is retained in the system until superseded or no longer needed.

SYSTEM MANAGER AND ADDRESS:

Command Chaplain, Headquarters, Defense Logistics Agency, ATTN: DH, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060–6221.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Individuals should provide their name and address.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Individuals should provide their name and address.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

RECORD SOURCE CATEGORIES:

Information is provided by the record subject.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–16836 Filed 7–5–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0072]

Privacy Act of 1974; System of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to amend a system of records.

SUMMARY: The Defense Logistics Agency is proposing to amend a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective without further notice on August 5, 2011 unless comments are received which would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/ Regulatory Information Number (RIN) and title, by any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler, Privacy Act Officer, Headquarters Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221, or by phone at (703) 767–5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency's system of record notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports.

Dated: June 29, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S370.10

SYSTEM NAME:

Labor Management Relations Records System (May 19, 2009, 74 FR 23396)

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Human Resources, Labor and Employee Relations Policy (J–13), Headquarters, Defense Logistics Agency (DLA), 8725 John J. Kingman Road, Suite 3630, Fort Belvoir, VA 22060–6221.

Defense Logistics Agency Human Resources Services-Columbus (DHRS–C), 3990 East Broad Street, Building 11, Section 3, Columbus, OH 43213–0919.

Defense Logistics Agency Human Resources Services-New Cumberland (DHRS–N), 2001 Mission Drive, Suite 3, New Cumberland, PA 17070–5042.

Defense Logistics Agency Human Resources Services (DHRS–D), 3990 East Broad Street, Building 306, Columbus, OH 43213–1158.''

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete ''Social Security Number'' from entry.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete ''E.O. 9397 (SSN)'' from entry.

PURPOSE(S):

Change ''unfair labor complaints'' to ''unfair labor practice complaints.''

RETRIEVABILITY:

Delete ''Social Security Numbers'' from entry.

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Director, DLA Human Resources, Headquarters, Defense Logistics Agency, ATTN: J–13, 8725 John J. Kingman Road, Suite 3630, Fort Belvoir, VA 22060–6221.

Director, Defense Logistics Agency Human Resources Services—Columbus (DHRS–C), 3990 East Broad Street, Building 11, Section 3, Columbus, OH 43213–0919.

Director, Defense Logistics Agency Human Resources Services—New Cumberland (DHRS–N), 2001 Mission Drive, Suite 3, New Cumberland, PA 17070–5042.

Director, Defense Logistics Agency Human Resources Services (DHRS–D), 3990 East Broad Street, Building 306, Columbus, OH 43213–1158.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written inquiry should contain the subject individual's full name, and case subject and case number, if known.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written inquiry should contain the subject individual's full name, and case subject and case number, if known.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR Part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.''

* * * * *

S370.10

SYSTEM NAME:

Labor Management Relations Records System.

SYSTEM LOCATION:

Human Resources, Labor and Employee Relations Policy (J–13), Headquarters, Defense Logistics Agency (DLA), 8725 John J. Kingman Road, Suite 3630, Fort Belvoir, VA 22060–6221.

Defense Logistics Agency Human Resources Services—Columbus (DHRS–C), 3990 East Broad Street, Building 11, Section 3, Columbus, OH 43213–0919.

Defense Logistics Agency Human Resources Services—New Cumberland (DHRS–N), 2001 Mission Drive, Suite 3, New Cumberland, PA 17070–5042.

Defense Logistics Agency Human Resources Services (DHRS–D), 3990 East Broad Street, Building 306, Columbus, OH 43213–1158.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DLA or other third party employees and individuals of other Federal agencies who receive personnel support from DLA who are involved in labor grievances, disputes, or complaints which have been referred to an arbitrator for resolution.

CATEGORIES OF RECORDS IN THE SYSTEM:

The file contains the subject individuals name, addresses, telephone numbers, background papers, and details pertaining to the case or issue.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Chapter 71 of Title 5 of the U.S. Code, Labor-Management Relations.

PURPOSE(S):

Records are maintained incident to the administration, processing, and resolution of unfair labor practice complaints, grievance-arbitrations, negotiability, and representation issues. Statistical data, with personal identifiers removed, may be used by management for reporting or policy evaluation purposes.

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 contained therein may specifically be disclosed outside the DOD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To Representatives of the U.S. Office of Personnel Management (OPM) on matters relating to the inspection, survey, audit or evaluation of Civilian Personnel Management Programs.

To the Comptroller General or any of his authorized representatives, in the course of the performance of duties of the Government Accountability Office relating to the Labor-Management Relations Program.

To the Federal Labor Relations Authority to respond to inquiries from that office regarding complaints referred to or filed with that office.

To arbitrators, examiners, or other third parties appointed to inquire into, review, or negotiate labor-management issues.

The DoD ''Blanket Routine Uses'' also apply to this system of records.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records may be stored on paper and/or electronic storage media.

RETRIEVABILITY:

Records are retrieved by case subject, case numbers, and/or individual employee name.

SAFEGUARDS:

Records are maintained in areas accessible only to DLA personnel who must access the records to perform their duties. The computerized files are password protected with access restricted to authorized users. Records are secured in locked or guarded buildings, locked offices, or locked cabinets during non duty hours.

RETENTION AND DISPOSAL:

Records will be destroyed 5 years after final resolution of the case.

SYSTEM MANAGER(S) AND ADDRESS:

Director, DLA Human Resources, Headquarters, Defense Logistics Agency, ATTN: J–13, 8725 John J. Kingman Road, Suite 3630, Fort Belvoir, VA 22060–6221.

Director, Defense Logistics Agency Human Resources Services—Columbus (DHRS–C), 3990 East Broad Street, Building 11, Section 3, Columbus, OH 43213–0919.

Director, Defense Logistics Agency Human Resources Services—New Cumberland (DHRS–N), 2001 Mission Drive, Suite 3, New Cumberland, PA 17070–5042.

Director, Defense Logistics Agency Human Resources Services (DHRS–D), 3990 East Broad Street, Building 306, Columbus, OH 43213–1158.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written inquiry should contain the subject individual's full name, and case subject and case number, if known.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

Written inquiry should contain the subject individual's full name, and case subject and case number, if known.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in 32 CFR part 323, or may be obtained from the DLA FOIA/Privacy Act Office, Headquarters, Defense Logistics Agency, ATTN: DGA, 8725 John J. Kingman Road, Suite 1644, Fort Belvoir, VA 22060–6221.

RECORD SOURCE CATEGORIES:

The individual; Servicing Human Resources Director, arbitrator's office, the Federal Labor Relations Authority Headquarters and regional offices, and union officials.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–16837 Filed 7–5–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Record of Decision for the F–35 Force Development Evaluation and Weapons School Beddown, Nellis AFB, NV

ACTION: Notice of Availability (NOA).

SUMMARY: On June 24, 2011, the United States Air Force signed the ROD for the F–35 Force Development Evaluation (FDE) and Weapons School (WS) Beddown, Nellis AFB, Nevada.

The decision was based on matters discussed in the Final Environmental Impact Statement (EIS), inputs from the public and regulatory agencies, and other relevant factors. The Final EIS was made available to the public on May 13, 2011, through a **Federal Register** NOA (Volume 76, Number 93, Page 28029) with a wait period that ended on June 14, 2011.

Authority: This NOA is published pursuant to the regulations (40 CFR Part 1506.6) implementing the provisions of the NEPA of 1969 (42 U.S.C. 4321, *et seq.*) and the Air Force's Environmental Impact Analysis Process (EIAP) (32 CFR parts 989.21(b) and 989.24(b)(7))

FOR FURTHER INFORMATION CONTACT: Mr. Nick Germanos, HQ ACC/A7PS, 129 Andrews St., Suite 327, Langley AFB, VA 23655–2769.

Albert Bodnar,

Chief, Policy and Compliance, Office of Information Dominance and Chief Information Officer.

[FR Doc. 2011–16696 Filed 7–5–11; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2011–0016]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Department of the Army 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 August 5, 2011 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and/ Regulatory Information Number (RIN) and title, by any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Mr. Leroy Jones, Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905, or by phone (703) 428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

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: June 29, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0015–185 SFMR

SYSTEM NAME:

Correction of Military Records Cases (January 28, 2008, 73 FR 4852).

CHANGES:

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 1552, Correction of military records: Claims incident thereto, 10 U.S.C. 1214, Armed Forces; Right to a Full and Fair Hearing; 10 U.S.C. 1216, Secretaries, powers, functions and duties; 10 U.S.C. 1553, Review of Discharge or Dismissal; 10 U.S.C. 1554, Military Personnel Benefits and E.O. 9397 (SSN), as amended.''

* * * * *

A0015–185 SFMR

SYSTEM NAME:

Correction of Military Records Cases.

SYSTEM LOCATION:

Army Review Boards Agency, 1901 South Bell Street, 2nd Floor, Arlington, VA 22202–4508. Copy of Board decision is incorporated in petitioner's Official Military Personnel File except where such action would nullify relief granted, in which case application and decisions are retained in files of the Correction Board.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present or former members of the U.S. Army, U.S. Army Reserve or Army National Guard or their authorized representatives who apply for the correction of his/her military records and review of Discharge from the Armed Forces of the United States.

CATEGORIES OF RECORDS IN THE SYSTEM:

Application for Correction of Military Record (DD Form 149), Application for the Review of Discharge from the Armed Forces of the United States (DD 293), individual's name (first and last), address, telephone number, email, fax number, branch of service, rank, social security number (SSN), date of discharge, type of discharge, relevant information pertaining to discharge or military corrective action, counselor's name, counselor's address, counselor's phone number and email, documentary evidence, affidavits, information from individual's military record pertinent to corrective action requested, testimony, hearing transcripts when appropriate, briefs/arguments, advisory opinions, findings, conclusions and decisional documents of the Board.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 1552, Correction of military records: Claims incident thereto, 10 U.S.C. 1214, Armed Forces; Right to a Full and Fair Hearing; 10 U.S.C. 1216, Secretaries, powers, functions and duties; 10 U.S.C. 1553, Review of Discharge or Dismissal; 10 U.S.C. 1554, Military Personnel Benefits and E.O. 9397 (SSN), as amended.

PURPOSE(S):

Records are used by the Board to consider all applications properly before it to determine the existence of an error or an injustice.

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 contained therein 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 Justice when cases are litigated.

The DoD ''Blanket Routine Uses'' set forth at the beginning of the Army'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 records in file folders and electronic storage media.

RETRIEVABILITY:

Applicant's surname, Social Security Number (SSN) and/or number assigned to applicant.

SAFEGUARDS:

Information is privileged, and restricted to individuals who have a need for the record in the performance of their official duties. Computer terminals with access to the records are located in rooms with authorized personnel. These rooms are locked when unoccupied. Common Access Card (CAC) certificates and PIN, or login and passwords are used to support the minimum requirements of accountability, access control, least privilege, and data integrity. Additionally, intrusion detection systems, malicious code protection, and firewalls are used.

RETENTION AND DISPOSAL:

Records are retained at the Army Review Boards Agency for at least 6 months after case is closed and then retired to the National Personnel Records Center where they are retained for 20 years.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Army Review Boards Agency, 1901 South Bell Street, 2nd Floor, Arlington, VA 22202–4508.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Director, Army Review Boards Agency, 1901 South Bell Street, 2nd Floor, Arlington, VA 22202–4508.

Individual must furnish full name, Social Security Number, service number if assigned, current address and telephone number, information that will assist in locating the record, and signature.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Director, Army Review Boards Agency, 1901 South Bell Street, 2nd Floor, Arlington, VA 22202–4508.

Individual must furnish full name, Social Security Number (SSN), service number if assigned, current address and telephone number, information that will assist in locating the record, and signature.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR Part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, his/her Official Military Personnel File, other Army records/reports, relevant documents from any source.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–16835 Filed 7–5–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID USN–2011–0010]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to delete a system of records.

SUMMARY: The Department of the Navy is deleting a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on August 5, 2011 unless comments are received which result in a contrary determination.

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

* *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

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

FOR FURTHER INFORMATION CONTACT: Ms. Robin Patterson, FOIA/Privacy Act Policy Branch, Department of the Navy, 2000 Navy Pentagon, Washington, DC 20350–2000, or by phone at (202) 685–6546.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above. The Department the Navy proposes to delete a systems of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: June 29, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DELETION:

N12290–1

SYSTEM NAME:

Personnel Action Reporting System (PARS) (September 2, 1999, 64 FR 48148)

REASON:

Commander, Navy Installations Command, Department of the Navy, has determined that N12290–1 provided for the collection by a system that is no longer in operation. This system, Personnel Action Reporting System (PARS) was a sunset system and all records contained therein have been properly destroyed. PARS, N12290–1, can therefore be deleted.

[FR Doc. 2011–16830 Filed 7–5–11; 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, 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 September 6, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Information Management and Privacy 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: June 29, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Office of Planning, Evaluation and Policy Development

Type of Review: New.

Title of Collection: Program Performance Data Audits Project.

OMB Control Number: Pending.

Agency Form Number(s): N/A.

Frequency of Responses: Annually.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 1,834.

Total Estimated Number of Annual Burden Hours: 1,829.

Abstract: This clearance request is submitted to OMB for the Office of Planning, Evaluation, and Policy Development's (OPEPD's) audit of grant program procedures for collecting, analyzing, and reporting performance and evaluation data. This request is necessary because OPEPD within the U.S. Department of Education (ED) has contracted with Decision Information Resources, Inc. and Mathematica Policy Research, Inc. to assess the procedures for collecting and reporting program performance and evaluation data for eleven ED grant programs. These audits and assessments will provide ED with

insight into (1) whether the programs' performance data are of high quality and the methods used to aggregate and report those data are sound; and (2) whether the local evaluations conducted by grantees (or their local evaluators) are of high quality and yield information that can be used to improve education programs. This OMB submission requests approval for the use of interview protocols for collecting information from program grantees and their local evaluators and program office contractors. All interview guides are designed to address the major research questions associated with this project. All other data used to address the audit's research questions will come from sources that will not require OMB approval.

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 4647. 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. 2011–16842 Filed 7–5–11; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R01–OW–2011–0364, FRL–9430–1]

Massachusetts Marine Sanitation Device Standard—Notice of Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Determination.

SUMMARY: The Regional Administrator of the Environmental Protection Agency—New England Region, has determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the coastal waters of Chatham, Orleans, Eastham, Wellfleet, Truro, and Provincetown, collectively termed the Outer Cape Cod for the purpose of this notice.

ADDRESSES: *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 electronically in *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Ann Rodney, U. S. Environmental Protection Agency—New England Region, Office of Ecosystem Protection, Oceans and Coastal Protection Unit, Five Post Office Square, Suite 100, OEP06–1, Boston, MA 02109–3912. Telephone: (617) 918–1538. Fax number: (617) 918–0538. E-mail address: *rodney.ann@epa.gov*.

SUPPLEMENTARY INFORMATION: On April 29, 2011, EPA published a notice that the Commonwealth of Massachusetts had petitioned the Regional Administrator, Environmental Protection Agency, to determine that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of the Outer Cape Cod. Four comments were received on this petition. The response to comments can be obtained utilizing the above contact information.

The petition was filed pursuant to Section 312(f)(3) of Public Law 92–500, as amended by Public Laws 95–217 and 100–4, for the purpose of declaring these waters a No Discharge Area (NDA).

Section 312(f)(3) states: After the effective date of the initial standards and regulations promulgated under this section, if any State determines that the protection and enhancement of the quality of some or all of the waters within such State require greater environmental protection, such State may completely prohibit the discharge from all vessels of any sewage, whether treated or not, into such waters, except that no such prohibition shall apply until the Administrator determines that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for such water to which such prohibition would apply.

This Notice of Determination is for the waters of the Outer Cape Cod. The NDA boundaries are as follows:

Waterbody/General Area	From Longitude	From Latitude	To Longitude	To Latitude
The westernmost landward boundary of the NDA starting on the south side of Chatham is an imaginary line drawn between the western part of the outlet of Stage Harbor and the northern tip of Monomoy Island (*All state waters east of Monomoy Island are included in this NDA*)	69° 59′ 0″ W	41° 39′ 26″ N	69° 59′ 0″ W	41° 37′ 20″ N
The southwestern boundary then continues from the southern tip of Monomoy Island through two navigational aids to the state/federal waters boundary	70° 0′ 36″ W	41° 32′ 30″ N	70° 0′ 11″ W	41° 29′ 15″ N
The landward boundary of the NDA follows the mean high water line from Chatham to Provincetown except at an imaginary line drawn between: (*This imaginary line is across the mouth of Pleasant Bay, which is already an NDA*)	69° 56′ 36″ W	41° 39′ 40″ N	69° 56′ 6″ W	41° 40′ 56″ N
The westernmost boundary on the northern side of Cape Cod is an imaginary line drawn from three miles off shore to the mean high water line in Provincetown (*This imaginary line is contiguous with the Cape Cod Bay NDA*)	70° 10′ 0″ W	42° 7′ 59″ N	70° 10′ 0″ W	42° 4′ 47″ N

The boundaries were chosen based on easy line-of-sight locations and generally represent all navigational waters. The area includes the municipal waters of Chatham, Orleans, Eastham, Wellfleet, Truro, and Provincetown, and from mean high water out to the state/federal boundary.

The information submitted to EPA by the Commonwealth of Massachusetts certifies that there is one landside pumpout facility at Goose Hummock Marine in Orleans within the proposed area available to the boating public. The location, contact information, hours of

operation, and water depth are provided at the end of this notice.

Based on the examination of the petition and its supporting documentation, and information from site visits conducted by EPA New England staff, EPA has determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the area covered under this determination.

This determination is made pursuant to Section 312(f)(3) of Public Law 92–500, as amended by Public laws 95–217 and 100–4.

PUMPOUT FACILITY WITHIN THE NO DISCHARGE AREA

[Outer Cape COD]

Name	Location	Contact info.	Hours	Mean low water depth
Goose Hummock Marine, Nauset Harbor.	13 Old County Rd., Orleans, MA	508–255–2620 ..... VHF 16	On call	3 ft.

Dated: June 27, 2011.

Ira W. Leighton,

Acting Regional Administrator, New England Region.

[FR Doc. 2011–16879 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9429–8]

Availability of Final NPDES General Permits MAG580000 and NHG580000 for Discharges From Publicly Owned Treatment Works Treatment Plants (POTW Treatment Plants) and Other Treatment Works Treating Domestic Sewage in the Commonwealth of Massachusetts and the State of New Hampshire

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Director of the Office of Ecosystem Protection, EPA–New England, is issuing a notice of availability of the final National Pollutant Discharge Elimination System (NPDES) General Permits for certain Publicly Owned Treatment Works Treatment Plants (POTW treatment plants) and Other Treatment Works Treating Domestic Sewage (collectively, ''facilities'') in the Commonwealth of Massachusetts (including both Commonwealth and Indian country lands) and the State of New Hampshire. Throughout this document, these two permits are collectively referred to as the ''Publicly Owned Treatment Works General Permit'' (''POTW GP'' or the ''General Permit''). The General Permit replaces the prior POTW GP, which expired on September 23, 2010 (the ''expired POTW GP'').

The POTW GP establishes Notice of Intent (''NOI'') requirements as well as effluent limitations, standards, and prohibitions for facilities that discharge to fresh and marine waters. Coverage under these General Permits is available to facilities in Massachusetts classified as minor facilities and to facilities in New Hampshire classified as major or minor facilities. Owners and/or operators of these facilities, including those facilities whose authorization to discharge under the expired POTW GP was administratively continued in accordance with the Administrative Procedures Act (5 U.S.C. 558(c)) and 40 CFR 122.6, will be required to submit an NOI to be covered by the final POTW GP to both EPA–New England and the appropriate state agency, in accordance with the notification requirements of the General Permit. Following EPA and State review of the NOI, the facility will receive written notification from EPA whether coverage and authorization to discharge under the General Permit has been granted. The eligibility requirements for permit coverage, including the requirement that a facility have a receiving water dilution factor equal to or greater than 50, are provided in the General Permit. The General Permit does not cover new sources as defined under 40 CFR 122.2.

DATES: The POTW GP shall be effective on July 6, 2011 and will expire at midnight, July 6, 2016. In accordance with 40 CFR Part 23, these permits shall be considered issued for the purpose of judicial review two (2) weeks after the **Federal Register** Publication. Under Section 509(b)(2) of the Clean Water Act, the requirements in this permit may not be challenged at a later date in civil or criminal proceedings to enforce these requirements. In addition, these permits may not be challenged in other agency proceedings.

ADDRESSES: The required notification information to obtain permit coverage is provided in the POTW GP. This information shall be submitted to both EPA and the appropriate state agency. Notification information may be sent via regular or overnight mail to EPA–Region 1, Office of Ecosystem Protection, OEP06–1, 5 Post Office Square-Suite 100, Boston, Massachusetts 02109–3912; and to the appropriate state agency at the addresses provided in Attachment F to the POTW GP.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the final POTW GP may be obtained by contacting Meridith Timony at 617–918–1533, between the hours of 9 a.m. and 5 p.m., Monday through Friday, excluding holidays. The General Permit and the Response to Comments document may be viewed over the Internet via the EPA–Region I Web site at *http://www.epa.gov/region1/npdes/potw-gp.html.* To obtain a paper copy of the documents, please contact Meridith Timony using the contact information provided above. A reasonable fee may be charged for copying requests.

Dated: May 26, 2011.

Ira W. Leighton,

Acting Regional Administrator, Region 1.

[FR Doc. 2011–16936 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0005; FRL–8878–8]

Pesticide Products; Receipt of Applications to Register New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this Notice of such applications, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before August 5, 2011.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number in the summary for the product of interest, by one of the following methods:

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

Instructions: Direct your comments to the docket ID number specified for the active ingredient of interest as shown in the registration applications summaries. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: A contact person is listed at the end of each registration application summary and may be contacted by telephone or e-mail. The mailing address for each contact person listed is: Registration Division (7505P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number). If you are commenting on a docket that addresses multiple products, please indicate to which registration number(s) your comment applies.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications for New Uses

EPA received applications as follows to register new uses for pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA, and is publishing this Notice of such applications pursuant to section 3(c)(4) of FIFRA. Notice of receipt of these

applications does not imply a decision by the Agency on the applications.

1. *Registration Numbers:* 100–811, 100–828. *Docket Number:* EPA–HQ–OPP–2011–0486. *Company name and address:* Syngenta Crop Protection, Inc. P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Cyprodinil. *Proposed Use:* Tree nuts, crop group 14. *Contact:* Lisa Jones, (703) 308–9424, *jones.lisa@epa.gov.*

2. *Registration Numbers:* 100–936, 100–941. *Docket Number:* EPA–HQ–OPP–2010–1079. *Company name and address:* Syngenta Crop Protection; P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Thiamethoxam. *Proposed Use:* Seed treatment on small cereal grains, crop group 15. *Contact:* Julie Chao, (703) 308–8735, *chao.julie@epa.gov.*

3. *Registration Numbers:* 100–1317. *Docket Number:* EPA–HQ–OPP–2011–0486. *Company name and address:* Syngenta Crop Protection, Inc. P.O. Box 18300, Greensboro, NC 27419. *Active ingredients:* Cyprodinil, difenoconazole. *Proposed Use:* Tree nuts, crop group 14. *Contact:* Lisa Jones, (703) 308–9424, *jones.lisa@epa.gov.*

4. *Registration Numbers:* 241–382, 241–427. *Docket Number:* EPA–HQ–OPP–2011–0387. *Company name and address:* BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, North Carolina 27709. *Active ingredient:* Dimethomorph. *Proposed Use:* Leafy vegetable group. *Contact:* Tamue L. Gibson, (703) 305–9096, *gibson.tamue@epa.gov.*

5. *Registration Numbers:* 264–776, 267–777, 264–826. *Docket Number:* EPA–HQ–OPP–2011–0458. *Company name and address:* Bayer CropScience LP, 2 T.W. Alexander Drive Research Triangle Park, NC 27709. *Active ingredient:* Trifloxystrobin. *Proposed Use:* Globe Artichokes. *Contact:* Tawanda Maignan, (703) 308–8050, *maignan.tawanda@epa.gov.*

6. *Registration Numbers:* 264–776, 264–989. *Docket Number:* EPA–HQ–OPP–2011–0456. *Company name and address:* Bayer CropScience LP, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. *Active ingredient:* Trifloxystrobin. *Proposed Use:* Alfalfa seed. *Contact:* Tawanda Maignan, (703) 308–8050. *maignan.tawanda@epa.gov.*

7. *Registration Numbers:* 279–3149, 279–3189, 279–3220, 279–3370. *Docket Number:* EPA–HQ–OPP–2011–0427. *Company name and address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredient:* Sulfentrazone. *Proposed Use(s):* For use on citrus fruits of crop group 10–10, non-grass animal feed crops of crop group 18, small berries and fruits of crop group 13–07, and tree nuts of crop group 14 including pistachios. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

8. *Registration Numbers:* 279–3181, 279–3194, 279–3241, 279–3242, 279–3276. *Docket Number:* EPA–HQ–OPP–2011–0428. *Company name and address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredient:* Carfentrazone-ethyl. *Proposed Use(s):* Crop group 18, non-grass animal feed crops. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

9. *Registration Number:* 279–3330. *Docket Number:* EPA–HQ–OPP–2011–0427. *Company name and address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredients:* Imazethapyr, sulfentrazone. *Proposed Use(s):* Crop group 18, non-grass animal feed crops. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

10. *Registration Number:* 279–3334. *Docket Number:* EPA–HQ–OPP–2011–0427. *Company name and address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredients:* Glyphosate IPA, sulfentrazone. *Proposed Use(s):* For use on citrus fruits of crop group 10–10, non-grass animal feed crops of crop group 18, small berries and fruits of crop group 13–07, and tree nuts of crop group 14 including pistachios. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

11. *Registration Number:* 279–3337. *Docket Numbers:* EPA–HQ–OPP–2011–0427, EPA–HQ–OPP–2011–0428. *Company name and address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredients:* Carfentrazone-ethyl, sulfentrazone. *Proposed Use(s):* For use on citrus fruits of crop group 10–10, non-grass animal feed crops of crop group 18, small berries and fruits of crop group 13–07, and tree nuts of crop group 14 including pistachios. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

12. *Registration Number:* 279–3340. *Docket Number:* EPA–HQ–OPP–2011–0427. *Company name and address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active ingredients:* Metribuzin, sulfentrazone. *Proposed Use(s):* Established stands of alfalfa and sainfoin. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

13. *Registration Number:* 5905–564. *Docket Number:* EPA–HQ–OPP–2010–0905. *Company name and address:* Helena Chemical Company, 7664 Smythe Farm Road, Memphis, TN 38120. *Active ingredient:* Dicamba and 2,4-Dichlorophenoxyacetic Acid. *Proposed Use:* Teff. *Contact:* Michael Walsh, Registration Division, (703) 308–2972, *walsh.michael@epa.gov.*

14. *Registration Number:* 7969–246. *Docket Number:* EPA–HQ–OPP–2011–0179. *Company name and address:* BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, North Carolina 27709. *Active ingredient:* Metconazole. *Proposed Use:* Sugarcane. *Contact:* Tamue L. Gibson, (703) 305–9096, *gibson.tamue@epa.gov.*

15. *Registration Number/File Symbol:* 8033–20, 8033–RRA. *Docket Number:* EPA–HQ–OPP–2011–0403. *Company name and address:* Nippon Soda Co., Ltd., c/o Nisso America Inc., 45 Broadway, Suite 2120, New York, NY 10006. *Active ingredient:* Acetamiprid. *Proposed Use:* Soybeans. *Contact:* Jennifer Urbanski, (703) 347–0156, *urbanski.jennifer@epa.gov.*

16. *Registration Number:* 42750–57. *Docket Number:* EPA–HQ–OPP–2010–0905. *Company name and address:* Albaugh Inc., 1525 NE 36th Street, Ankeny, IA 50021. *Active ingredient:* Dicamba (3,6-dichloro-o-anisic acid). *Proposed Use:* Teff. *Contact:* Michael Walsh, Registration Division, (703) 308–2972, *walsh.michael@epa.gov.*

17. *Registration Number:* 59639–151. *Docket Number:* EPA–HQ–OPP–2008–0771. *Company name and address:* Valent U.S.A. Corp., P.O. Box 8025, Walnut Creek, CA 94596. *Active ingredient:* Clothianidin. *Proposed Use:* Seed treatment for leafy greens, subgroup 4A. *Contact:* Marianne Lewis, (703) 308–8043, *lewis.marianne@epa.gov.*

18. *Registration Number:* 62719–25. *Docket Number:* EPA–HQ–OPP–2010–0905. *Company name and address:* Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268. *Active ingredient:* 2,4-Dichlorophenoxy Acetic Acid. *Proposed Use:* Teff. *Contact:* Michael Walsh, Registration Division, (703) 308–2972, *walsh.michael@epa.gov.*

19. *Registration Number/File Symbol:* 71512–8, 71512–EN. *Docket Number:* EPA–HQ–OPP–2011–0457. *Company name and address:* ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, OH 44077. *Active ingredient:* Fluazinam. *Proposed Use:* Golf course turf. *Contact:* Tawanda Maignan, (703) 308–8050, *maignan.tawanda@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pest.

Dated: June 24, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–16872 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0850; FRL–8878–9]

Chlorpyrifos Registration Review; Preliminary Human Health Risk Assessment; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's preliminary human health risk assessment for the registration review of chlorpyrifos and opens a public comment period on this document. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed a comprehensive preliminary human health risk assessment for all chlorpyrifos uses. After reviewing comments received during the public comment period, EPA will issue a revised risk assessment, explain any changes to the preliminary risk assessment, and respond to comments and may request public input on risk mitigation before completing a proposed registration review decision for chlorpyrifos. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before September 6, 2011.

ADDRESSES: Submit your comments identified by the docket identification (ID) number EPA–HQ–OPP–2008–0850, by one of the following methods:

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

Instructions: Direct your comments to the docket ID number EPA–HQ–OPP–2008–0850. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information contact:* Tom Myers, Chemical Review Manager, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 308–8589; *fax number:* (703) 308–7070; *e-mail address: myers.tom@epa.gov.*

For general questions on the registration review program, contact: Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–5026; *fax number:* (703) 308–8090; *e-mail address: costello.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the chemical review manager listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Authority

EPA is conducting its registration review of chlorpyrifos pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

III. Registration Reviews

A. What action is the agency taking?

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registration for chlorpyrifos to ensure that it continues to satisfy the FIFRA standard for registration—that is, that chlorpyrifos can still be used without unreasonable adverse effects on human health or the environment. Chlorpyrifos is an organophosphate insecticide, acaricide, and miticide used to control a variety of insects on food and feed crops, golf course turf, greenhouses, nonstructural wood treatments (such as utility poles and fence posts), ant bait stations, and as an adult mosquitocide. EPA has completed a comprehensive preliminary human health risk assessment for all chlorpyrifos uses.

Pursuant to 40 CFR 155.53(c), EPA is providing an opportunity, through this notice of availability, for interested parties to provide comments and input concerning the Agency's preliminary human health risk assessment for chlorpyrifos. EPA acknowledged its intent to issue this assessment for public comment in a December 21, 2010, Stipulation and Order issued by the U.S. District Court for the Southern District of New York in *Natural Resources Defense Council, et al.* v. *EPA,* No. 10 Civ. 5590. Comments and input could address, among other things, the Agency's risk assessment methodologies and assumptions, as applied to this preliminary risk assessment. The Agency will consider all comments received during the public comment period and make changes, as appropriate, to the preliminary human health risk assessment. EPA will then issue a revised risk assessment, explain any changes to the preliminary risk assessment, and respond to comments. In the **Federal Register** notice announcing the availability of the revised risk assessment, if the revised risk assessment indicates risks of concern, the Agency may provide a comment period for the public to submit suggestions for mitigating the risk identified in the revised risk assessment before developing a proposed registration review decision on chlorpyrifos.

1. *Other related information.* Additional information on chlorpyrifos is available on the Pesticide Registration Review Status webpage for this pesticide, *http://www.epa.gov/oppsrrd1/registration_review/chlorpyrifos/index.htm.* Information on the Agency's registration review program and its implementing regulation is available at *http://www.epa.gov/oppsrrd1/registration_review.*

2. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

List of Subjects

Environmental protection, Chlorpyrifos, Pesticides and pests.

Dated: June 22, 2011.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2011–16729 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9429–7]

Proposed CERCLA Administrative Cost Recovery Settlement Agreement; Textron Inc., Whittaker Corporation, United States Army, and United States Department of Energy

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement agreement; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of Past Response Costs and Future Response Costs, as these terms are defined in the settlement, concerning the Nuclear Metals, Inc. Superfund Site (''Site'') located at 2229 Main Street in Concord, Middlesex County, Massachusetts with Textron Inc., Whittaker Corporation, United States Army, and United States Department of Energy. The settlement requires payment of $4,115,000 in reimbursement of Past Response Costs. The settlement also requires performance of a non-time critical removal action and payment of all Future Response Costs. The settlement includes covenants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement for recovery of response costs (Section XV of the proposed settlement). The Agency will consider all comments received and may modify or withdraw its consent to this cost recovery settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the Concord Free Public Library, 129 Main St., Concord, MA 01742 and at U.S. EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912.

DATES: Comments must be submitted on or before August 5, 2011.

ADDRESSES: The proposed settlement is available for public inspection at U.S. EPA Region 1, OSRR Records and Information Center, 5 Post Office Square, Suite 100, Mailcode LIB01–2, Boston, MA 02109–3912, by appointment, (617) 918–1440. Comments should reference the Nuclear Metals, Inc. Superfund Site, Concord, MA and U.S. EPA Region 1 Docket No. CERCLA–01–2011–004, and should be addressed to Audrey Zucker, U.S. EPA Region 1, 5 Post Office Square, Suite 100, Mailcode OES04–2, Boston, MA 02109–3912.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed settlement agreement can also be obtained from Heather Cote, U.S. EPA Region 1, 5 Post Office Square, Suite 100, Mailcode OES04–4, Boston, MA 02109–3912. Additional information on the Nuclear Metals, Inc. Superfund Site and the index to the administrative record for the non-time critical removal action can be found at *http://www.epa.gov/region1/superfund/sites/nmi.*

Dated: March 31, 2011.

Rich Cavagnero,

Acting Director, Office of Site Remediation & Restoration, U.S. EPA, Region 1.

[FR Doc. 2011–16934 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9429–9]

Proposed Administrative Settlement Agreement under Section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act for the Price Landfill Superfund Site, City of Pleasantville and Egg Harbor Township, Atlantic County, NJ

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Administrative Settlement and Opportunity for Public Comment.

SUMMARY: The United States Environmental Protection Agency (''EPA'') is proposing to enter into an administrative settlement agreement (''Settlement Agreement'') with Atlantic City Electric Company, Inc. (''Respondent'') pursuant to Section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9622(h). The Settlement Agreement provides for Respondent's payment of certain past costs incurred at the Price Landfill Superfund Site, City of Pleasantville and Egg Harbor Township, Atlantic County, New Jersey (''Site'').

In accordance with Section 122(i) of CERCLA, 42 U.S.C. 9622(i), this notice is being published to inform the public of the proposed Settlement Agreement and of the opportunity to comment. For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the proposed Settlement Agreement. EPA will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations that indicate that the proposed settlement is inappropriate, improper or inadequate. EPA's response to any comments received will be available for public inspection at EPA Region 2, 290 Broadway, 17th Floor, New York, NY 10007–1866.

DATES: Comments must be provided by August 5, 2011.

ADDRESSES: Comments should reference the EPA Index No. II–CERCLA–02–2011–2013 and should be sent to the U.S. Environmental Protection Agency, Region 2, Office of Regional Counsel, New Jersey Superfund Branch, 290 Broadway–17th Floor, New York, NY 10007.

SUPPLEMENTARY INFORMATION: A copy of the proposed administrative settlement, as well as background information relating to the settlement, may be obtained from William C. Tucker, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 2, 17th Floor, 290 Broadway, New York, New York 10007–1866. Telephone: 212–637–3139.

FOR FURTHER INFORMATION CONTACT: William C. Tucker, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 2, 17th Floor, 290 Broadway, New York, New York 10007–1866. Telephone: 212–637–3139.

Dated: June 1, 2011.

Walter Mugdan,

Director, Emergency and Remedial Response Division.

[FR Doc. 2011–16876 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Performance Review Board

AGENCY: Federal Communications Commission.

ACTION: Notice.

As required by the Civil Service Reform Act of 1978 (Pub. L. 95–454), Chairman Julius Genachowski appointed the following executive to the Performance Review Board (PRB): Mindel De La Torre.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2011–16867 Filed 7–5–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0153; Docket 2011–0079; Sequence 12]

Federal Acquisition Regulation; Submission for OMB Review; OMB Circular A–119

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

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning OMB Circular A–119.

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 August 5, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0153, OMB Circular A–119, by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0153, OMB Circular A–119'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0153, OMB Circular A–119''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0153, OMB Circular A–119'' 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 9000–0153, OMB Circular A–119.

Instructions: Please submit comments only and cite Information Collection 9000–0153, OMB Circular A–119, 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. Anthony Robinson, Procurement Analyst, Contract Policy Branch, GSA (202) 501–2658 or e-mail *anthony.robinson@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

On February 19, 1998, a revised OMB Circular A–119, ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,'' was published in the **Federal Register** at 63 FR 8545, February 19, 1998. FAR Subparts 11.1 and 11.2 were revised and a solicitation provision was added at 52.211–7, Alternatives to Government-Unique Standards, to implement the requirements of the revised OMB circular. If an alternative standard is proposed, the offeror must furnish data and/or information regarding the alternative in sufficient detail for the Government to determine if it meets the Government's requirements.

B. Annual Reporting Burden

Respondents: 100.
Responses Per Respondent: 1.
Total Responses: 100.
Hours Per Response: 1.
Total Burden Hours: 100.
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. 9000–0153, OMB Circular A–119, in all correspondence.

Dated: June 27, 2011.

Millisa Gary,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 2011–16832 Filed 7–5–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Regional Partnership Grant (RPG) Program Data Collection.

OMB No.: 0970–0353.

Description

On September 30, 2007, the Administration for Children and Families (ACF) Children's Bureau awarded multi-year grants to 53 regional partnerships grantees (RPGs) to improve the safety, permanency and well-being of children affected by methamphetamine or other substance abuse who have been removed or are at risk of removal from their home. The Child and Family Services Improvement Act of 2006, the authorizing legislation for the RPG program, required that a set of performance indicators be established to periodically assess the grantees' outcomes. The legislation mandated that these performance indicators be developed through a consultative process involving ACF, the Substance Abuse and Mental Health Services Administration (SAMHSA), and representatives of the State or Tribal agencies who are members of the regional partnerships. The legislation also requires the Secretary of the Department of Health and Human services to submit annually to Congress a report that includes the performance indicators established under this grant program.

The final set of RPG performance indicators was approved by ACF and disseminated to the funded grantees in January 2008. It includes a total of 23 indicators across four outcome domains: Child/youth (9 indicators), adult (7 indicators), family/relationship (5 indicators), and regional partnership/service capacity (2 indicators). It also includes a core set of child and adult demographic elements that will provide important context needed to properly analyze, explain and understand the outcomes. No other national data collection measures these critical child, adult, family, and RPG outcomes specifically for these children and

families. The data also will have significant implications for policy and program development for child well-being programs nationwide.

The purpose of this request is to obtain OMB approval for an extension of the original three year request which was approved on March 31, 2009. Forty-three of the original 53 grantees were awarded for a five-year grant period, thus necessitating an extension of the original request in order to continue data collection for the remainder of the grant period. The first submission of RPG grantee data to the RPG data collection system ocurred in December, 2008, and every six months thereafter. Data collection will be conducted for the fifth year of the grant period, ending September 30, 2012, with data submission by January 2013. Data collection may be extended for one year until January 2014 should grantees request and be granted no-cost extensions.

To minimize grantee data collection and reporting burden, many of the data elements are already being collected by counties and States in order to report Federally-mandated data for the Adoption and Foster Care Analysis and Reporting System (AFCARS), the Treatment Episode Data Set (TEDS) and the National Outcome Measures (NOMs); in addition, all States voluntarily submit data for the Federal National Child Abuse and Neglect Data System (NCANDS). Therefore, most child welfare data elements included in the RPG performance measures can be found in a State's automated case management system, which is often a Federally-funded Statewide Automated Child Welfare Information System (SACWIS). TEDS admission and discharge data are collected by State substance abuse agencies according to their own information systems for monitoring substance abuse treatment admissions and transmitted monthly or quarterly to the SAMHSA contractor.

As a result of prior Federal government reporting requirements, States are already collecting several data elements needed by the RPGs. The RPG lead agency or their state or local partners are able to download information from these existing State child welfare and substance abuse treatment data systems to obtain data to monitor their RPG program outcomes, thereby reducing the amount of primary data collection needed.

Respondents: RPG Grantees.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State, local, and Tribal Government	26	2	175.50	9,126
Private Sector	17	2	175.50	5,967
Estimated Total Annual Burden Hours				15,093

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* ACF Reports Clearance Officer. *E-mail address: infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–16789 Filed 7–5–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for a Nonvoting Industry Representative and Request for Nominations for a Nonvoting Industry Representative on an FDA Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of a nonvoting industry representative to serve on its Cellular, Tissue, and Gene Therapies Advisory Committee notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to serve its Cellular, Tissue, and Gene Therapies Advisory Committee. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nomination will be accepted for current vacancies effective with this notice.

DATES: Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating that interest to FDA by August 5, 2011, for vacancies listed in the notice. Concurrently, nomination material for prospective candidates should be sent to FDA by August 5, 2011.

ADDRESSES: All letters of interest and nominations should be submitted in writing to Gail Dapolito (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Gail Dapolito, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–

1448, 301–827–1289; *Fax:* 301–827–0294; *E-mail: gail.dapolito@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Cellular, Tissue, and Gene Therapies Advisory Committee

The Agency requests nominations for a nonvoting industry representative on the Cellular, Tissue, and Gene Therapies Advisory Committee. The Cellular, Tissue, and Gene Therapies Advisory Committee advises the Commissioner of Food and Drugs (the Commissioner) or designee in discharging responsibilities as they relate to the regulation of cellular and gene therapy products.

This committee has 13 voting members. Members are asked to provide their expert scientific and technical advice to FDA to help make sound decisions on the safety, effectiveness, appropriate use, and labeling of cellular and gene therapy products.

II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the Cellular, Tissue, and Gene Therapies Advisory Committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

III. Application Procedure

Individuals may self nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. A current curriculum vitae and the name of the committee of interest should be sent to the FDA contact person (see **FOR FURTHER INFORMATION CONTACT**) within the 30 days (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA has a special interest in ensuring that women, minority groups, individuals with physical disabilities, and small businesses are adequately represented on its advisory committees, and therefore, encourages nominations for appropriately qualified candidates from these groups. Specifically, in this document, nominations for nonvoting representatives of industry interests are encouraged from the cellular and gene therapy products biotech industry.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to the advisory committees.

Dated: June 29, 2011.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2011–16828 Filed 7–5–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Cardiovascular and Renal Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Cardiovascular and Renal Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 8, 2011, from 8 a.m. to 5 p.m.

Location: The Marriott Inn and Conference Center, University of Maryland University College (UMUC), The Ballroom, 3501 University Blvd. East, Adelphi, MD 20783–7998. The conference center's telephone number is 301–985–7300.

Contact Person: Kristina Toliver, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, e-mail: *CRDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On September 8, 2011, the committee will discuss new drug application (NDA) 202439, rivaroxaban tablets, submitted by Johnson & Johnson Pharmaceutical Research and Development, L.L.C., on behalf of Ortho-McNeil-Janssen-Pharmaceuticals, for the prevention of stroke and systemic embolism (blood clots other than in the head) in patients with nonvalvular atrial fibrillation (abnormally rapid contractions of the atria, the upper chambers of the heart).

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 24, 2011. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 16, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may

conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 17, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kristina Toliver at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 30, 2011.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2011–16862 Filed 7–5–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Blood Products Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Blood Products Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on August 2, 2011, from 1:30 p.m. to 5 p.m. and on August 3, 2011, from 8 a.m. to 2:30 p.m.

Location: Hilton Hotel, Washington, DC North Gaithersburg, 620 Perry Pkwy., Gaithersburg, MD 20877, 301–977–8900. For those unable to attend in person, the meeting will also be Web cast. The Web cast will be available at the following links.

Blood Products Advisory Committee Day 1: *http://fda.yorkcast.com/webcast/Viewer/?peid=b6ce0d080a594ddf9d362a0b1815b4491d.*

Blood Products Advisory Committee Day 2: *http://fda.yorkcast.com/webcast/Viewer/?peid=68d4630cf50847c5aaec06b1720f205f1d.*

Contact Person: Bryan Emery or Rosanna Harvey, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On August 2, 2011, the committee will discuss a study on the incidence of *Trypanosoma cruzi* infection in blood donors and its implications for selective testing of blood donors. On August 3, 2011, the committee will discuss measures to preserve the blood supply during a severe emergency. In the afternoon, the committee will hear the following updates: Summary of the June 7–8, 2011, Health and Human Services Advisory Committee on Blood Safety and Availability meeting; summary of the May 17–18, 2011, public workshop on risk mitigation strategies to address procoagulant activity in immune globulin products; and summary of the August 1–2, 2011, Transmissible Spongiform Encephalopathies Advisory Committee meeting.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before July 26, 2011. Oral presentations from the public will be scheduled on August 2, 2011, between approximately 3:30 and 4 p.m. and on August 3, 2011, between approximately 11 and 11:30 a.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before July 18, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by July 19, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Bryan Emery or Rosanna Harvey at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 30, 2011.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2011–16859 Filed 7–5–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye 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 the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Eye Institute Special Emphasis Panel, NEI Research Program Grant Applications II.

Date: July 6, 2011.

Time: 1:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NEI, 5635 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Anne E. Schaffner, PhD, Scientific Review Officer, Division of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *aes@nei.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Eye Institute Special Emphasis Panel, NEI Mentored Training Grant Applications.

Date: July 18–19, 2011.

Time: 9 a.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NEI, 5635 Fishers Lane, Rockville, MD 20892, (Virtual Meeting).

Contact Person: Anne E. Schaffner, PhD, Scientific Review Officer, Division of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *aes@nei.nih.gov.*

Name of Committee: National Eye Institute Special Emphasis Panel, NEI Translational Grant Review.

Date: July 25, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Chevy Chase II, Washington, DC 20015.

Contact Person: Daniel R. Kenshalo, PhD, Scientific Review Officer, Division of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *kenshalod@nei.nih.gov.*

Name of Committee: National Eye Institute Special Emphasis Panel, NEI Research Project Grant Applications.

Date: August 2–3, 2011.

Time: 9 a.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NEI, 5635 Fishers Lane, Rockville, MD 20892, (Virtual Meeting).

Contact Person: Anne E. Schaffner, PhD, Scientific Review Officer, Division of Extramural Research, National Eye Institute, National Institutes of Health, 5635 Fishers Lane, Suite 1300, MSC 9300, 301–451–2020, *aes@nei.nih.gov.*

Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, (HHS)

Dated: June 29, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–16852 Filed 7–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: September 12–13, 2011.

Closed: September 12, 2011, 3:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 1, 1 Center Drive, WIlson Hall, Bethesda, MD 20892.

Open: September 13, 2011, 9 a.m. to 1 p.m.

Agenda: Report from the Insitute Director.

Place: National Institutes of Health, Building 1, 1 Center Drive, Wilson Hall, Bethesda, MD 20892.

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Institute on Alcohol Abuse & Alcoholism, National Institutes of Health, 5635 Fishers Lane, RM 2085, Rockville, MD 20852, 301–443–9737, *bautista@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://www.silk.nih.gov/silk/niaaa1/about/roster.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: June 29, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–16858 Filed 7–5–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0052]

DHS Data Privacy and Integrity Advisory Committee

AGENCY: Privacy Office, DHS.

ACTION: Committee Management; Request for Applicants for Appointment to the DHS Data Privacy and Integrity Advisory Committee.

SUMMARY: The Department of Homeland Security Privacy Office is seeking applicants for appointment to the DHS Data Privacy and Integrity Advisory Committee.

DATES: Applications for membership must reach the Department of Homeland Security Privacy Office at the address below on or before August 15, 2011.

ADDRESSES: If you wish to apply for membership, please submit the documents described below to Martha K. Landesberg, Executive Director, DHS

Data Privacy and Integrity Advisory Committee, by either of the following methods:

- *E-mail: PrivacyCommittee@dhs.gov.* Include the Docket Number (DHS–2011–0052) in the subject line of the message.
- *Fax:* (703) 235–0442.

FOR FURTHER INFORMATION CONTACT: Martha K. Landesberg, Executive Director, DHS Data Privacy and Integrity Advisory Committee, Department of Homeland Security, Washington, DC 20528, by telephone (703) 235–0780, by fax (703) 235–0442, or by e-mail to *PrivacyCommittee@dhs.gov.*

SUPPLEMENTARY INFORMATION: The DHS Data Privacy and Integrity Advisory Committee is an advisory committee established in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C.A. App. 2. The Committee was established by the Secretary of Homeland Security under the authority of 6 U.S.C. 451 and provides advice at the request of the Secretary and the DHS Chief Privacy Officer on programmatic, policy, operational, administrative, and technological issues within DHS that relate to personally identifiable information (PII), as well as data integrity and other privacy-related matters. The duties of the Committee are solely advisory in nature. In developing its advice and recommendations, the Committee may, consistent with the requirements of the FACA, conduct studies, inquiries, workshops and seminars in consultation with individuals and groups in the privacy sector and/or other governmental entities. The Committee typically meets four times in a calendar year.

Committee Membership: The DHS Privacy Office is seeking applicants for terms to expire on January 31, 2014. Members are appointed by and serve at the pleasure of the Secretary of the Department of Homeland Security, and must be specially qualified to serve on the Committee by virtue of their education, training, and experience in the fields of data protection, privacy, and/or emerging technologies. Pursuant to the FACA, the Committee's Charter requires that Committee membership be balanced to include:

1. Individuals who are currently working in the areas of higher education or research in public (except Federal) or not-for-profit institutions;

2. Individuals currently working in non-governmental industry or commercial interests, including at least one individual who is familiar with the data concerns of small to medium enterprises; and

3. Other individuals, as determined appropriate by the Secretary.

Committee members serve as Special Government Employees (SGE) as defined in section 202(a) of title 18 United States Code. As such, they are subject to Federal conflict of interest laws and government-wide standards of conduct regulations. Members must annually file Confidential Financial Disclosure Reports (OGE Form 450) for review and approval by Department ethics officials. DHS may not release these reports or the information in them to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Committee members are also required to have an appropriate security clearance as a condition of their appointment. Members are not compensated for their service on the Committee; however, while attending meetings or otherwise engaged in Committee business, members may receive travel expenses and per diem in accordance with Federal regulations.

Committee History and Activities: All individuals interested in applying for Committee membership should review the history of the Committee's work. The Committee's charter and current membership, transcripts of Committee meetings, and all of the Committee's reports and recommendations to the Department are posted on the Committee's Web page on the DHS Privacy Office Web site (*http://www.dhs.gov/privacy*).

Applying for Membership

If you are interested in applying for membership on the DHS Data Privacy and Integrity Advisory Committee, please submit the following documents to Martha K. Landesberg, Executive Director, at the address provided below by August 15, 2011:

1. A current resume; and

2. A letter that explains your qualifications for service on the Committee and describes in detail how your experience is relevant to the Committee's work.

Your resume and your letter will be weighed equally in the application review process. Please note that by Administration policy individuals who are registered as Federal lobbyists are not eligible to serve on Federal advisory committees. If you are registered as a Federal lobbyist and you have actively lobbied at any time since August 15, 2009, you are not eligible to apply for membership on the DHS Data Integrity and Privacy Advisory Committee. Applicants selected for membership will be required to certify, pursuant to 28 U.S.C. 1746, that they are not registered as Federal lobbyists. Please send your documents to Martha K. Landesberg, Executive Director, DHS Data Privacy and Integrity Advisory Committee, by *either* of the following methods:

- *E-mail: PrivacyCommittee@dhs.gov.*
- *Fax:* (703) 235–0442.

Privacy Act Statement: DHS's Use of Your Information

Authority: DHS requests that you voluntarily submit this information under its following authorities: the Federal Records Act, 44 U.S.C. 3101; the FACA, 5 U.S.C.A. App. 2; and the Privacy Act of 1974, 5 U.S.C. 552a.

Principal Purposes: When you apply for appointment to the DHS Data Privacy and Integrity Advisory Committee, DHS collects your name, contact information, and any other personal information that you submit in conjunction with your application. We will use this information to evaluate your candidacy for Committee membership. If you are chosen to serve as a Committee member, your name will appear in publicly-available Committee documents, membership lists, and Committee reports.

Routine Uses and Sharing: In general, DHS will not use the information you provide for any purpose other than the Principal Purposes, and will not share this information within or outside the agency. In certain circumstances, DHS may share this information on a case-by-case basis as required by law or as necessary for a specific purpose, as described in the DHS/ALL–009 Department of Homeland Security Advisory Committees System of Records Notice (October 3, 2008, 73 FR 63181).

Effects of Not Providing Information: You may choose not to provide the requested information or to provide only some of the information DHS requests. If you choose not to provide some or all of the requested information, DHS may not be able to consider your application for appointment to the Data Privacy and Integrity Advisory Committee.

Accessing and Correcting Information: If you are unable to access or correct this information by using the method that you originally used to submit it, you may direct your request in writing to the DHS Chief FOIA Officer at *foia@dhs.gov.* Additional instructions are available at *http://www.dhs.gov/foia* and in the DHS/ALL–002 Mailing and Other Lists System of Records referenced above.

Dated: June 29, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–16804 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–9L–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0061]

Privacy Act of 1974; Department of Homeland Security/ALL–030 Use of the Terrorist Screening Database System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 the Department of Homeland Security proposes to establish a new Department-wide system of records notice entitled, ''Department of Homeland Security/ALL–030 Use of the Terrorist Screening Database System of Records.'' The Department of Homeland Security is maintaining a mirror copy of the Department of Justice/Federal Bureau of Investigation–019 Terrorist Screening Records System of Records, August 22, 2007, in order to automate and simplify the current method for transmitting the Terrorist Screening Database to the Department of Homeland Security and its components. Additionally, the Department of Homeland Security is issuing a Notice of Proposed Rulemaking concurrent with this system of records elsewhere in the **Federal Register**. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before August 5, 2011. This new system will be effective August 5, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0061 by one of the following methods:

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

FOR FURTHER INFORMATION CONTACT: For general questions and privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) proposes to establish a new system of records titled, ''DHS/ALL–030 Use of the Terrorist Screening Database (TSDB) System of Records.'' DHS is maintaining a mirror copy of the Department of Justice (DOJ)/Federal Bureau of Investigation (FBI)–019 Terrorist Screening Records System of Records (August 22, 2007, 72 FR 47073) in order to automate and simplify the current method for transmitting the TSDB to DHS and its components.

Homeland Security Presidential Directive 6 (HSPD–6), issued in September 2003, called for the establishment and use of a single consolidated watchlist to improve the identification, screening, and tracking of known or suspected terrorists and their supporters. The FBI/TSC maintains and distributes the TSDB as the U.S. government's consolidated terrorist watchlist. DHS and the FBI/TSC, working together, have developed the DHS Watchlist Service (WLS) in order to automate and simplify the current method for transmitting TSDB records from the FBI/TSC to DHS and its components.

The WLS allows the FBI/TSC and DHS to move away from a manual and cumbersome process of data transmission and management to an automated and centralized process. The WLS will replace multiple data feeds from the FBI/TSC to DHS and its components, as documented by information sharing agreements, with a single feed from the FBI/TSC to DHS and its components. The WLS is a system to system secure connection with no direct user interface.

DHS and its components are authorized to access TSDB records via the WLS pursuant to the terms of information sharing agreements with FBI/TSC. DHS is publishing this SORN and has published privacy impact assessments to provide additional transparency into how DHS has implemented WLS. DHS will review and update this SORN no less then biennially as new DHS systems come online with the WLS and are approved consistent with the terms of agreements with FBI/TSC. There are five DHS systems that currently receive TSDB data directly from the FBI/TSC and will use the WLS. These systems have existing SORNs that cover the use of the TSDB:

(1) Transportation Security Administration (TSA), Office of Transportation Threat Assessment and Credentialing: DHS/TSA–002 Transportation Security Threat Assessment System (May 19, 2010, 75 FR 28046);

(2) TSA, Secure Flight Program: DHS/TSA–019 Secure Flight Records System (November 9, 2007, 72 FR 63711);

(3) U.S. Customs and Border Protection (CBP), Passenger Systems Program Office for inclusion in TECS: DHS/CBP–011 TECS System (December 19, 2008 73 FR 77778);

(4) U.S. Visitor and Immigrant Status Indicator Technology (US–VISIT) Program for inclusion into the DHS Enterprise Biometrics Service (IDENT): DHS/USVISIT–0012 DHS Automated Biometric Identification System (June 5, 2007, 72 FR 31080); and

In addition, two DHS components will receive TSDB data via the WLS in the form of a computer readable extract. The components' use of the TSDB data is covered by existing SORNs:

(1) Office of Intelligence and Analysis (I&A): DHS/IA–001 Enterprise Records System, (May 15, 2008 73 FR 28128), and

(2) U.S. Immigration and Customs Enforcement (ICE): DHS/ICE–009 External Investigations, (January 5, 2010 75 FR 404).

Information stored in the WLS will be shared back with the FBI/TSC in order to ensure that DHS and the FBI/TSC can reconcile any differences in the database and ensure DHS has the most up-to-date and accurate version of TSDB records. All other sharing will be conducted pursuant to the programmatic system of records notices and privacy impact assessments discussed in this SORN.

DHS is planning future enhancements to the WLS that will provide for a central mechanism to receive information from DHS components when they encounter a potential match to the TSDB and send this information to the FBI/TSC. DHS will update this SORN to reflect such enhancements to the WLS, as part of its biennial reviews of this SORN once that capability is implemented.

DHS is publishing this SORN to cover the Department's use of the TSDB in

order to provide greater transparency to the process.

Concurrent with the publication of this SORN, DHS is issuing a Notice of Proposed Rulemaking to exempt this system from specific sections of the Privacy Act.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses to their records are put, and to assist individuals to more easily find such files within the agency. Below is the description of the DHS/ALL–030 Use of the Terrorist Screening Database system of records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records DHS/ALL–030

SYSTEM NAME:

Department of Homeland Security (DHS)/ALL–030 Use of the Terrorist Screening Database (TSDB) System of Records

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at DHS and Component Headquarters in Washington, DC and field offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include:

- Individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism (''known or suspected terrorists'').

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- Identifying information, such as name, date of birth, place of birth, biometrics, photographs, passport and/or drivers license information, and other available identifying particulars used to compare the identity of an individual being screened with a known or suspected terrorist, including audit records containing this information;
- For known or suspected terrorists, in addition to the categories of records listed above, references to and/or information from other government law enforcement and intelligence databases, or other relevant databases that may contain terrorism information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

- Homeland Security Act of 2002, Public Law 107–296;
- Section 5 U.S.C. 301;
- The Tariff Act of 1930, as amended;
- The Immigration and Nationality Act; and
- 49 U.S.C. 114, 5103a, 40113, ch. 49 and 46105.

PURPOSE(S):

DHS and its components collect, use, maintain, and disseminate information in the DHS Watchlist Service (WLS) to facilitate DHS counterterrorism, law enforcement, border security, and inspection activities. TSDB data, which includes personally identifiable information (PII), is necessary for DHS to effectively and efficiently assess the risk and/or threat posed by a person for the conduct of its mission.

The Federal Bureau of Investigation (FBI)/Terrorist Screening Center (TSC) is providing a near real time, synchronized version of the TSDB in order to improve the timeliness and governance of watchlist data exchanged between the FBI/TSC and DHS and its component systems that currently use watchlist data.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ)/FBI/TSC in order to receive confirmations that the information has been appropriately transferred and any other information related to the reconciliation process so that DHS is able to maintain a mirror copy of the TSDB.

This system will share information internal to the Department pursuant to (b)(1) of the Privacy Act. Besides the routine use described above, external sharing shall occur at the programmatic level pursuant to following published System of Records Notices:

(1) TSA, Office of Transportation Threat Assessment and Credentialing: DHS/TSA–002 Transportation Security Threat Assessment System (May 19, 2010, 75 FR 28046);

(2) TSA, Secure Flight Program: DHS/TSA–019 Secure Flight Records System (November 9, 2007, 72 FR 63711);

(3) CBP, Passenger Systems Program Office for inclusion in TECS: DHS/CBP–011 TECS System (December 19, 2008 73 FR 77778);

(4) U.S. VISIT program for inclusion into the DHS Enterprise Biometrics Service (IDENT): DHS/USVISIT–0012 DHS Automated Biometric Identification System (June 5, 2007, 72 FR 31080);

(5) Office of Intelligence and Analysis (I&A): DHS/IA–001 Enterprise Records System, (May 15, 2008 73 FR 28128), and

(6) U.S. Immigration and Customs Enforcement (ICE): DHS/ICE–009 External Investigations, (January 5, 2010 75 FR 404).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD–ROM.

RETRIEVABILITY:

Records may be retrieved by name or personal identifier.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

The WLS will maintain a near real time mirror of the TSDB, and will not retain historical copies of the TSDB. The WLS will be synchronized with the TSDB. When the FBI/TSC adds, modifies, or deletes data from the TSDB, the WLS will duplicate these functions almost simultaneously, and that information will then be passed to DHS and its component systems. The DHS component that is screening individuals will maintain, separate from the WLS, a record of a match or possible match with the TSDB and DHS will retain this information in accordance with the DHS component specific SORNs identified in this notice.

SYSTEM MANAGER AND ADDRESS:

Executive Director, Passenger Systems Program Office, Office of Information Technology, Customs and Border Protection, 7400 Fullerton Rd, Springfield, VA.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, DHS and its components will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Headquarters or component FOIA Officer, whose contact information can be found at *http://www.dhs.gov/foia* under ''contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive, SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR Part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury, as a substitute for notarization. In addition you should provide the following:

- An explanation of why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created;
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records; and
- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

In addition, if individuals are uncertain what agency handles the information, they may seek redress through the DHS Traveler Inquiry Redress Program (TRIP) (January 18, 2007, 72 FR 2294). Individuals who believe they have been improperly denied entry, refused boarding for transportation, or identified for additional screening by CBP may submit a redress request through TRIP.

TRIP is a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at transportation hubs such as airports and train stations or crossing U.S. borders. Redress requests should be sent to: DHS Traveler Redress Inquiry Program, 601 South 12th Street, TSA–901, Arlington, VA 20598 or online at *http://www.dhs.gov/trip* and at *http://www.dhs.gov*.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records are received from the DOJ/FBI–019 Terrorist Screening Records System of Records (August 22, 2007, 72 FR 47073)

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (e)(12); (f); (g)(1); and (h) pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–16807 Filed 7–5–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–0539]

National Offshore Safety Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the National Offshore Safety Advisory Committee. This Committee advises the Secretary of Department of Homeland Security on matters and actions concerning activities directly involved with or in support of the exploration of offshore mineral and energy resources insofar as they relate to matters within Coast Guard jurisdiction.

DATES: Applicants should submit a cover letter and resume in time to reach the Alternate Designated Federal Officer (ADFO) on or before August 22, 2011.

ADDRESSES: Applicants should send their cover letter and resume to the following address: Commandant (CG–5222), Attn: Vessel and Facility Operations Standards, U.S. Coast Guard, 2100 Second Street, SW., STOP 7126, Washington, DC 20593–7126; or by calling (202) 372–1386; or by faxing (202) 372–1926; or by e-mailing to *Kevin.Y.Pekarek2@uscg.mil.*

This notice, is available in our online docket, USCG–2011–0539, at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kevin Y. Pekarek, ADFO of National Offshore Safety Advisory Committee (NOSAC); telephone (202) 372–1386; fax (202) 372–1926; or e-mail at *Kevin.Y.Pekarek2@uscg.mil.*

SUPPLEMENTARY INFORMATION: The National Offshore Safety Advisory Committee (NOSAC) is a Federal advisory committee under 5 U.S.C. App. (Pub. L. 92–463). It was established under authority of Title 6 U.S.C. section 451 and advises the Secretary of Homeland Security on matters affecting the offshore industry.

The Committee is expected to meet approximately twice per year as called for by its charter and normally meets in Houston, Texas or New Orleans, Louisiana. It may also meet for extraordinary purposes. NOSAC or its subcommittees may conduct telephonic meetings at other times throughout the year when necessary for specific tasking.

We will consider applications for five positions that will become vacant on January 31, 2012.

(a) One member representing enterprises specializing in the support, by offshore supply vessels or other vessels, of offshore mineral and oil operations including geophysical services;

(b) One member representing construction of offshore exploration and recovery facilities;

(c) One member representing employees of companies engaged in offshore operations, who should have recent practical experience on vessels or offshore units involved in the offshore mineral and energy industry;

(d) One member representing enterprises specializing in offshore drilling; and,

(e) One member representing companies engaged in production of petroleum.

To be eligible, applicants for all available positions should have expertise and/or knowledge and experience regarding the technology, equipment and techniques that are used or are being developed for use in the exploration for and the recovery of offshore mineral resources.

Registered lobbyists are not eligible to serve on federal advisory committees. Registered lobbyists are lobbyists required to comply with provisions contained in the Lobbying Disclosure Act of 1995 (Pub. L. 110–81, as amended). Each NOSAC Committee member serves a term of office of up to three years. Members may be considered to serve consecutive terms. All members serve at their own expense and receive no salary or reimbursement of travel expenses, or other compensation from the Federal Government.

In support of the policy of the Coast Guard on gender and ethnic nondiscrimination, we encourage qualified men and women of all racial and ethnic groups to apply. The Coast Guard values diversity; all different characteristics and attributes of persons that enhance the mission of the Coast Guard.

If you are interested in applying to become a member of the Committee, send your cover letter and resume to Kevin Y. Pekarek, ADFO of NOSAC at Commandant (CG–5222)/NOSAC, U.S. Coast Guard, 2100 Second Street, SW., STOP 7126, Washington, DC 20593–7126. Send your cover letter and resume in time for it to be received by the ADFO on or before August 22, 2011.

To visit our online docket, go to *http://www.regulations.gov,* enter the docket number for this notice (USCG–2011–0539) in the Search box, and click ''Go.'' Please do not post your resume on this site.

Dated: June 30, 2011.

F. J. Sturm,

Acting Director of Commercial Regulations and Standards.

[FR Doc. 2011–16913 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–0012]

Self-Defense of Vessels of the United States

AGENCY: Coast Guard, DHS.

ACTION: Notice of policy.

SUMMARY: The Coast Guard has completed a review of policy and public comments received regarding standard rules for the use of force for self-defense of vessels of the United States as described in the Coast Guard Authorization Act of 2010. It has determined that the existing guidance regarding the use of force provides an adequate framework for standard rules for the use of force for self-defense against piracy.

DATES: This notice is effective on July 6, 2011.

ADDRESSES: The policy letter and other documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0012 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, West Building Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://www.regulations.gov*.

This policy is also available on the U.S. Coast Guard's Homeport Web site at *http://homeport.uscg.mil* by clicking the International Port Security Program tab > Port Security Advisory > Port Security Advisory (03–09).

FOR FURTHER INFORMATION CONTACT: If you have questions concerning the policy, please call LCDR John Reardon, Office of Maritime and International Law, United States Coast Guard; telephone 202–372–1129, e-mail *John.C.Reardon@uscg.mil.* If you have questions on viewing the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

The Coast Guard is publishing this notice to affirm that guidance published by the Coast Guard, in Port Security Advisory (PSA) 03–09, provides adequate guidance on conduct relating to section 912 of the Coast Guard Authorization Act of 2010 (CGAA). Section 912 of the CGAA states that an owner, operator, time charterer, master, mariner, or individual who uses force or authorizes the use of force to defend a vessel of the United States against an act of piracy shall not be liable for monetary damages for any injury or death caused by such force to any person engaging in an act of piracy if such force was in accordance with standard rules for the use of force in self-defense of vessels prescribed by the Secretary.

In accordance with Section 912 of the CGAA, the Coast Guard requested input from the public and representatives of industry and labor in order to determine if the current authorization in 33 U.S.C. 383, Resistance of Pirates by Merchant Vessels, and Coast Guard guidance in PSA 3–09 provides an adequate framework for standard rules for the use of force for self-defense of vessels of the United States. 76 FR 4706. The Coast Guard received eleven comments, which are available in the public docket found on *http://www.regulations.gov.* After review of the comments received, the Coast Guard has determined the policy regarding standard rules for the

use of force for self-defense or defense of others is sufficient.

The majority of the comments were supportive of the overall current guidance and stated the well-established rights of self-defense of seafarers in 33 U.S.C. 383, accompanied by the advisory guidelines of PSA 3–09, are an adequate framework. One comment stated that PSA 3–09 constitutes sufficient information to be considered standard rules and requires no alteration. Another comment stated that PSA 3–09 adequately describes the masters' authority and discretion in the use of self-defense and did not believe more specific guidance was necessary. The comment further stated that 33 U.S.C. 383 and the Coast Guard Authorization Act of 2010 section 912 provided sufficient immunity for persons defending vessels.

Of the eleven comments received, several were outside the scope of the guidance, but were constructive suggestions on potential tactics and operations. These comments are helpful and will be considered during routine reviews and updates to other advisories and guidance. For example, three comments urged further deployment of heavier weapons and suggested a legal exemption for merchant vessels to carry machine guns and rocket propelled grenades and for the use of military weapons not permitted under U.S. law. Another urged that restrictions on import/export of weapons be lifted and the international community be pressured to allow deployment of weapons. One commenter suggested that the Coast Guard provide additional guidance on the use of non-deadly force options, including pepper spray and other chemical repellants. Additionally, one comment encouraged the use of Special Forces to respond to hostage situations. One comment noted that armed security teams onboard its vessels had successfully deterred attacks. Other comments noted that the safe room concept (''citadel'') should be reviewed. The Coast Guard continues to examine these and other issues in consultation with interagency and industry partners to ensure the continued development of guidance in responding to piracy.

Given the existing guidance and the public support for that guidance as revealed in the comments, the Coast Guard has determined that the current authorization in 33 U.S.C. 383, Resistance of Pirates by Merchant Vessels, and the guidance published by the Coast Guard in Port Security Advisory 3–09 provide an adequate framework for standard rules for the use of force for self-defense. We have reproduced the text of Port Security Advisory 03–09 below.

Port Security Advisory (03–09)

Subject: Guidance on Self-Defense or Defense of Others by U.S. Flagged Commercial Vessels Operating in High Risk Waters

1. Purpose

This document is intended to provide guidance to U.S. flagged commercial vessels and embarked personnel, including contract security personnel, not entitled to sovereign immunity and operating in High Risk Waters (HRW),[1] for employment of force in self-defense or defense of others, as well as defense of the vessel. This guidance does not apply to U.S. flagged vessels entitled to sovereign immunity. It does not apply to U.S. Government personnel, civilian or military, embarked on non-sovereign-immune U.S. flagged commercial vessels to provide vessel security. This document restates existing law in this area. It does not establish new standards or duties with respect to the right of self-defense or defense of others. The examples provided herein are included merely to illustrate how the outlined principles could apply to the issue of piracy. Actual situations will vary, based on the specific circumstances of a ship's defensive measures and capabilities at hand, and the facts of the situation confronted. This document does not prescribe rules of engagement. Rather, it provides guidance intended to aid companies in the development of their vessel security plan submissions for operating within HRW. This guidance should not be read to mandate specific actions at particular points of time. Nothing in this document prevents an individual from acting in self-defense or defense of others. In addition to the right of self-defense and defense of others, 33 U.S.C. 383 provides authority for the master and crew to respond to a piratical attack, authorizing them to ''oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel * * *''

2. Definitions

The following definitions apply for the purpose of this guidance:

a. *Self-defense or defense of others* means the act of thwarting an attack upon oneself, another person, or both by using force, up to and including deadly force.

b. *Defense of the vessel* means the act of using force to prevent damage to or theft of a vessel or its property. It is a concept separate from defending individuals embarked aboard the vessel. That is intended to be covered within the definition self-defense or defense of others.

c. *Imminent* means may occur at any moment, ready to take place, impending, threateningly or menacingly near or at hand.

d. *Imminent danger* means an attacker poses an imminent threat of great bodily harm or death to oneself or others.

Examples of imminent danger include, but are not limited to, aiming or firing weapons at a U.S. flagged vessel with individuals embarked, or an attempted armed, non-consensual boarding, without legal authority, of a U.S. flagged vessel by another vessel (other than U.S. or foreign warships, law enforcement vessels, or other vessels clearly marked as being on non-commercial government service). It might also include the act of brandishing weapons directed at crewmembers or security personnel, where there is a reasonable belief that the attacker(s) also has the means and opportunity to inflict great bodily harm or death on the individual or others in the vicinity. The determination of imminent danger is fact dependent, and the law may be broader than the paradigm outlined above. Although the law may allow for other considerations, or use slightly differing terminology based on an individual's particular circumstances, the Coast Guard uses the following as a helpful training tool for its members to explain the concept: Imminent danger would exist when an attacker manifests apparent intent to cause great bodily harm or death to oneself or others, as demonstrated by the following elements, each of which is present at the same time:

(1) *Means.* The attacker has the apparent ability, either physically (relative size, strength, expertise, or other attributes) or through the use of an object(s), to inflict great bodily harm or death to oneself or others. Physical means can include in some circumstances the use of hands or feet to choke or beat an individual. Objects can include weapons *e.g.,* firearms, explosives, knives, etc.), as well as other devices under the control of the attacker;

(2) *Opportunity.* The combination of circumstances by which an attacker

[1] This guidance anticipates that contracted security personnel may be embarked on U.S. flagged merchant ships operating in HRW, but may also or alternatively be embarked on U.S. flagged vessels (not entitled to sovereign immunity) providing a security escort for a U.S. flagged merchant ship operating in HRW. *See* USCG Minimum Guidelines for Contracted Security Services in High Risk Waters for additional guidance relevant to contracted security personnel.

apparently can cause great bodily harm or death to oneself or others (*e.g.,* access to a weapon that is within range to be used against oneself or others); and

(3) *Act.* The attacker makes an overt movement which induces one to reasonably believe that he is manifesting a threat to cause great bodily harm or death to oneself or others (*e.g.*, an attacker points or discharges a firearm or other weapon at crewmembers or security personnel, or employs or prepares to employ climbing gear for an armed, non-consensual boarding).

e. *Great bodily harm* means an injury to the body that results in unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. It is synonymous with ''serious bodily injury'', ''serious bodily harm'', ''serious physical injury'', or ''grievous bodily injury''.

f. *Force* means the affirmative application of techniques or actions, typically listed within the vessel security plan, directed against a specific vessel or person(s).

g. *Non-deadly force* means any force other than deadly force.

h. *Deadly force* means any force that is likely to cause great bodily harm or death.

i. *Warning shot* means a signal to a vessel to stop. The term does not include shots fired as a signal that the use of deadly force is imminent, a technique that should not be employed.

3. Guidance

a. Guiding Principles

Vessel masters retain control of and authority over their vessels, crewmembers, and embarked security personnel at all times. Any use of force employed in accordance with the guidance set forth herein is subject to the direction of the vessel master. Only that force reasonably necessary under the circumstances should be used. Nothing in the application of this guidance shall be construed as to necessarily require personnel to meet force with equal or lesser force.

b. Self-defense or Defense of Others

In the exercise of self-defense or defense of others, crew and security personnel may use all available means to apply that force reasonably necessary to defend themselves or others from harm, including the use of deadly force if required.

c. Use of Deadly Force

Subject to the above, deadly force may only be used in self-defense or defense of others, when an individual has the reasonable belief that the person or persons to which the deadly force would be directed poses an imminent danger of death or great bodily harm. The objective when using deadly force in self-defense or defense of others is defense of life. The use of deadly force in self-defense or defense of others may include the use of ordnance fired into a vessel, if necessary for self-defense or defense of others. Accordingly, when confronted with a person or vessel that poses an imminent danger of death or great bodily harm, personnel and vessels to which this guidance applies may use reasonable force, up to and including deadly force, in self-defense or defense of others.

d. Use of Non-Deadly Force

Subject to the above, non-deadly force may be used in the following circumstances:

(1) for self-defense or defense of others.

(2) for defense of the vessel.

(3) to prevent the theft or, intentional damage to, or destruction of property (including the U.S. flagged vessel) that the master, crew, or security personnel are authorized to protect.

Non-deadly force tactics could include maneuvers by the vessel, deployment of sonic blasts, use of fire hoses to flood a vessel threatening to attack, the use of disabling fire by properly trained personnel, or other non-lethal means employed by crewmembers or security personnel, directed at a vessel or persons threatening attack.

e. Retreat

Although not required under the law, retreat (*e.g.*, to a safe room) may be an appropriate alternative to the use of force and may be the most reasonable choice under the circumstances. This is particularly appropriate where disengaging temporarily from a confrontational situation may reduce tensions, mitigate risk, reduce a potential threat, and provide time for the arrival of additional assets or personnel, including military or law enforcement assets or personnel. U.S. flagged vessels and embarked persons, including crew and security personnel, are not required to retreat to avoid situations in which the use of force, including deadly force, is appropriate.

f. Defense of the Vessel and Other Property

Masters always retain the inherent right to use force in defense of the vessel. Masters must inform the crew and security personnel of their authority to employ force in defense of the vessel. Masters may restrain the authority of the crew and security personnel to employ force in defense of the vessel. If a master withholds from the crew or security personnel any use of force authority for defense of the vessel, the master must approve the withheld portion prior to its use in defense of the vessel. Defense of the vessel alone does not justify deadly force. Unless otherwise directed by a master, the crew and security personnel may use non deadly force in defense of the vessel. Masters should consider all the circumstances when employing force, and resort to deadly force only when there is imminent danger of death or great bodily harm.

g. Use of Signals

Signals, including firing of warning shots, may be employed, but are not required. Warning shots are not a use of force, and should not be used if they will endanger any persons or property. Moreover, warning shots should not be used as a signal that the use of deadly force is imminent.

4. The Conditions of Entry Applicable to Vessels Outlined in Port Security Advisory 1–09 Remain in Effect

Conclusion

As a result of this review, there will be no change to the policy. The Coast Guard will routinely review and update the policy as needed.

Dated: June 29, 2011.

Kevin S. Cook,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. 2011–16890 Filed 7–5–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: File Number OMB 22; Extension of an Existing Information Collection: Comment Request

ACTION: 30–Day Notice of Information Collection Under Review: OMB 22, National Interest Waivers; Supplemental Evidence to I–140 and I–485; OMB Control No. 1615–0063.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance

with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on April 28, 201 at 76 FR 23832, allowing for a 60-day public comment period. USCIS received comments from one commenter. A discussion of the comments and USCIS' responses are addressed in item 8 of the supporting statement that can be viewed at: *http://www.regulations.gov.*

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until August 5, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *USCISFRComment@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0063 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 collection.

(2) *Title of the Form/Collection:* National Interest Waivers; Supplemental Evidence to I–140 and I–485.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; File No. OMB–22. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. The supplemental documentation will be used by the U.S. Citizenship and Immigration Services to determine eligibility for national interest waiver requests and to finalize the request for adjustment to lawful permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 8,000 responses, two responses per respondent, at one (1) hour per response.

An estimate of the total public burden (in hours) associated with the collection: 16,000 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/*

We may also be contacted at: USCIS, Regulatory Products Division, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020, Telephone number 202–272–8377.

Dated: June 30, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–16871 Filed 7–5–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–694, Extension of a Currently Approved Information Collection; Comment Request

ACTION: *30-Day Notice of Information Collection Under Review:* Form I–694, Notice of Appeal of Decision Under Section 210 or 245A of the Immigration and Nationality Act; OMB Control No. 1615–0034.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on April 12, 2011, at 76 FR 20361, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until August 5, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: Sunday Aigbe, Chief, Regulatory Products Division, USCIS, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *USCISFRComment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0034 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 agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Notice of Appeal of Decision Under Section 210 or 254A of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–694; 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 information collection will be used by USCIS in considering appeals of denials or termination of temporary and permanent residence status by legalization applicants and special agricultural workers, under sections 210 and 245A of the Immigration and Nationality Act, and related applications for waiver of grounds of inadmissibility.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 50 responses at 30 minutes (0.5 hour) per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 45 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, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2210; Telephone 202–272–8377.

Dated: June 30, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–16868 Filed 7–5–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form N–644, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form N–644, Application for Posthumous Citizenship; OMB Control No. 1615–0059.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on April 19, 2011, at 76 FR 21913, allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until August 5, 2011. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: Sunday Aigbe, Chief, Regulatory Products Division, USCIS, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via e-mail at *USCISFRComment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.* When submitting comments by e-mail please make sure to add OMB Control Number 1615–0059 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:* Application for Posthumous Citizenship.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–644; 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 information collection will be used by USCIS to verify eligibility and review the request for awarding posthumous citizenship.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 50 responses at 1 hour and 50 minutes (1.833 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 92 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, Office of the Executive Secretariat, 20 Massachusetts Avenue, NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: June 30, 2011.

Sunday Aigbe,

Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2011–16866 Filed 7–5–11; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs And Border Protection

Agency Information Collection Activities: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions

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: 1651–0067.

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: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a 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 26750) on May 9, 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 August 5, 2011.

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 *oira_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: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions.

OMB Number: 1651–0067.

Form Number: None.

Abstract: U.S. Customs and Border Protection (CBP) is responsible for determining whether imported articles that are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 9801.00.10, 9802.00.20, 9802.00.25, 9802.00.40, 9802.00.50, and 9802.00.60 are entitled to duty-free or reduced duty treatment. In order to file under these HTSUS provisions, importers, or their agents, must have the declarations that are provided for in 19 CFR 10.1(a), 10.8(a), and 10.9(a) in their possession at the time of entry and submit them to CBP upon request. These declarations enable CBP to ascertain whether the statutory conditions and requirements of these HTSUS provisions have been satisfied. CBP proposes to add the declaration filed under HTSUS 9817.00.40 in accordance with 19 CFR 10.121 to this information collection.

Current Actions: CBP proposes to extend the expiration date of this information collection with a change to the burden hours resulting from updated estimates of the response time, and the addition of HTSUS 9817.00.40. There are no other changes to the information being collected.

Type of Review: Extension and Revision.

Affected Public: Individuals.

Estimated Number of Respondents: 19,455.

Estimated Number of Responses per Respondent: 3.

Estimated Number of Total Annual Responses: 58,335.

Estimated Time per Response: 1 minute.

Estimated Total Annual Burden Hours: 933.

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: June 30, 2011.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2011–16908 Filed 7–5–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

Agency Information Collection Activities; New Collection; Comment Request

ACTION: 30-Day Notice of Information Collection for Review; OMB Control No. 1653–NEW.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on December 22, 2010, Vol. 75 pp. 80542, allowing for a 60 day comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted for thirty days until August 5, 2011.

Written comments and suggestions from the public and affected agencies regarding items contained in this notice and especially with regard to the estimated public burden and associated response time should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, for United States Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the 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:* New Collection.

(2) *Title of the Form/Collection:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* None.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households; Farms; Business or other for-profit; Not-for-profit institutions; State, local or Tribal governments; The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 139,587 responses at 5 minutes (.0833 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 11,586 annual burden hours.

Requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be directed to: Office of the Chief Financial Officer/OAA/Records Branch, U.S. Immigration and Customs Enforcement, 500 12th Street SW., STOP 5705, Washington, DC 20536–5705.

Dated: June 29, 2011.

John Ramsay,

Forms Program Manager, Office of Asset Administration, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2011–16813 Filed 7–5–11; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–64]

Notice of Submission of Proposed Information Collection to OMB Tenant Resource Network Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The purpose of TRN is to make grants to applicant organizations to assist, inform, educate and engage tenants of eligible Section 8-assisted properties regarding their rights, responsibilities and options in response to a property owner's filing a notice of Opt-Out or mortgage prepayment, in response to a second consecutive ''Below 60'' score of the property from the HUD Real Estate Assessment Center (REAC), or in anticipation of a maturing mortgage on the property within 24 months of publication of this notice. The program aims to engage tenants in efforts to preserve eligible properties as affordable housing, and to provide tenants with information on their own rights and responsibilities based on 24 CFR Part 245 and guidance in HUD handbook 4381.5

DATES: *Comments Due Date: August 5, 2011.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal.

Comments should refer to the proposal by name and/or OMB approval Number (2502–Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA–Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Tenant Resource Network Program.

OMB Approval Number: 2502–Pending.

Form Numbers: HUD–50080–TRNP.

Description of the Need For the Information and its Proposed Use

The purpose of TRN is to make grants to applicant organizations to assist, inform, educate and engage tenants of eligible Section 8-assisted properties regarding their rights, responsibilities and options in response to a property owner's filing a notice of Opt-Out or mortgage prepayment, in response to a

second consecutive ''Below 60'' score of the property from the HUD Real Estate Assessment Center (REAC), or in anticipation of a maturing mortgage on the property within 24 months of publication of this notice. The program aims to engage tenants in efforts to preserve eligible properties as affordable housing, and to provide tenants with information on their own rights and responsibilities based on 24 CFR Part 245 and guidance in HUD handbook 4381.5

Frequency of Submission: On occasion.

	Respondents	Number of responses	x	Annual response	=	Burden hours
Reporting Burden:	100	18	....	43.867	....	78,961

Total Estimated Burden Hours: 78,961.

Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: June 29, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–16889 Filed 7–5–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–C–59]

Notice of Submission of Proposed Information Collection to OMB; Public Housing Financial Management Template

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice. Correction.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Public Housing Assessment System requires public housing agencies to submit financial information annually to HUD. The Uniform Financial Reporting Standards for HUD housing programs requires that this information be submitted electronically, using generally accepted accounting principles, in a prescribed format. The Operating Fund Program regulation (24 CFR 990) requires PHAs to submit information at a project level. Correct the Burden Hour on the previously.

DATES: *Comments Due Date:* August 5, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2535–0107) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA-Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Public Housing Financial Management Template.

OMB Approval Number: 2535–0107.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use

The Public Housing Assessment System requires public housing agencies to submit financial information annually to HUD. The Uniform Financial Reporting Standards for HUD housing programs requires that this information be submitted electronically, using generally accepted accounting principles, in a prescribed format. The Operating Fund Program regulation (24 CFR 990) requires PHAs to submit information at a project level.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting burden	7,763	1	....	5.49	....	42,619

Total Estimated Burden Hours: 42,619.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: June 29, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–16891 Filed 7–5–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–65]

Notice of Submission of Proposed Information Collection to OMB; Data Collection of the Disaster Housing Assistance Program Incremental Rent Transition Study

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The U.S. Department of the Housing and Urban Development (HUD) is conducting an important national study of Disaster Housing Assistance Program (DHAP) families who transitioned from stepped-up rents (*i.e.,* Phase I) and $0 rent (*i.e.,* Phase II/Phase III) to market rate or assisted housing and track their housing, employment, and financial outcomes over time.

DATES: *Comments Due Date:* August 5, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2528–0256) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA–Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Data Collection of the Disaster Housing Assistance Program Incremental Rent Transition Study.

OMB Approval Number: 2528–0256.

Form Numbers: None.

Description of the need for the Information and its Proposed Use: The U.S. Department of the Housing and Urban Development (HUD) is conducting an important national study of Disaster Housing Assistance Program (DHAP) families who transitioned from stepped-up rents (*i.e.,* Phase I) and $0 rent (*i.e.,* Phase II/Phase III) to market rate or assisted housing and track their housing, employment, and financial outcomes over time.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	1,425	1		0.666	....	950

Total Estimated Burden Hours: 950.

Status: Reinstatement with change of a previously approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: June 29, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–16911 Filed 7–5–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management, Regulation and Enforcement

[Docket ID No. BOEM–2011–0011]

Information Collection Activity: Plans and Information, Extension of a Collection; Comment Request

AGENCY: Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), Interior.

ACTION: Notice of extension of an information collection (1010–0151).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), BOEMRE is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns the paperwork requirements in the regulations of planned exploration, development, and production operations on the OCS, under Subpart B, Plans and Information.

DATES: Submit written comments by September 6, 2011.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Regulations and Standards Branch at (703) 787–1607. You may also contact Cheryl Blundon to obtain a copy, at no cost, of the regulations and the forms that require the subject collection of information.

ADDRESSES: You may submit comments by either of the following methods listed below.

• Electronically: go to *http://www.regulations.gov*. In the entry titled ''Enter Keyword or ID,'' enter BOEM–2011–0011 then click search. Follow the instructions to submit public comments and view supporting and related materials available for this collection. BOEMRE will post all comments.

• E-mail *cheryl.blundon@boemre.gov*. Mail or hand-carry comments to the Department of the Interior; Bureau of Ocean Energy Management, Regulation and Enforcement; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ICR 1010–0151 in your comment and include your name and return address.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR Part 250, Subpart B, Plans and Information.

Form(s): MMS–137, MMS–138, MMS–139, MMS–141, and MMS–142.

OMB Control Number: 1010–0151.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.,* 31 U.S.C. 9701), authorizes the Secretary of the Interior to prescribe rules and regulations to administer leasing of the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition. Sections 11 and 25 of the amended OCS Lands Act require the holders of OCS oil and gas or sulphur leases to submit exploration plans (EPs) or development and production plans (DPPs) to the Secretary for approval prior to commencing these activities. As a Federal agency, we have a continuing affirmative duty to comply with the Endangered Species Act (ESA). This includes a substantive duty to carry out any agency action in a manner that is not likely to jeopardize protected species as well as a procedural duty to consult with the Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries) before engaging in a discretionary action that may affect a protected species.

The Independent Offices Appropriations Act (31 U.S.C. 9701), the Omnibus Appropriations Bill (Pub. L. 104–133, 110 Stat. 1321, April 26, 1996), and OMB Circular A–25, authorize Federal agencies to recover the full cost of services that confer special benefits. Under the Department of the Interior's (DOI) implementing policy, the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEM) is required to charge fees for services that provide special benefits or privileges to an identifiable non-Federal recipient above and beyond those which accrue to the public at large. Several requests for approval required in subpart B are subject to cost recovery, and BOEMRE regulations specify service fees for these requests.

This authority and responsibility are among those delegated to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE). The regulations at 30 CFR part 250, subpart B, concern plans and information required while conducting activities on a lessee and/or operators lease and are the subject of this collection. This request also covers the related Notices to Lessees and Operators (NTLs) that BOEMRE issues to clarify, supplement, or provide additional guidance on some aspects of our regulations.

BOEMRE engineers, geologists, geophysicists, environmental scientists, and other Federal agencies analyze and evaluate the information and data collected under subpart B to ensure that planned operations are safe; will not adversely affect the marine, coastal, or human environment; and will conserve the resources of the OCS. We use the information to: (a) Report annually to NOAA Fisheries the effectiveness of mitigation, any adverse effects of the proposed action, and any incidental take, in accordance with 50 CFR 402.14(i)(3), and (b) allow the Regional Supervisor to make an informed decision on whether to approve the proposed exploration or development and production plans as submitted or whether modifications are necessary without the analysis and evaluation of the required information. The affected States also review the information collected for consistency with approved Coastal Zone Management (CZM) plans.

Specifically, BOEMRE uses the information to evaluate, analyze, determine, or ensure that:

• Ancillary activities comply with appropriate laws or regulations and are conducted safely, protect the environment, and do not interfere or conflict with the other uses of the OCS *(i.e.,* military use, subsistence activity).

• Points of contact and responsible parties are designated for proposed activities.

• Surveying, monitoring, or other activities do not interfere or conflict with preexisting and other uses of the area.

• Plans or actions meet or implement lease stipulation requirements.

• Proposed exploration, drilling, production, and pipeline activities are conducted in a safe and acceptable manner for the location and water depth proposed and conserve reservoir energy to allow enhanced recovery operations in later stages of lease development.

• Unnecessary or incompatible facilities are not installed on the OCS.

• Shallow drilling hazards (such as shallow gas accumulations or mudslide areas) are avoided.

• Areas are properly classified for H_2S, and appropriate procedures are in place.

• Appropriate oil spill planning measures and procedures are implemented.

• Expected meteorological conditions at the activity site are accommodated.

• Environmentally sensitive areas are identified, and the direct and cumulative effects of the activities are minimized.

• Offshore and onshore air quality is not significantly affected by the proposed activities.

• Waste disposal methods and pollution mitigation techniques are appropriate for local conditions.

• State CZM requirements have been met.

• Archaeological or cultural resources are identified and protected from unreasonable disturbances.

• Socioeconomic effects of the proposed project on the local community and associated services have been determined.

• Support infrastructures and associated traffic are adequately covered in plans.

The following forms used in the Gulf of Mexico Region (GOMR) are also submitted to BOEMRE. The OMB approved these forms as part of the information collection for the current subpart B regulations. The BOEMRE forms are:

• MMS–0137 (Plan Information Form) is submitted to summarize plan information. Due to the Deepwater Horizon and Macondo well incident, we reevaluated procedures for reviewing blowout scenarios and worst case discharge. The revised form is printed at the end of this notice for your review and comment.

• MMS–0138 (GOM Air Emission Calculations for Exploration Plans) and MMS–0139 (GOM Air Emission Calculations for Development Operations Coordination Documents

(DOCDs)) are submitted to standardize the way potential air emissions are estimated and approved as part of the OCS plan. While both forms remain unchanged, the instructions for each have been revised, which would affect how information is to be calculated. The revised instructions for each form are printed at the end of this notice for your review.

• MMS–0141 (ROV Survey Report) is submitted to report the observations and information recorded from 2 sets of ROV monitoring surveys to identify high-density biological communities that may occur on the seafloor in deep water.

• MMS–0142 (Environmental Impact Analysis Worksheet) is a fill in the blank form that is submitted to identify the environmental impact-producing factors (IPFs) for the listed environmental resources.

BOEMRE is also providing: Tips to Avoid Common Emissions Spreadsheet Errors and Instructions, which are printed at the end of this notice for your review.

We will protect information considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR 2), 30 CFR 250.197, ''Data and information to be made available to the public or for limited inspection,'' and 30 CFR Part 252, ''Outer Continental Shelf (OCS) Oil and Gas Information Program.'' No items of a sensitive nature are collected. Responses are mandatory.

Frequency: On occasion, weekly, monthly, semi-annually, annually, and varies by section.

Description of Respondents: Potential respondents include Federal OCS oil, gas, and sulphur lessees and holders of pipeline rights-of-way.

Estimated Reporting and Recordkeeping Hour Burden: The currently approved annual reporting burden for this collection is 291,414 hours. The following chart details the individual components and respective hour burden estimates of this ICR. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 250 subpart B and NTLs	Reporting & recordkeeping requirement	Hour burden
		Non-hour costs
200 thru 206	General requirements for plans and information. Burden included with specific requirements below.	0.
201 thru 206; 211 thru 228: 241 thru 262;	BOEMRE posts on FDMS, EPs/DPPs/DOCDs, and receives public comments in preparation of EAs. Not considered IC as defined in 5 CFR 1320.3(h)(4).	0.
Ancillary Activities		
208 NTL	Notify BOEMRE and other users of the OCS before conducting ancillary activities.	10.
210(a)	Submit report summarizing & analyzing data/information obtained or derived from ancillary activities.	1.
210(b)	Retain ancillary activities data/information; upon request, submit to BOEMRE.	2.
Contents of Exploration Plans (EP)		
211 thru 228; 209; NTL 2010 N–06, and other NTLs.	Submit EP and all required information (including, but not limited to, submissions required by BOEMRE forms MMS–137, MMS–138, MMS–142 used in GOMR, withdrawals; lease stipulations; reports; H2S; G&G; etc.) and provide notifications.	659.25. $3,442 for ea EP*. AKOCS—1,000.
Seismic Survey Mitigation Measures and Protected Species Observer Program		
211 thru 228: 241 thru 262; NTLs	Submit to BOEMRE observer training requirement materials and information.	½ hour.
	Training certification and recordkeeping	½ hour.
	If used, submit to BOEMRE information on any passive acoustic monitoring system prior to placing it in service.	1 hour.
	Submit to BOEMRE marine mammal observation report(s) (this includes observer duty and training and are the occasional activities done in-house and not subcontracted out.).	345 hours**.
	Observer training*** (in-house training is in hours—contracted out training is in non- hour cost burdens).	8 hours. $37.50/hr.
	Observation Report/Form	$10,400.
	Observation Duty (3 observers fulfilling an 8 hour shift ea for 365 calendar days × 4 vessels = 35,040 man-hours).	$52/hr.
Protected Species Report		
211 thru 228: 241 thru 262; NTLs	Submit injured/dead protected species report.	½ hour.
Trash and Debris Awareness/Elimination		
211 thru 228: 241 thru 262; NTLs	Submit request for training video	½ hour.
	Submit annual report to BOEMRE on training process and certification	½ hour.
	Training recordkeeping	½ hour.

Citation 30 CFR 250 subpart B and NTLs	Reporting & recordkeeping requirement	Hour burden
		Non-hour costs
	Post placards on vessels and structures (exempt from information collection burden because BOEMRE is providing exact language for the trash and debris warning, similar to the ''Surgeon General's Warning'' exemption).	0.
Review and Decision Process for the EP		
231(b); 232(d); 234; 235; 281(d)(3); 283; 284; 285; NTL 2010 N–06.	Submit amended, modified, revised, or supplemental EP, or resubmit disapproved EP; withdraw your EP.	120.
235(b); 272(b); 281(d)(3)(ii)	Appeal State's objection [burden exempt as defined in 5 CFR 1320.4(a)(2), (c)].	0.
Contents of Development and Production Plans (DPP) and Development Operations Coordination Documents (DOCD)		
241 thru 262; 209; NTL 2010 N–06, and others.	Submit DPP/DOCD and accompanying/supporting information (including, but not limited to, submissions required by BOEMRE forms MMS–0137, MMS–0139, MMS–0142 used in GOMR; lease stipulations; withdrawals, etc.); provide notifications.	690. $3,971 for ea DPP or DOCD. AKOCS—1,700.
Review and Decision Process for the DPP or DOCD		
266(b); 267(d); 272(a); 273; 283; 284; 285; 209; NTL 2010 N–06.	Submit amended, modified, revised, or supplemental DPP or DOCD, or resubmit disapproved DPP or DOCD.	95. POCS–680.
267(a)	Once BOEMRE deemed DPP/DOCD submitted; Governor of each affected State, local government official; etc., submit comments/recommendations.	1.
267(b)	General public comments/recommendations submitted to BOEMRE re DPPs or DOCDs. Not considered IC as defined in 5 CFR 1320.3(h)(4).	0.
269(b)	Submit information on preliminary plans for leases or units in vicinity of proposed development and production activities.	2.
Post-Approval Requirements for the EP, DPP, and DOCD		
280(b)	Request departure from your approved EP, DPP, or DOCD [burden covered under 1010–0114].	0.
281(a)	Submit various applications [burdens included under appropriate subpart or form (1010–0050; 1010–0059; 1010–0141; 1010–0149)].	0.
282	Retain monitoring data/information	2.
	Submit monitoring plans	1.
282(b)	Submit monitoring reports and data (including form MMS–0141 used in GOMR).	2.
Submit DWOPs, CIDs, and Departure/Alternative Compliance Requests		
287 thru 295	Submit DWOP and accompanying/supporting information	750. $3,336 for ea DWOP.
296 thru 298	Submit CID and accompanying/supporting information	443. $25,629 for ea CID.
200 thru 299	General departure and alternative compliance requests not specifically covered elsewhere in subpart B regulations.	2.

* You may have multiple locations and/or wells for each EP, EPP, or DOCD.
** Hours are based on 14 days of observing, attending a training session, and writing report(s).
*** Allowed minimal hour burden for in-house training.
NOTE: The non-hour cost burdens associated with EPs, DPPs or DOCDs, DWOPs, and CIDs relate to cost recovery fees. These fees are based on actual monies received in FY2010 thru the Pay.gov system.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have identified seven non-hour costs associated with this information collection. Four of these non-hour cost burdens are cost recovery fees. They consist of fees being submitted with EPs ($3,442), DPPs or DOCDs ($3,971), DWOPs ($3,336), and CIDs ($25,629). There are also three non-hour cost burdens that are associated with the Protected Species Observer Program. The costs associated with this program are due to activities that are, for the most part, subcontracted to other service companies with expertise in these areas. To allow for the potential in-house reporting by lessees/operators, we have retained a minimal hour burden in the table.

We have not identified any other non-hour cost burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency ''* * * to provide notice * * * and otherwise consult

with members of the public and affected agencies concerning each proposed collection of information * * *''. Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Agencies must also estimate the non-hour cost burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information, monitoring, and record storage facilities. You should not include estimates for equipment or services purchased: (i) Before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB. Revised Form BOEMRE–0137 follows:

BILLING CODE 4310–MR–P

U.S. Department of the Interior
Bureau of Ocean Energy Management,
Regulation and Enforcement

OMB Control Number: 1010-0151
OMB Approval Expires: mo/dy/yr

OCS PLAN INFORMATION FORM

General Information

Type of OCS Plan:		Exploration Plan (EP)	Development Operations Coordination Document (DOCD)		

Company Name:	BOEMRE Operator Number:
Address:	Contact Person:
	Phone Number:
	E-Mail Address:

If a service fee is required under 30 CFR 250.125(a), provide the	Amount paid		Receipt No.	

Project and Worst Case Discharge (WCD) Information

Lease(s):		Area:		Block(s):		Project Name (If Applicable):			
Objective(s)		Oil		Gas		Sulphur		Salt	Onshore Support Base(s):
Platform/Well Name:		Total Volume of WCD:							API Gravity:
Distance to Closest Land (Miles):		Volume from uncontrolled blowout:							

Have you previously provided information to verify the calculations and assumptions for your WCD?		Yes		No
If so, provide the Control Number of the EP or DOCD with which this information was provided				
Do you propose to use new or unusual technology to conduct your activities?		Yes		No
Do you propose to use a vessel with anchors to install or modify a structure?		Yes		No
Do you propose any facility that will serve as a host facility for deepwater subsea development?		Yes		No

Description of Proposed Activities and Tentative Schedule (Mark all that apply)

Proposed Activity	Start Date	End Date	No. of Days
Exploration drilling			
Development drilling			
Well completion			
Well test flaring (for more than 48 hours)			
Installation or modification of structure			
Installation of production facilities			
Installation of subsea wellheads and/or manifolds			
Installation of lease term pipelines			
Commence production			
Other (Specify and attach description)			

Description of Drilling Rig

	Jackup		Drillship		Caisson		Tension leg platform
	Gorilla Jackup		Platform rig		Fixed platform		Compliant tower
	Semisubmersible		Submersible		Spar		Guyed tower
	DP Semisubmersible		Other (Attach Description)		Floating production system		Other (Attach Description)
Drilling Rig Name (If Known):							

Description of Structure

Description of Lease Term Pipelines

From (Facility/Area/Block)	To (Facility/Area/Block)	Diameter (Inches)	Length (Feet)

OCS PLAN INFORMATION FORM (CONTINUED)
Include one copy of this page for each proposed well/structure

Proposed Well/Structure Location

Well or Structure Name/Number (If renaming well or structure, reference previous name):					Previously reviewed under an approved EP or DOCD?		Yes		No		
Is this an existing well or structure?		Yes		No	If this is an existing well or structure, list the Complex ID or API No.						
Do you plan to use a subsea BOP or a surface BOP on a floating facility to conduct your proposed activities?							Yes		No		
WCD info	For wells, volume of uncontrolled blowout (Bbls/day):				For structures, volume of all storage and pipelines (Bbls):			API Gravity of fluid			

	Surface Location	**Bottom-Hole Location (For Wells)**	**Completion (For multiple completions, enter separate lines)**
Lease No.	OCS	OCS	OCS OCS
Area Name			
Block No.			
Blockline Departures (in feet)	N/S Departure: F____ L	N/S Departure: F____ L	N/S Departure: F____ L N/S Departure: F____ L N/S Departure: F____ L
	E/W Departure: F____ L	E/W Departure: F____ L	E/W Departure: F____ L E/W Departure: F____ L E/W Departure: F____ L
Lambert X-Y coordinates	X:	X:	X: X: X:
	Y:	Y:	Y: Y: Y:
Latitude/ Longitude	Latitude	Latitude	Latitude Latitude Latitude
	Longitude	Longitude	Longitude Longitude Longitude

Water Depth (Feet):	MD (Feet):	TVD (Feet):	MD (Feet): MD (Feet): MD (Feet):	TVD (Feet): TVD (Feet): TVD (Feet):
Anchor Radius (if applicable) in feet:				

Anchor Locations for Drilling Rig or Construction Barge (If anchor radius supplied above, not necessary)

Anchor Name or No.	Area	Block	X Coordinate	Y Coordinate	Length of Anchor Chain on Seafloor
			X =	Y =	
			X =	Y =	
			X =	Y =	
			X =	Y =	
			X =	Y =	
			X =	Y =	
			X =	Y =	
			X =	Y =	

OCS PLAN INFORMATION FORM (CONTINUED)

Provide the following information for the well with the highest Worst Case Discharge volume:

Worst Case Discharge (WCD) Well Information							
WCD Well Name	Surface Lease	Surface Area/Block	Bottom Lease	Bottom Area/Block	Product Type	MD	TVD

Analog Well(s)			
Area/Block	OCS Lease	Well No.	API No.

Geologic Data for WCD

Open Hole Interval for WCD	
Top (TVD in feet)	Base (TVD in feet)

	Sand 1	Sand 2	Sand 3	Sand 4	Sand 5
Formation Data					
Sand Name					
Estimated Top TVD					
Estimated Base TVD					
Estimated Net Sand Height MD (Net Pay if hydrocarbon)					
Estimated Net Sand Height TVT (Net Pay if hydrocarbon)					
Fluid Type					
Used in WCD? (Yes/No)					

Seismic Survey Used	

Engineering Data for WCD

WCD Engineering Items											
WCD (STB/Day)											
WCD Calculated at	Mudline		Yes		No		Atmosphere		Yes		No
Flow Correlation											
Outlet Pressure (Psia)											
Gas Turbulence Factor											
Software Model Used											

	Sand 1	Sand 2	Sand 3	Sand 4	Sand 5
Formation Data					
Sand Name					
Permeability (mD)					
Initial Pressure (PSIA)					

OCS PLAN INFORMATION FORM (CONTINUED)

Reservoir Temperature (F)					
Porosity (0.00)					
Water Saturation (0.00)					
Rock Compressibility (microsips)					
Water Salinity (ppm)					
Drive Mechanism					
Drainage Area (acres)					
Oil Reservoir Data					
Bubble Point Pressure (PSIA)					
Initial Bo (RB/STB)					
Bo (RB/STB) @ Bubble Point					
Rsi (SCF/STB)					
Initial Oil Viscosity (Cp)					
Oil Viscosity (CP) @ Bubble Point					
Oil Compressibility (1/PSIA)					
Oil API Gravity (API)					
Specific Gas Gravity (0.00)					
Gas Reservoir Data					
Condensate API Gravity (API)					
Specific Gas Gravity (0.00)					
Yield (STB/MMCF)					

Source of Permeability Used			
Permeability from MDT			
Permeability from Core Analysis	Percussion core	Rotary sidewall core	Conventional core
Pressure Transient Analysis			
Permeability from CMR or NMR log analysis			
Permeability from other source			

Provide Model Input Values for Relative Permeability:	
Residual Oil to Gas fraction (=1-Slc-Swc)	
Residual Oil to Water fraction (=Soc)	
Critical Gas fraction (Sgc, Gas/Oil-Water Systems)	
Residual Gas to Water fraction (Sgc, Gas/Gas-Water Systems)	
Kro Oil Curve Endpoint (fraction of absolute permeability)	
Krg Gas Curve Endpoint (fraction of absolute permeability)	
Krw Water Curve Endpoint (fraction of absolute permeability)	

Paperwork Reduction Act of 1995 Statement: The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires us to inform you that BOEMRE collects this information as part of an applicant's Exploration Plan or Development Operations Coordination Document submitted for BOEMRE approval. We use the information to facilitate our review and data entry for OCS plans. We will protect proprietary data according to the Freedom of Information Act and 30 CFR 250.197. 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 Office of Management and Budget Control Number. Responses are mandatory. The public reporting burden for this form is included in the burden for preparing Exploration Plans and Development Operations Coordination Documents. We estimate that burden to average 600 hours per response, or 640 with an accompanying EP (1,000 hours in AKOCSR), or 690 (1,700 in AKOCSR) with an accompanying DPP or DOCD, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms associated with subpart B. Direct comments regarding the burden estimate or any other aspect of this form to the Information Collection Clearance Officer, Mail Stop 5438, Bureau of Ocean Energy Management, Regulation and Enforcement, 1849 C Street, NW, Washington, DC 20240.

Revised Instructions for Form BOEMRE-0138
GULF OF MEXICO AIR EMISSIONS CALCULATIONS INSTRUCTIONS

General

This entire document (EP_AQ.XLS) was prepared through the cooperative efforts of those professionals in the oil industry including the API/OOC Gulf of Mexico Air Quality Task Force, and the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), who deal with air emission issues. This document was revised extensively in 2011 to update emission factors and to estimate emissions for additional equipment types. This document is intended to standardize the way we estimate our potential air emissions for Exploration Plans (EP) approved by the BOEMRE. It is intended to be thorough but flexible to meet the needs of different operators. This instructions document gives the basis for the emission factors used in the emission spreadsheet as well as general instructions for using the spreadsheet.

The following sections describe the spreadsheets in the DOCD_AQ.XLS workbook.

TITLE

The TITLE sheet requires input of the company's name, area, block, OCS-G number, platform and/or well(s), drilling rig name and type, and contact information in the corresponding lines. This data will automatically be transferred to the EMISSIONS and SUMMARY sheets.

STATIONARY FACTORS

The emission factors were compiled from the latest AP-42 references or from industry studies if no AP-42 reference was available. Factors may be revised as more data becomes available. A change to the STATIONARY FACTORS sheet will be automatically changed in the EMISSIONS sheets. A Sulfur Content table was added in 1996. A change in this table will automatically revise SO_2 emission factors and the corresponding emission estimates. If your sulfur content is different than the default values in the table, you should change the values in the table to match your actual fuel sulfur content.

Engines, Boilers/Burners, and Liquid Flaring

1. Particulate Matter (PM) emission factors for natural gas combustion are for filterable PM only.
2. It is assumed that PM = PM_{10} = $PM_{2.5}$ unless individual species are provided in AP-42.
3. If an emission factor for VOC is not provided in AP-42, it is assumed that TOC or Nonmethane TOC = VOC.
4. In order to estimate the worst-case emissions, the dual-fuel emission factors for **dual-fuel turbines** are the highest of either the natural gas emission factor or distillate emission factor for each pollutant.
5. The emission factors provided in AP-42 for **dual-fuel-fired engines** assume 95 percent natural gas combustion and 5 percent diesel fuel combustion.

Natural Gas Flares

The emission factors are from AP-42, Chapter 13.5. The emission factors are in units of lbs/MMBtu. These factors are multiplied by a heat value of 1050 MMBtu/MMscf to convert units to lbs/MMscf. The VOC factor is based on the hydrocarbon emission factor in table 13.5-1 and the average non-methane components in table 13.5-2

VESSEL FACTORS

The VESSEL FACTORS sheet was added in 2011 to accommodate revised emission factors for vessels and drilling rigs. The emission factors are disaggregated by vessel type and category, and kW rating. The original emission factors were obtained from the following sources: e-mail communications with EPA regarding data from EPA's regulatory program; U.S. Environmental Protection Agency's Current Methodologies in Preparing Mobile Source Port-Related Emission Inventories, Final Report, April 2009, Prepared by ICF International; and the European Environmental Agency, EMEP/EEA Air Pollutant Emission Inventory Guidebook—2009, Technical report No. 9. 2009. The typical load factors and adjusted power (based on the average power in each class) were applied to the emission factors to acquire the final emission rates. One additional piece of information necessary to calculate the SO_2 emission factors for vessels is the sulfur content in the fuel. The fuel sulfur content needs to be entered in a separate table in the VESSEL FACTORS sheet. The recommended

default for vessel fuel sulfur content for projects implemented prior to 2012 is 500 ppm. For projects implemented after 2012, the default value should be changed to 15 ppm.

METHODOLOGY

The METHODOLOGY sheet was added in 2011 to show the formulas used to estimate emissions on the EMISSIONS sheets.

EMISSIONS

The emissions from an operation should be presented for a calendar year (2011, 2012, etc.). The operation may include production only or production in conjunction with other activities such as drilling or construction operations. For additional years, the Emissions Spreadsheet is renamed EMISSIONS_2, EMISSIONS_3, etc. The different operating parameters for each year should be entered to calculate revised emissions for that year. The emissions will be calculated as shown on the METHODOLOGY sheet for each equipment type.

To customize the spreadsheet for your application, it is possible to delete lines for non-applicable equipment/activities or copy/insert an entire line if more than one similar type of equipment is present. If you add or delete rows, you should confirm that the correct cells are being referenced from the STATIONARY FACTORS and VESSEL FACTORS tabs. If you used alternate emission factors, you should confirm that the calculation methodology is correct for your alternate factors.

SUMMARY

The SUMMARY sheet is designed to show a proposed estimate of emissions from an activity over a ten year period. The first line (Row 7) of the summary sheet is linked to the yearly totals in the EMISSIONS_1 sheet; the second line (Row 8) is linked to the EMISSIONS_2 sheet, etc. If additional years of calculations are necessary to reach a constant, then a spreadsheet can be copied and linked to the summary sheet for future years. Once emissions are constant the values are carried to the end of the 10-year period.

Revised Instructions for Form BOEMRE-0139
GULF OF MEXICO AIR EMISSIONS CALCULATIONS INSTRUCTIONS

General

This entire document (DOCD_AQ.XLS) was prepared through the cooperative efforts of those professionals in the oil industry including the API/OOC Gulf of Mexico Air Quality Task Force, and the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), who deal with air emission issues. This document was revised extensively in 2011 to update emission factors and to estimate emissions for additional equipment types. This document is intended to standardize the way we estimate our potential air emissions for Development Operations Coordination Documents (DOCD) approved by the BOEMRE. It is intended to be thorough but flexible to meet the needs of different operators. This instructions document gives the basis for the emission factors used in the emission spreadsheet as well as general instructions for using the spreadsheet.

The following sections describe the spreadsheets in the DOCD_AQ.XLS workbook.

TITLE

The TITLE sheet requires input of the company's name, area, block, OCS-G number, platform and/or well(s), drilling rig name and type, and contact information in the corresponding lines. This data will automatically be transferred to the EMISSIONS and SUMMARY sheets.

STATIONARY FACTORS

The emission factors were compiled from the latest AP-42 references or from industry studies if no AP-42 reference was available. Factors may be revised as more data becomes available. A change to the STATIONARY FACTORS sheet will be automatically changed in the EMISSIONS sheets. A Sulfur Content table was added in 1996. A change in this table will automatically revise SO_2 emission factors and the corresponding emission estimates. If your sulfur content is different than the default values in the table, you should change the values in the table to match your actual fuel sulfur content. Tables for Fugitive THC Emission Factors, Default Sales Gas Composition, Mud Degassing THC Emission Factors, THC Emission Speciation for Mud Degassing, and fuel conversion factors were added in 2011. Changes to these tables will automatically be reflected in the associated emission factors and emission estimates.

Turbines, Engines, Boilers/Heaters/Burners, and Liquid Flaring

6. Particulate Matter (PM) emission factors for natural gas combustion are for filterable PM only.
7. It is assumed that PM = PM_{10} = $PM_{2.5}$ unless individual species are provided in AP-42.
8. If an emission factor for VOC is not provided in AP-42, it is assumed that TOC or Nonmethane TOC = VOC.
9. In order to estimate the worst-case emissions, the dual-fuel emission factors for **dual-fuel turbines** are the highest of either the natural gas emission factor or distillate emission factor for each pollutant.
10. The emission factors provided in AP-42 for **dual-fuel-fired engines** assume 95 percent natural gas combustion and 5 percent diesel fuel combustion.

Natural Gas Flares

The emission factors are from AP-42, Chapter 13.5. The emission factors are in units of lbs/MMBtu. These factors are multiplied by a heat value of 1050 MMBtu/MMscf to convert units to lbs/MMscf. The VOC factor is based on the hydrocarbon emission factor in table 13.5-1 and the average non-methane components in table 13.5-2.

Storage Tanks, Glycol Dehydrators, Gas Venting, Amine Gas Sweetening Units, and Loading Operations

Average emission values were estimated from the BOEMRE 2005 or 2008 Gulfwide Emission Inventory Studies as indicated in the Ref. column. Total emissions from each equipment type are estimated according to the counts provided on the EMISSIONS sheets.

Fugitives

The worst-case THC emission factor is selected from the Fugitive THC Emission Factors table according to the stream type selected on each EMISSIONS sheet. VOC emissions are estimated from the THC emissions based on the Default Sales Gas Composition table. The VOC component of the sales gas includes C_3, through C_{8+}.

Mud Degassing

VOC emission factors for mud degassing are derived from the Mud Degassing THC Emission Factors table and the THC Emission Speciation for Mud Degassing table. Methane and Ethane are not considered to be VOCs.

Pneumatic Pumps and Pressure Level Controllers

VOC emissions are estimated based on the throughput reported on the EMISSIONS sheets and the Default Sales Gas Composition table. The VOC component of the sales gas includes C_3, through C_{8+}.

VESSEL FACTORS

The VESSEL FACTORS sheet was added in 2011 to accommodate revised emission factors for vessels and drilling rigs. The emission factors are disaggregated by vessel type and category, and kW rating. The original emission factors were obtained from the following sources: e-mail communications with EPA regarding data from EPA's regulatory program; U.S. Environmental Protection Agency's Current Methodologies in Preparing Mobile Source Port-Related Emission Inventories, Final Report, April 2009, Prepared by ICF International; and the European Environmental Agency, EMEP/EEA Air Pollutant Emission Inventory Guidebook—2009, Technical report No. 9. 2009. The typical load factors and adjusted power (based on the average power in each class) were applied to the emission factors to acquire the final emission rates. One additional piece of information necessary to calculate the SO_2 emission factors for vessels is the sulfur content in the fuel. The fuel sulfur content needs to be entered in a separate table in the VESSEL FACTORS sheet. The recommended default for vessel fuel sulfur content for projects implemented prior to 2012 is 500 ppm. For projects implemented after 2012, the default value should be changed to 15 ppm.

METHODOLOGY

The METHODOLOGY sheet was added in 2011 to show the formulas used to estimate emissions on the EMISSIONS sheets.

EMISSIONS

The emissions from an operation should be presented for a calendar year (2011, 2012, etc.). The operation may include

production only or production in conjunction with other activities such as drilling or construction operations. For additional years, the Emissions Spreadsheet is renamed EMISSIONS_2, EMISSIONS_3, etc. The different operating parameters for each year should be entered to calculate revised emissions for that year. The emissions will be calculated as shown on the METHODOLOGY sheet for each equipment type.

To customize the spreadsheet for your application, it is possible to delete lines for non-applicable equipment/activities or copy/insert an entire line if more than one similar type of equipment is present. If you add or delete rows, you should confirm that the correct cells are being referenced from the STATIONARY FACTORS and VESSEL FACTORS tabs. If you used alternate emission factors, you should confirm that the calculation methodology is correct for your alternate factors.

The production equipment can be customized further by adding the use of the equipment behind the equipment type name. For example, "TURBINE nat gas" could be changed to "TURBINE nat gas – Gas Compressor"; or "BURNER" could be changed to "BURNER - Line Heater".

SUMMARY

The SUMMARY sheet is designed to show a proposed estimate of emissions from an activity over a ten year period. The first line (Row 7) of the summary sheet is linked to the yearly totals in the EMISSIONS_1 sheet; the second line (Row 8) is linked to the EMISSIONS_2 sheet, etc. If additional years of calculations are necessary to reach a constant, then a spreadsheet can be copied and linked to the summary sheet for future years. Once emissions are constant the values are carried to the end of the 10-year period.

TIPS TO AVOID COMMON EMISSIONS SPREADSHEET ERRORS

These tips are provided to assist you in avoiding common air quality reporting errors and thus facilitate the quickest possible review of your plan:

1. Review the instruction documents for Forms MMS-0138 and Form MMS-0139, prior to using the DOCD or EP spreadsheets. Review the instructions documents regularly to check for updates.

2. The emissions estimates should be based on and reflect the activity description and schedule required as part of the plan.

3. The emissions calculations are required to be worst-case estimates for the facility.

4. Actual emission factors and actual equipment horsepower should be used whenever they are known. If the drilling rig is not known, the maximum horsepower rating for the type of rig (jack-up, submersible, platform, barge, semi-submersible, or drillship) must be used. If actual emissions factors are unavailable, average emission factors may be used. Average emission factors may not be used if it is known that the equipment involved emits at a rate greater than the average. Default average emission factors are provided in the spreadsheets.

5. Equipment should be shown as running 24 hours a day, 365 days a year, unless you provide documentation with the plan certifying an alternative to the maximum activity for the equipment. You must also provide a quantifiable method of verifying compliance with this alternative maximum activity limit. For example, verification can be achieved by maintaining a log of the actual fuel used by a piece of equipment, or by maintaining a log of the actual hours a piece of equipment was used. These certifications and verifications must be in writing. The documentation or certifications must be included in the plan. The verifications must be documented at least monthly and a copy must be maintained at the facility involved. Additionally, copies of these verifications must be provided to BOEMRE employees upon request or as directed by the Regional Supervisor.

6. Emissions from all vessels directly related to the proposed activity must be included for the duration of their activity within 25 miles of the facility. This typically includes crew boats, supply boats, work boats, tug boats, anchor handling vessels, lift boats, pile drivers, standby boats, construction barges/vessels, etc.

7. The default marine vessel fuel sulfur concentration can be revised to the anticipated marine vessel fuel sulfur concentration on the vessel factors tab of both the DOCD and EP spreadsheets. If the fuel sulfur concentration is not known, the default value of 500 ppm should be used for activities that occur in 2012. For activities after 2012, the fuel sulfur concentration for marine vessel diesel fuel should be 15 ppm.

8. Emissions from the construction of lease term pipelines must be attributed to the facility from which the product it carries originates. For gas lift pipelines, the construction emissions for the pipeline are attributed to the well which is

produced using the lift gas, in other words, the well to which the lift gas flows.

9. If the production is first processed at the receiving (terminus) platform of a lease term pipeline, the incremental increase in emissions at the receiving facility will also be included in the spreadsheets covering the producing well.

10. Emissions associated with workovers, recompletions, equipment swapouts, etc. must be included in spreadsheets for DOCDs. For workovers and recompletions, a few weeks of drilling allotted to future years precludes the need for a revised DOCD each time you need to work over a well.

11. For any plan involving subsequent activity at an existing facility, emissions data must be provided for the proposed activity and for the facility total (proposed plus existing emissions). This should be depicted in two separate and clearly labeled sets of spreadsheets.

12. If platforms are bridge connected, they are considered to be one facility for air quality purposes, and development plans must include the emissions from all of the connected platforms as one facility. Each structure should have its own set of spreadsheets, but remember it is the total for the facility which is used for determining exemption or significance.

13. For purposes of calculating the BOEMRE exemption level, the distance to shore should be expressed in tenths of a statute mile up to 20 miles, and in whole statute miles for distances beyond 20 miles. The nearest point of any land should be used. This is defined as the distance from the facility to the mean high water mark of any State, including barrier islands and shoals.

14. Verification of non-default emission factors: documentation is required for any emission factor below the defaults included in the spreadsheets. Verification (typically by stack-testing) of these reduced emission factors will also be required upon start-up and occasionally thereafter to prove that the reduced emission factors are actually being achieved and maintained.

15. Emission reductions: describe any proposed emission reduction measures, including a description of the affected source(s), the emission reduction control technologies or procedures, quantity of reductions to be achieved, and the monitoring system you propose to use to measure emissions.

16. Include fugitive emissions for DOCDs.

17. If the activity includes a boom for emergency use, be sure to include a description of its usage in your description of equipment and processes. Indicate whether it will be used as a vent or flare and the conditions under which it will be used (e.g., compressor downtime, equipment upset, accident). Include estimates of flaring or venting in the spreadsheets.

18. If the activity includes compressor(s), indicate intended action during compressor downtime (e.g., shut-in, flare, vent).

19. If the activity includes a continuous flare, describe why it is needed (e.g., to incinerate harmful levels of H2S).

20. If the activity includes a glycol reboiler that is operated using waste heat or electricity, indicate this in a statement.

21. If H2S is expected, indicate the expected concentration.

Public Comment Procedures: 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.

BOEMRE Information Collection Clearance Officer: Arlene Bajusz (703) 787–1025.

Dated: June 28, 2011.

Doug Slitor,

Acting Chief, Office of Offshore Regulatory Programs.

[FR Doc. 2011–16745 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–MR–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2011–N141; 96300–1671–0000–P5]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit: new applications and corrected application.

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 a Federal permit is issued that allows such activities. The ESA law requires that we invite public comment before issuing these permits. We also correct and reopen the comment period for a previously announced application.

DATES: We must receive comments or requests for documents on or before August 5, 2011.

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 e-mail *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (e-mail).

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 e-mail or address not listed under **ADDRESSES**. If you provide an e-mail 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, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, the Endangered Species Act of 1973, section 10(a)(1)(A), as amended (16 U.S.C. 1531 *et seq.*), require that we invite public comment before final action on these permit applications.

III. Permit Applications

A. Endangered Species

Applicant: Feld Entertainment Inc., Vienna, VA; PRT–37444A (Corrected Application)

On June 23, 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 36934). We made an error by omitting one animal in the Feld Entertainment, Inc. application, which starts at the bottom of column 3 on page 36934. The omitted animal is a captive-born tiger (Panthera tigris). All the other information we printed was correct. With this notice, we correct that error and reopen the comment period for PRT–37444A. The corrected entry for this application is as follows: The applicant request a permits to import, for the purpose of enhancement of the species through conservation education, one African leopard (*Panthera pardus*), one Siberian tiger (*Panthera tigris altaica*), and seven tigers (*Panthera tigris*). The captive-born animals are being imported from Schweiberdingen, Germany, in cooperation with Alexander Lacey.

Multiple Applicants (New Applications)

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: Alan Maki, Alpine, WY; PRT–43269A

Applicant: Jeffrey Rachor, Dallas, TX; PRT–43976A

Applicant: Lewis Metzger, Houston, TX; PRT–46316A

Applicant: David Cote, Morristown, NJ; PRT–43284A

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2011–16907 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–EA–2011–N125; 90100–1664–1HCC–5A]

Wildlife and Hunting Heritage Conservation Council

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of teleconference.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a public teleconference of the Wildlife and Hunting Heritage Conservation Council (Council).

DATES: We will hold the teleconference on Tuesday, July 26, 2011, from 10 a.m. to 1 p.m. (Eastern Daylight Time). If you wish to listen to the teleconference, orally present material during the teleconference, or submit written material for the Council to consider during the teleconference, notify Joshua Winchell by Thursday, July 21, 2011. See instructions under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Joshua Winchell, Council Coordinator, 4401 N. Fairfax Dr., Mailstop 3103–AEA, Arlington, VA 22203; (703) 358–2639 (phone); (703) 358–2548 (fax); or *joshua_winchell@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION: In accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., we give notice that the Council will hold a teleconference (*see* **DATES**).

Background

Formed in February 2010, the Council provides advice about wildlife and habitat conservation endeavors that:

(a) Benefit recreational hunting;

(b) Benefit wildlife resources; and

(c) Encourage partnership among the public, the sporting conservation

community, the shooting and hunting sports industry, wildlife conservation organizations, the States, Native American tribes, and the Federal Government.

The Council advises the Secretary of the Interior (DOI) and the Secretary of Agriculture (USDA), reporting through the Director of the U.S. Fish and Wildlife Service (Service), in consultation with the Director of the Bureau of Land Management (BLM), Chief of the Forest Service (USFS), Chief of the Natural Resources Service (NRCS), and Administrator of the Farm Services Agency (FSA). The Council's duties are strictly advisory and consist of, but are not limited to, providing recommendations for:

(a) Implementing the Recreational Hunting and Wildlife Resource Conservation Plan—A Ten-Year Plan for Implementation;

(b) Increasing public awareness of and support for the Sport Wildlife Trust Fund;

(c) Fostering wildlife and habitat conservation and ethics in hunting and shooting sports recreation;

(d) Stimulating sportsmen and women's participation in conservation and management of wildlife and habitat resources through outreach and education;

(e) Fostering communication and coordination among State, Tribal, and Federal Government; industry; hunting and shooting sportsmen and women; wildlife and habitat conservation and management organizations; and the public;

(f) Providing appropriate access to Federal lands for recreational shooting and hunting;

(g) Providing recommendation to improve implementation of Federal conservation programs that benefit wildlife, hunting, and outdoor recreation on private lands; and

(h) When requested by the agencies' designated ex officio members, or the Designated Federal Officer in consultation with the Council Chairman, performing a variety of assessments or reviews of policies, programs, and efforts, through the Council's designated subcommittees or workgroups.

Background information on the Council is available at *http://www.fws.gov/whhcc.*

Teleconference Agenda

The Council will convene by telephone to discuss: (1) The U.S. Forest Service's Planning Rule, (2) the U.S. Fish and Wildlife Service's National Wildlife Refuge System Vision document, (3) the conservation and forestry titles of the USDA Farm Bill, and (4) impacts to wildlife and habitat funding resulting from the Equal Access to Justice Act (5 U.S.C. 504; 28 U.S.C. 2412). In advance of the teleconference, we will post the final agenda and copies of materials to be discussed by the Council on the Internet at *http://www.fws.gov/whhcc.*

Procedures for Public Input

Interested members of the public may listen to the teleconference, orally present material during the teleconference, or submit written material ahead of time for the Council to consider during the teleconference. Questions from the public will not be considered during the teleconference. Speakers who wish to expand upon oral statements they presented during the teleconference, or those who had wished to speak but could not be accommodated on the agenda, are invited to submit written statements to the Council before the teleconference.

Oral presentations will be limited to 2 minutes per speaker, with no more than a total of 30 minutes for all speakers. Those wishing to give oral presentations must notify the Council Coordinator by July 21, 2011.

Written statements must be received by July 21, 2011, so that the information may be made available to the Council for their consideration prior to this teleconference. Written statements must be supplied to the Council Coordinator in one of the following formats: One hard copy with original signature, or one electronic copy via e-mail. Please submit your statement to Joshua Winchell, Council Coordinator (*see* **FOR FURTHER INFORMATION CONTACT**).

In order to listen to or participate in this teleconference, you must register by close of business on July 21, 2011. Please submit your name, e-mail address, and phone number to Joshua Winchell, Council Coordinator (*see* **FOR FURTHER INFORMATION CONTACT**).

Teleconference Summary Minutes

The Council Coordinator will maintain the teleconference's summary minutes, which will be available for public inspection at the location under **FOR FURTHER INFORMATION CONTACT** during regular business hours within 90 days after the teleconference. You may purchase personal copies for the cost of duplication.

Dated:June 24, 2011.

Gregory E. Siekaniec,

Acting Deputy Director.

[FR Doc. 2011–16839 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLUT980300–L12100000–PH0000–24–1A]

Notice of Utah's Resource Advisory Council (RAC)

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Utah's Resource Advisory Council (RAC).

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management's (BLM) Utah RAC will meet as indicated below.

DATES: The Utah RAC will meet Thursday, August 4, 2011, (8:15 a.m.—5 p.m.), South Ogden Park & Ride, and Friday, August 5, 2011, (8:30 a.m.—3:30 p.m.) in Salt Lake City, Utah.

ADDRESSES: On August 4, the RAC will meet at the Park-N-Ride, Exit 405 (South Weber Drive), from Highway 89 (South Ogden). The South Weber Park & Ride is the first right crossing Highway 89 on the north side of South Weber Drive. The RAC will meet on the north end of the parking lot. Directions and further information will be provided for the field tour of the Deseret Land and Livestock Allotment (Woodruff, Utah). On August 5, the business meeting will be held at the BLM's Utah State Office, 440 West 200 South, fifth floor Monument Conference Room, Salt Lake City, Utah.

FOR FURTHER INFORMATION CONTACT: Sherry Foot, Special Programs Coordinator, Utah State Office, Bureau of Land Management, P.O. Box 45155, Salt Lake City, Utah 84145–0155; phone (801) 539–4195.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Utah. On August 4, planned agenda topics include a field tour of the Three Creeks Allotment on the Deseret Land and Livestock (DLL) in Woodruff, Utah. The RAC will view the long-term and annual benefits to wildlife, livestock water quality, and recreational opportunities of ''time control'' grazing. A presentation on data collected from DLL from Open Range Consulting will also take place. For tour convenience and parking at the DLL, only the first four (4) vehicles to sign on for the field tour will be permitted to accompany the RAC. These vehicles

should be 4-wheel drive and have heavy-duty tires due to the terrain. To sign on for the tour, contact Sherry Foot, Special Programs Coordinator, (801) 539–4195, no later than close of business July 25, 201l.

On August 5, a business meeting will be held to discuss the ecological, social, and economic values that can be created by the proposed grazing strategy (follow-up to the field tour); RAC voting in support of the Rich County Project subgroup report; RAC subgroup report on the draft BLM Utah Instruction Memorandum on the Statewide Travel Management Planning Policy; Air Quality status update; a conference call with BLM's Director Abbey on the RAC's involvement with the America's Great Outdoors Initiative; and, Grazing/Range monitoring guidelines and protocol. The conference call with Director Abbey will take place from 1–1:45 p.m. (Mountain Time). A half-hour public comment period, where the public may address the Council, is scheduled for August 5, from 2:45–3:15 p.m. Written comments may be sent to the Bureau of Land Management addressed listed above.

All meetings are open to the public; however, transportation, lodging, and meals are the responsibility of the participating public.

Dated: June 29, 2011.

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Juan Palma,

State Director.

[FR Doc. 2011–16831 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

National Park Service

Notice of Intent To Prepare a Draft Environmental Impact Statement and Conduct Public Scoping on the Adoption of a Long-Term Experimental and Management Plan for the Operation of Glen Canyon Dam

AGENCY: Bureau of Reclamation and National Park Service, Interior.

ACTION: Notice of intent.

SUMMARY: On December 10, 2009, Secretary of the Interior (Secretary) Ken Salazar announced that the development of a Long-Term Experimental and Management Plan (LTEMP) for Glen Canyon Dam was needed. The Secretary emphasized the inclusion of stakeholders, particularly those in the Glen Canyon Dam Adaptive Management Program (GCDAMP), in the development of the LTEMP. The Department of the Interior (Department), through the Bureau of Reclamation (Reclamation) and the National Park Service (NPS), will prepare a draft environmental impact statement (EIS) and conduct public scoping for the adoption of a LTEMP for the operation of Glen Canyon Dam. The Department's decision to develop the LTEMP is a component of its efforts to continue to comply with the ongoing requirements and obligations established by the Grand Canyon Protection Act of 1992 (Pub. L. 102–575) (GCPA). Reclamation and the NPS will co-lead this effort because Reclamation has primary responsibility for operation of Glen Canyon Dam and the NPS has primary responsibility for Grand Canyon National Park and Glen Canyon National Recreation Area.

FOR FURTHER INFORMATION CONTACT: Beverley Heffernan, telephone (801) 524–3712; facsimile (801) 524–3826; e-mail *LTEMPEIS@usbr.gov.*

SUPPLEMENTARY INFORMATION: The GCDAMP was established by, and has been implemented pursuant to the Secretary's 1996 Record of Decision on the Operation of Glen Canyon Dam (ROD), in order to comply with monitoring and consultation requirements of the GCPA. The GCDAMP includes a Federal advisory committee known as the Glen Canyon Dam Adaptive Management Work Group (AMWG), a technical work group, a scientific monitoring and research center administered by the U.S. Geological Survey (USGS), and independent scientific review panels. The AMWG makes recommendations to the Secretary concerning Glen Canyon Dam operations and other management actions to protect resources downstream of Glen Canyon Dam consistent with the GCPA and other applicable provisions of Federal law.

The purpose of the proposed LTEMP is to utilize current, and develop additional scientific information, to better inform Departmental decisions and to operate the dam in such a manner as to improve and protect important downstream resources while maintaining compliance with relevant laws including the GCPA, the Law of the River, and the Endangered Species Act (ESA). The National Environmental Policy Act (NEPA) process will document and evaluate impacts of the alternatives described in the EIS. The LTEMP is intended to develop and implement a structured, long-term experimental and management plan, to determine the need for potential future modifications to Glen Canyon Dam operations, and to determine whether to establish an ESA Recovery Implementation Program for endangered fish species below Glen Canyon Dam.

A primary function of the LTEMP will be to identify adaptive management experiments that have been successfully completed under the GCDAMP and to evaluate potential future experiments that may further inform management decisions. Revised dam operations and other actions under the jurisdiction of the Secretary will be considered for alternatives in the EIS, in keeping with the scope of the GCPA. The LTEMP will be the first EIS completed on the operations of Glen Canyon Dam since the 1995 EIS, which was intended to allow the Secretary to ''balance and meet statutory responsibilities for protecting downstream resources for future generations and producing hydropower, and to protect affected Native American interests.'' Given that it has been 15 years since completion of the 1996 ROD on the operation of Glen Canyon Dam, the Department will study new information developed through the GCDAMP, including information on climate change, so as to more fully inform future decisions regarding the operation of Glen Canyon Dam and other management and experimental actions.

As stated above, the LTEMP will build on more than a decade of scientific experimentation and monitoring undertaken as part of the GCDAMP. Accordingly, Reclamation and the NPS intend, where appropriate, to incorporate by reference, or tier from, earlier NEPA compliance documents prepared as part of the Department's Glen Canyon Dam adaptive management efforts, see 40 CFR 1500.4(i), 1502.20, and 1508.20(b), such as the Environmental Assessment for an Experimental Protocol for High-Flow Releases from Glen Canyon Dam and the Environmental Assessment for Non-Native Fish Control in the Colorado River Downstream from Glen Canyon Dam that are currently in preparation.

Environmental documentation and updated information developed for the Long-Term Experimental Plan (LTEP) EIS (that was partially developed during 2006–2007) will be utilized. In a **Federal Register** notice published on February 12, 2008 (73 FR 8062), the LTEP EIS was put on hold until completion of environmental compliance on a five-year plan of experimental flows (2008–2012), including a high-flow test completed in March 2008 and yearly fall steady flows to be conducted in September and October of each year from 2008–2012.

This **Federal Register** notice provides notice that the LTEP EIS, initiated in a **Federal Register** notice dated November 6, 2006 (71 FR 64982), will be superseded by the LTEMP EIS. In addition, this notice provides the public with initial information regarding the anticipated development and purpose of the LTEMP, and notice of the Department's commitment to analyze the LTEMP in an EIS pursuant to NEPA.

Public scoping meetings will be held to solicit comments on the scope of the LTEMP and the issues and alternatives that should be analyzed. These meetings will serve to expand upon the input received from meetings and recommendations of the AMWG. Additional information regarding the dates and times for the upcoming meetings and identification of relevant comment periods will be provided in a future **Federal Register** notice, as well as through other methods of public involvement as the NEPA process is undertaken and the LTEMP is developed and prepared.

Background

Glen Canyon Dam was authorized by the Colorado River Storage Project Act of 1956 and completed by Reclamation in 1963. Below Glen Canyon Dam, the Colorado River flows for 15 miles through the Glen Canyon National Recreation Area which is managed by the NPS. Fifteen miles below Glen Canyon Dam, Lees Ferry, Arizona, marks the beginning of Marble Canyon and the northern boundary of Grand Canyon National Park.

The major function of Glen Canyon Dam is water conservation and storage. The dam is specifically managed to regulate releases of water from the Upper Colorado River Basin to the Lower Colorado River Basin to satisfy provisions of the 1922 Colorado River Compact and subsequent water delivery commitments, and thereby allow states within the Upper Basin to deplete water from the watershed upstream of Glen Canyon Dam and utilize their apportionments of Colorado River water.

Another function of Glen Canyon Dam is to generate hydroelectric power. Between the dam's completion in 1963 and 1990, the dam's daily operations were primarily to maximize generation of hydroelectric power. Over time, concerns arose with respect to the operation of Glen Canyon Dam, including effects on the downstream riparian ecosystem and on species listed pursuant to the ESA. In 1992, Congress passed and the President signed into law the GCPA which addresses potential impacts of dam operations on downstream resources in Glen Canyon National Recreation Area and Grand Canyon National Park.

The GCPA required the Secretary to complete an EIS evaluating alternative operating criteria that would determine how Glen Canyon Dam would be operated ''to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established.'' The final EIS was completed in March 1995. Consistent with section 1802 of the GCPA, the Preferred Alternative (Modified Low Fluctuating Flow Alternative) was selected as the best means to operate Glen Canyon Dam in a ROD issued on October 9, 1996. In 1997 the Secretary adopted operating criteria for Glen Canyon Dam (62 FR 9447) as required by Section 1804(c) of the GCPA.

Additionally, the GCPA required the Secretary to undertake research and monitoring to determine if revised dam operations were achieving the resource protection objectives of the final EIS and ROD. These provisions of the GCPA were incorporated into the 1996 ROD and led to the establishment of the GCDAMP, administered by Reclamation, and of the Grand Canyon Monitoring and Research Center within the USGS.

Purpose and Need for Action

The purpose of the proposed action is to fully evaluate dam operations and identify management actions and experimental options that will provide a framework for adaptively managing Glen Canyon Dam over the next 15 to 20 years consistent with the GCPA and other provisions of applicable Federal law. The proposed action will help determine specific alternatives that could be implemented to meet the GCPA's requirements and to minimize—consistent with law—adverse impacts on the downstream natural, recreational, and cultural resources in the two park units, including resources of importance to American Indian Tribes. The need for the proposed action stems from the need to utilize scientific information developed over the past 15 years to better inform Departmental decisions on dam operations and other management and experimental actions so that the Secretary may continue to meet statutory responsibilities for protecting downstream resources for future generations, conserving ESA listed species, and protecting Native American interests, while meeting water delivery obligations and for the generation of hydroelectric power.

Proposed Federal Action

The proposed Federal action is to (a) Develop and implement a structured, long-term experimental and management plan for the operation of Glen Canyon Dam and (b) to determine whether to establish a Recovery Implementation Program for endangered fish species below Glen Canyon Dam.

Public Disclosure

Before including a name, address, telephone number, e-mail address, or other personal identifying information in the comment, please be advised that the entire comment—including personal identifying information—may be made publicly available at any time. While a commenter may request that Reclamation and the NPS withhold personal identifying information from public review, Reclamation and the NPS cannot guarantee that the Department will be able to do so.

Dated: June 23, 2011.

Anne J. Castle,

Assistant Secretary—Water and Science.

Rachel Jacobson,

Acting Assistant Secretary—Fish and Wildlife and Parks.

[FR Doc. 2011–16926 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Draft Environmental Impact Statement/ Environmental Impact Report (EIS/EIR) and Notice of Scoping Meeting for the San Joaquin River Exchange Contractors Water Authority's 25-Year Water Transfer Program 2014 to 2038, California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of intent and scoping meeting.

SUMMARY: The Department of the Interior, Bureau of Reclamation (Reclamation) and the San Joaquin River Exchange Contractors Water Authority (Exchange Contractors) propose to prepare a joint EIS/EIR for a twenty-five year water transfer program (Program). The action would be to execute agreements for water transfers among Reclamation, Mid-Pacific Region; Central Valley Project (CVP) and State Water Project (SWP) contractors; and the Exchange Contractors for water service years 2014 to 2038. The Program would consist of the annual development and transfer of up to 150,000 acre-feet of substitute water (maximum of 100,000 acre-feet of

conserved water and a maximum of 50,000 acre-feet from land fallowing) from the Exchange Contractors to other CVP contractors, to Reclamation's Refuge Water Supply Program (RWSP) for delivery to the San Joaquin Valley wetland habitat areas (wildlife refuges), and/or State Water Project (SWP) contractors.

DATES: Written comments on the scope of the EIS/EIR should be mailed to Mr. Brad Hubbard at the address below by August 10, 2011.

A public scoping meeting will be held on July 13, 5–7 p.m., in Los Banos, California.

ADDRESSES: Written comments on the scope of the EIS should be sent to Mr. Brad Hubbard, Bureau of Reclamation, 2800 Cottage Way, MP–410, Sacramento, California, 95825, or via e-mail to *bhubbard@usbr.gov.*

The public scoping meeting will be held at the Miller-Lux Building, Floor 1, 830 Sixth Street, Los Banos, California.

FOR FURTHER INFORMATION CONTACT: Mr. Brad Hubbard, Project Manager, Bureau of Reclamation at the above address, via e-mail at *BHubbard@usbr.gov* or at 916–978–5204, or Ms. Joann White, San Joaquin River Exchange Contractors Water Authority, via e-mail at *jwhite@sjrecwa.net* at 209–827–8616.

SUPPLEMENTARY INFORMATION: The Program's objective is the Exchange Contractor's annual transfer of Central Valley Project (CVP) water to:

- Other CVP contractors and SWP contractors to meet demands of agriculture, municipal, and industrial uses, and/or
- The RWSP for delivery to the San Joaquin Valley Federal, State and private wildlife refuges.

The proposed Program would assist Reclamation in optimizing the use of limited existing water resources for agriculture, fish and wildlife resources, and municipal and industrial purposes. The Exchange Contractors propose to annually transfer CVP water for the production of agricultural crops or livestock and/or municipal and industrial uses because of water supply shortages or when full contract deliveries cannot otherwise be made. The RWSP needs additional water to provide the refuges with the increment between Level 2 (approximately 422 thousand acre-feet (TAF) of CVP yield—the amount of water historically used by refuges prior to 1992), and Level 4 (approximately 555 TAF—the amount of water required for optimum wetland habitat development) quantities. This increment is known as ''Incremental Level 4'' and is water the RWSP acquires from willing sellers. The Program's annual water transfers would occur largely within the San Joaquin Valley of central California. The Exchange Contractors' service area covers parts of Fresno, Madera, Merced, and Stanislaus counties. The agricultural water users that would benefit from the potential transfers are located in the counties of Stanislaus, San Joaquin, Merced, Madera, Fresno, San Benito, Santa Clara, Tulare, Kern, Kings, Contra Costa, Alameda, Monterey, and Santa Cruz. The wetland habitat areas that may receive the water are located in Merced, Fresno, Kings, Tulare, and Kern counties.

Some of the resources potentially affected by transfers under the proposed Program include: surface water including the San Joaquin River, groundwater, biological resources, land uses including Indian Trust Assets (if any), air quality/climate change, socioeconomics including impacts to agricultural production, and environmental justice.

Special Assistance for Public Meetings

If special assistance is required to participate in the scoping meeting, please contact Ms. Joann White at 209–827–8616 or via e-mail at *jwhite@sjrecwa.net.* A telephone device for the hearing impaired (TDD) is available at 916–989–7285.

Public Disclosure

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: June 3, 2011.

Anastasia T. Leigh,

Acting Regional Environmental Officer, Mid-Pacific Region.

[FR Doc. 2011–16838 Filed 7–5–11; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–11–019]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: July 20, 2011 at 11 a.m.

PLACE: Room 110, 500 E Street, SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

Matters To Be Considered:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–379 and 731–TA–788 and 790–793 (Second Review)(Stainless Steel Plate from Belgium, Italy, Korea, South Africa, and Taiwan). The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before August 10, 2011.
5. Vote in Inv. No. 731–TA–856 (Second Review)(Ammonium Nitrate from Russia). The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before July 27, 2011.
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: June 30, 2011.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2011–16946 Filed 7–1–11; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[OMB Number 1110–0015]

Agency Information Collection Activities: Proposed Collection, Comments Requested Revision of a Currently Approved Collection; Hate Crime Incident Report; Quarterly Hate Crime Report

ACTION: 60-day Notice of Information Collection Under Review.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until September 6, 2011. This process is

conducted in accordance with 5 CFR 1320.10.

Written comments concerning this information collection should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attn:* DOJ Desk Officer. The best way to ensure your comments are received is to e-mail them to *oira_submission@omb.eop.gov* or fax them to 202–395–7285. All comments should reference the 8 digit OMB number for the collection or the title of the collection. To request a copy of copy of the proposed information collection instrument with instructions, should be directed to Mr. Gregory E. Scarbro, Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, or facsimile to (304) 625–3566. If you have questions concerning the collection, please call Gregory E. Scarbro at 1–304–625–2000 or the DOJ Desk Officer at 202–395–3176.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Hate Crime Incident Report and the Quarterly Hate Crime Report.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection: Form Number:* 1–699 and 1–700; *Sponsor:* Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* City, county, state, federal and tribal law enforcement agencies. *Brief Abstract:* This collection is needed to collect information on hate crime incidents committed throughout the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 14,981 law enforcement agency respondents that submit quarterly, four times per year, for a total of 59,924 responses with an estimated response time of 9 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 8,989 hours, annual burden, associated with this information collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street, NE., Room 2E–508, Washington, DC 20530.

Jerri Murray,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. 2011–16853 Filed 7–5–11; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—Evaluating Early Access to Medicaid as a Reentry Strategy

AGENCY: National Institute of Corrections, U.S. Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: The National Institute of Corrections (NIC) Administration Division is seeking applications for the development, implementation, and evaluation of a project to assess the effects of access to Medicaid at the time of release from incarceration on reentry outcomes, including health care utilization, employment success, and recidivism. The recipient of the award will work in a partnership with the selected state's prisons, jails, and Medicaid agency to implement and evaluate the project. This project will be conducted over a 36-month period. This cooperative agreement is a collaborative project between the National Institute of Corrections and the Office of the Assistant Secretary for Planning and Evaluation (ASPE), U.S. Department of Health of Human Services (HHS).

To be considered, applicants must demonstrate at a minimum (1) In-depth knowledge of the criminal justice and healthcare fields, (2) experience working with local jails, state prisons, and state Medicaid agencies, (3) the capacity to engage local jails, state prisons, and state Medicaid agencies participation in this project, and (4) the experience and organizational capacity to carry out the goals of this project.

DATES: Applications must be received by 4 p.m. (EDT) on August 11, 2011.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of Corrections, 320 First Street NW., Room 5002, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date as mail at NIC is sometimes delayed due to security screening.

Hand-delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. At the front desk, dial (202) 307–3106, extension 0 for pickup.

Faxed and e-mailed applications will not be accepted; however, electronic applications can be submitted via *http://www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this announcement and links to the required application forms can be downloaded from the NIC Web site at *http://www.nicic.gov/cooperativeagreements.*

All technical or programmatic questions concerning this announcement should be directed to CDR Anita E. Pollard, Corrections Health Manager, National Institute of Corrections. CDR Pollard can be reached by e-mail at *apollard@bop.gov.* In addition to the direct reply, all questions and responses will be posted on NIC's Web site at *http://www.nicic.gov for public review.* (The names of those submitting questions will not be posted.) The Web site will be updated regularly and postings will remain on the Web site until the closing date of this cooperative agreement solicitation. Only questions received by 12 p.m. (EDT) on August 2, 2011 will be answered.

SUPPLEMENTARY INFORMATION:

Overview: The reentry period is associated with increased risk of re-arrest, medical problems, and death. Many individuals reenter the community with significant health problems, yet few have access to any public or private health insurance upon

release from incarceration. (S. E. Wakeman, M. E. McKinney, and J. D. Rich. (2009). ''Filling the Gap: The Importance of Medicaid Continuity for Former Inmates.'' *Journal of General Internal Medicine* 24 (7): 860–62.) NIC is seeking solicitations for a project that will develop a replicable process for including enrollment in Medicaid as part of reentry programming in prisons and jails. The project will also evaluate whether timely access to healthcare contributes to increased positive integration into the community after release by measuring changes in healthcare utilization, employment, and recidivism using random assignment or other rigorous statistical techniques for measuring impacts. The focus population consists of incarcerated individuals who are returning to the community and who are reasonably expected to be eligible upon release for federal or state funded Medicaid services under a variety of special state Medicaid provisions. The project's activities will also inform the design of Medicaid enrollment strategies for this low-income, childless adult population expected to be included in the 2014 Medicaid coverage expansion under the Affordable Care Act.

Background: A large share of the individuals who cycle through America's jails and prisons are poor, minority, and male. At the end of 2009, 93 percent of state and Federal prison inmates were male and black males had an imprisonment rate (3,119 per 100,000 U.S. residents) that was more than 6 times higher than white males (487 per 100,000), and almost 3 times higher than Hispanic males (1,193 per 100,000). (R. H. Lamb and L. E. Weinberger, ''Persons with Severe Mental Illness in Jails and Prisons: A Review,'' *Psychiatric Services* 49 (April 1998):483–92.) Rates of mental illness, substance use and abuse, infectious disease, and chronic health problems are higher among jail and prison inmates than for the general U.S. population. Results of several studies of jail and prison populations suggest that rates are three to seven times higher for incarcerated individuals compared to the general population, depending on the condition. One study of reentering individuals found that nearly four in 10 men and six in 10 women have a combination of physical health, mental health, and substance abuse conditions. Not only do these conditions pose health risks, but they can contribute to criminal behavior if untreated or inadequately treated during incarceration and following release.

Individuals reentering society after incarceration often encounter a number of barriers. Research suggests that helping to ensure that reentering individuals can meet their basic needs can lead to better outcomes for those individuals, including lower rates of recidivism. Severe or unmanaged health problems increase the risk of adverse outcomes, *i.e.* physical illness, relapse, etc. Reentering individuals with health problems report more problems finding employment and physical and mental health conditions often interfere with their ability to work. Among the general reentering population, employment is shown to reduce one's odds of returning to jail or prison. However, returning offenders with debilitating health conditions have reentry experiences that vary greatly from the average reentering individual. Successful treatment of reentering individuals' health conditions could increase rates of reentry success by improving their ability to work, support themselves, and abstain from substance use, all of which have been shown to contribute to decreased recidivism. (K. Mallik-Kane and C. Visher, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape to Process of Reintegration,* Washington, DC: Urban Institute, 2008).

Jails and prisons are responsible for providing medical care while individuals are incarcerated, but that care typically ends as soon as individuals are released back to the community. Continuity of care between the correctional facility and the community is a critical factor in this, providing crucial support to individuals as they strive to comply with conditions of release. However, upon release, most individuals have few options for receiving necessary healthcare, including addiction and mental health treatment. Correctional jurisdictions make significant investments in the health of incarcerated individuals; access to affordable healthcare post-release increases the value of those investments and may reduce future corrections spending.

The results of several studies suggest that between 50 and 90 percent of the criminal justice-involved population lacks health insurance when released from prison or jail. Low levels of employment and income among the formerly incarcerated reduce their ability to obtain affordable health insurance and partially explain the low level of coverage among this population. (D. Mancuso and B.E.M. Felver (2010) ''Health Care Reform, Medicaid Expansion and Access to Alcohol/Drug Treatment: Opportunities for Disability Prevention.'' *RDA Report 4.84.* Washington Department of Social and Health Services, Research and Data Analysis Division, Olympia, Washington; C. Redcross, D. Bloom, G. Azurdia, J. Zweig, and N. Pindus. (2009). ''Transitional Jobs for Ex-Prisoners Implementation, Two-Year Impacts, and Costs of the Center for Employment Opportunities (CEO) Prisoner Reentry Program.'' MDRC for the U.S. Dept. of Health and Human Services, Office of Planning Research and Evaluation. Washington, DC; E.A. Wang, M.C. White, R. Jamison, J. Goldenson, M. Estes and J.P. Tulsky. (2008) ''Discharge Planning and Continuity of Health Care: Findings from the San Francisco County Jail.'' *American Journal of Public Health,* 98 (12): 2182–84.; K. Mallik-Kane and C. A. Visher. (2008) ''Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration.'' Urban Institute Justice Policy Center: Washington, D.C.; B. DiPietro. *Frequently Asked Questions: Implications of the Federal Legislation on Justice Involved Populations.* New York: Council of State Governments Justice Center, 2011.)

In March of 2010, the Patient Protection and Affordable Care Act (PPACA), Public Law 111–148 and the Health Care and Education Reconciliation Act, Public Law 111–152 were passed and signed into law and together became known as the Affordable Care Act, or health care reform. One of the most notable elements of the Affordable Care Act is its 2014 expansion of Medicaid eligibility to individuals at or below 133 percent of the federal poverty level. This will dramatically increase the Medicaid-eligible population. A Congressional Budget Office (CBO) analysis estimates that an additional 16 million individuals will be eligible for Medicaid beginning in 2014. Included in that population are many of the 9 million individuals who cycle through American jails and the over 725,000 individuals who are released from prison every year. Many of these individuals have significant health needs but, in most states, are not currently eligible for enrollment in Medicaid. (Congressional Budget Office. 2010. ''Letter to Nancy Pelosi on H.R. 4872, Reconciliation Act of 2010 (Final Health Care Legislation).'' Washington, DC: Congressional Budget Office, March 20; S. Somers, A. Hamblin, J. Verdier, and V. Byrd. August 2010 ''Covering Low-Income Childless Adults in Medicaid: Experiences from Selected States.'' Center for Health Care

Strategies and Mathematica Policy Research, Inc.)

The changes occurring as a result of healthcare reform will significantly affect the ways in which justice involved individuals can access public health insurance and services. Estimates indicate that at least 35 percent of new Medicaid eligibles under the Affordable Care Act will have a history of criminal justice system involvement. (Calculations based on the estimated size of newly eligible population, the size of the justice involved population and the share of that population without insurance.) This overlap between the reentering population and Medicaid eligibles provides the opportunity to jumpstart the enrollment process for health care coverage through Medicaid on a broader scale as part of the reentry planning process. It also allows for the evaluation of the association between expanding access to treatment and health services and reentry outcomes. Particularly, it provides a framework for evaluating the interconnectedness of health status, employment, and recidivism. Additionally, this provides a mechanism for studying targeted outreach and enrollment strategies for one large subgroup of those newly eligible for Medicaid in 2014.

NIC/DOJ and ASPE/HHS are committed to promoting risk reduction through the use of evidence-based policies and practices. One way to reduce risk among individuals reentering the community from prison or jail is to ensure continuity of care between the detention facility and the community. Effective continuity of care increases treatment benefits and opportunities for successful reintegration, strengthens already invested treatment resources, and decreases health and safety risks among reentering individuals and the communities to which they return. Some local jails and state corrections institutions currently include pre-release application for Medicaid as a part of the reentry planning process. The Bazelon Center for Mental Health Law, an advocacy organization for people with mental disabilities, has made a strong case for incorporating assistance to benefits, such as Medicaid, a part of reentry programming. Reentry activities that connect individuals to Medicaid often include providing active assistance with the application processes and linking individuals to community providers. Research has found a positive relationship between access to healthcare upon reentry and a number of outcomes related to improved well-being although, most of this research focuses on individuals with severe mental illness. These positive effects include reduced recidivism and reduced health care costs. (Bazelon Center for Mental Health Law. (2009) *LIFELINES: Linking to Federal Benefits for People Exiting Corrections. Volumes 1, 2, and 3.* Washington, DC; D. Mancuso and B.E.M. Felver (2010) ''Health Care Reform, Medicaid Expansion and Access to Alcohol/Drug Treatment: Opportunities for Disability Prevention.'' *RDA Report 4.84.* Washington Department of Social and Health Services, Research and Data Analysis Division, Olympia, Washington; A. T. Wenzlow, H. T. Ireys, B. Mann, C. Irvin, & J. Teich. (2011) ''Effects of a Discharge Planning Program on Medicaid Coverage of State Prisoners with Serious Mental Illness.'' *Psychiatric Services,* 62(1): 73–78).

NIC and ASPE are expanding on earlier research by examining the provision of Medicaid enrollment assistance and its effect on reentry outcomes for all Medicaid-eligible individuals reentering the community from jail or prison. The reentry population may face numerous challenges in applying for Medicaid, including low literacy levels, poor mental health and functioning, incomplete personal identification and lack of documentation. Addressing these challenges as a part of the reentry planning process will facilitate the development of evidence-based practices for connecting a population with unique and complicated needs to health services in the community.

Purpose: This project will evaluate how application assistance during incarceration and enrollment in Medicaid at the time of release from incarceration affects three outcomes related to individual and community well-being: (1) Healthcare utilization, (2) employment, and (3) recidivism. Without adequate access to healthcare and treatment, individuals reentering the community from jail or prison can contribute to decreased public safety, create additional financial burdens on the public health system, and be less likely to find and maintain employment. This model requires cooperation and collaboration among local jails, state corrections, parole and probation (if under supervision), and Medicaid agencies to provide access to continuing community-based healthcare following release. States have developed systems to assist other vulnerable populations, such as homeless and domestic violence populations, with benefits applications, but these processes may not have been adapted or extended to the reentry population. Enrollment in Medicaid capitalizes on treatment provided in the jail or prison setting and offers necessary support for an individual to comply with conditions of release. If shown as an effective practice for increasing access to healthcare and increasing successful reentry outcomes, this strategy would be a win-win for states by improving the effectiveness of both corrections and Medicaid agencies and potentially reducing long-term costs.

Scope of Work: The cooperative agreement awardee will design, implement, and evaluate a project that addresses the following research questions: (1) What are the institutional challenges for local jails, state corrections departments, and Medicaid agencies in implementing a pre-release application process? What application processes has the state developed and do they consider individuals who may have difficulty providing standard documentation or social security numbers (SSNs)? How do they help these groups, and does this vary by online, fax, and other modalities? (2) Does the implementation of a pre-release Medicaid application process lead to greater and faster enrollment in Medicaid than waiting until after release? (3) Does the pre-release Medicaid application process result in greater and timelier use of community healthcare services? (4) How does the relationship between pre-release application for Medicaid and actual enrollment and utilization of Medicaid vary across subgroups? (5) What is the impact of the pre-release application process and Medicaid enrollment on employment success, as measured, for example, by earnings? How does this relationship vary across subgroups? (6) What is the effect of the program on recidivism, as mediated or moderated by healthcare access and utilization? Does this relationship have subgroup variation?

A schedule of activities for this project shall include, at a minimum, the following:

(1) Identification of an appropriate evaluation site(s) among states that either (a) currently have a Section 1115 Medicaid demonstration waiver to cover childless adults; (b) are early adopters of the Medicaid expansion under the Affordable Care Act; or, (c) use state-only funding to extend public health insurance coverage to childless adults. (*See* appendix A for a list of likely states.)

(2) Selection of sites using criteria established by NIC and ASPE. (a) Scale shall be a primary criterion for site selection. The cohort of prisoners in the queue for release must be large enough

that early findings on the take-up rates can be generated within the first 15 months of the project. (b) The level of statistical rigor allowed by the site selection is a second criterion. Sites that allow random assignment to treatment and control groups of individuals within an institution or of facilities within a state are preferable to those that allow for only a comparison group. (c) States' willingness to and ability to conduct statistical data matching for the evaluation is a third criterion. (d) Adequate sample size is a fourth criterion. The sample of individuals must be such that rigorous statistical techniques can be employed to determine subgroup outcomes.

(3) Design and facilitation of project implementation through: (a) Providing assistance to the sites in the development of an appropriate reentry Medicaid application process; (b) Helping states identify resources, including reallocation of existing reentry programming resources and recruitment of volunteers to implement the project; (c) Assisting states in developing Memorandums of Understanding (MOUs) for data exchange between state corrections, local jails, Medicaid agencies, and state repositories of employment information. Information on employment is most likely available from the quarterly wage data available through the state unemployment insurance agency or state child support enforcement program. The state child support enforcement agency also maintains the state directory of new hires which has information on all new job starts.

(4) Design and conduct of random assignment project evaluation, which includes using the analyses of matched data using appropriate statistical methodologies to determine the relationship between early access to Medicaid and the previously identified outcomes of interest: (a) Healthcare utilization, (b) employment success, and (c) recidivism.

These are the minimum project requirements. Procedurally the award recipient will also be responsible for preparing documents that may be required by NIJ to obtain approvals and clearances associated with the Privacy Act, Paperwork Reduction Act, and Protection of Human Subjects.

Applicants are also encouraged to approach other funding partners to expand the scope of the demonstration to include access to additional benefits, such as food stamps (SNAP); to consider supplemental data collection strategies such as participant surveys; and to implement the project in additional sites. These expansions will be subject to the approval of NIC and ASPE.

Key issues and challenges for this project include: Recruitment of sites where both the corrections and Medicaid agencies are willing to participate and exchange information; Reducing the barriers to establishing institution-spanning collaborations given state and local government fiscal constraints; Differences in the reentry planning processes in jail and prison environments; Confidentiality restrictions that may impede the development of shared data agreements between state and local corrections, Medicaid, and child support agencies; Collection of data on healthcare utilization among non-Medicaid users in both the treatment and control groups; Development of an experimental evaluation design given the constraints that accompany research conducted in corrections environments; Capacity of communities to provide additional healthcare services to newly eligible populations; Medicaid requirements for verifiable identification as part of the enrollment process and to access services; Consistent transition planning across disciplines. Post release parole or probation supervision, when ordered, plays an important role in potential success or failure of transitional planning, but will probably be administered by a separate agency.

The applicant must address the issues and challenges identified above by describing why each issue is important and propose strategies for successfully addressing each challenge. Applicants are encouraged to identify and address additional issues and challenges that they believe will significantly affect the successful implementation of this project.

Project deliverables include: A site selection memorandum that lays out what sites were considered, the criteria for site selection, and the site recommendation (year 1); An implementation report that details the design of the demonstration implementation challenges and how those challenges were met (year 2); A policy brief on initial findings related to Medicaid enrollment (year 2); A report on project impacts at 12 months post release (year 3).

If additional resources are made available in subsequent years, additional deliverables may include: A replicability toolkit for the field with sections that apply to local jails, state prisons, and Medicaid agencies (year 4); and A report on project impacts at 24 months post release (year 5).

Document Preparation: For all awards in which a document will be a deliverable, the awardee must follow the Guidelines for Preparing and Submitting Manuscripts for Publication as found in the ''General Guidelines for Cooperative Agreements,'' which will be included in the award package. All final publications submitted for posting on the NIC Web site must meet the federal government's requirement for accessibility (508 PDF and 508 HTML file or other acceptable format). All documents developed under this cooperative agreement must be submitted in draft form to NIC for review before the final products are delivered. NIC will manage the concurrent review with ASPE.

Meetings: The cooperative agreement awardee, with subject matter experts, will attend an initial meeting with the ASPE and NIC staff for a project overview and preliminary planning. This will take place shortly after the cooperative agreement is awarded and will be held in Washington, DC. The meeting will last up to 2 full days.

The awardee, with subject matter experts, should also plan to meet with ASPE and NIC staff at least two more times during the course of the project. These meetings will last up to 2 days and may focus on project development and updates. Only one of these meetings will be held in Washington, DC.

The awardee, with subject matter experts, should plan to meet via WebEx several times at key points during the project for updates and project development activities. NIC will host these meetings, which will last up to 2 hours. The meeting itself will be at NIC's expense, but fees for project staff who attend the meeting will be charged to the cooperative agreement.

Application Requirements: An application package must include: OMB Standard Form 424, Application for Federal Assistance; A cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year under which the applicant operates (e.g., July 1 through June 30); An outline of projected costs with the budget and strategy narratives described in this announcement; and a project summary/abstract. The following additional forms must also be included: OMB Standard Form 424A—Budget Information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non-Construction Programs (both available at *http://www.grants.gov*); DOJ/FBOP/NIC Certification Regarding Lobbying, Debarment, Suspension and Other Responsibility Matters; The Drug-Free Workplace Requirements (available at *http://www.nicic.org/Downloads/PDF/certif-frm.pdf*).

Applications should be concisely written, typed double-spaced and reference the project by the NIC opportunity number and title referenced in this announcement. If you are hand delivering or submitting via Fed-Ex, please include an original and three copies of the full proposal (program and budget narrative, application forms, assurances and other descriptions). The originals should have the applicant's signature in blue ink. Electronic submissions will be accepted only via *http://www.grants.gov*.

The project summary/abstract portion of the application should include a summary of the application's project description and a brief description of the critical elements of the proposed project. The summary must be clear, accurate, concise, and without reference to other parts of the application. The brief description must include the needs to be addressed, the goals and objectives for the project, and how the strategies proposed meet those goals and objectives.

Please place the following at the top of the abstract: Project title; Applicant name (Legal name of applicant organization); Mailing address; Contact phone numbers (voice, fax); E-mail address; Web site address, if applicable.

The Project Summary/Abstract must be single-spaced and limited to one page in length.

The narrative portion of the application should include, at a minimum, the following sections.

A Statement indicating the applicant's understanding of the project's purpose, goals and objectives. The applicant should state this in language other than that used in the solicitation (*i.e.,* do not simply repeat the wording from the solicitation).

Project Design and Implementation: This section should describe how the applicant proposes to assist the sites in the design and implementation of the project and how the key design and implementation issues and challenges will be addressed.

Project Evaluation: This section will lay out the proposed random assignment or other statistically rigorous evaluation strategy for the project and how key evaluation issues and challenges will be addressed.

Project Management: In this section, the applicant will provide a chart of measurable project milestones and timelines for the completion of each milestone.

Capabilities and Competencies: This section should describe the qualifications of the applicant organization and any partner organizations doing the work proposed and the expertise of key staff to be involved in the project. Attach resumes that document relevant knowledge, skills, and abilities to complete the project for the principle investigator and each staff member assigned to the project. If the applicant organization has completed similar projects in the past, please include the URL/Web site or ISBN number for accessing a copy of the referenced work.

Budget: The budget should detail all costs for the project, show consideration for all contingencies for the project, note a commitment to work within the proposed budget, and demonstrate the ability to provide deliverables reasonably according to schedule.

The narrative portion of the application should not exceed 30 double-spaced typewritten pages, excluding attachments related to the credentials and relevant experience of staff.

Authority: Public Law 93–415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. Funds may be used only for the activities linked to the desired outcome of the project. The funding amount should not exceed $500,000. There is no match required under this announcement but applicants may include commitments from other funding partners to expand the scope of the demonstration to include access to additional benefits; to propose supplemental data collection strategies such as participant surveys; to implement the project in additional sites; and for other enhancements related to this project. The approval of these collaborative efforts is subject to the written approval of NIC and ASPE.

Eligibility of Applicants: Eligible applicants include non-profit and for-profit entities, public and private institutions of higher education, individuals, organizations, and private agencies. Applicants must have: Demonstrated capacity in designing, implementing, and evaluating projects in correctional settings; Subject matter expertise in best practices in pre-release planning and services; Subject matter expertise in prison/jail transitions to community; Subject matter expertise in Medicaid eligibility for childless adults under current law and under implementation of the Affordable Care Act provisions for expansion to this population in 2014; Subject matter expertise in healthcare access issues for individuals re-entering the community from prison or jail.

Applicants may partner with other entities to bring the full range of subject matter expertise to the proposal. The approval of these collaborative efforts is subject to the written approval of NIC and ASPE. Applicants must have demonstrated ability to implement a project of this size and scope.

Review Considerations: Applications received under this announcement will be subject to a collaborative NIC and ASPE review process. The criteria for the evaluation of each application will be as follows:

Programmatic: 40 Points.

Are all of the project research questions and activities adequately discussed? Is there a clear description of how each project activity will be accomplished, including major tasks, the strategies to be employed, required staffing, responsible parties, and other required resources? Are there any unique or exceptional approaches, techniques, or design aspects proposed that will enhance the project?

Project Management and Administration: 20 Points. Does the applicant identify reasonable objectives, milestones, measures to track progress? Are the proposed management and staffing plans clear, realistic, and sufficient to carry out the project? Is the applicant willing to meet with NIC and ASPE, at a minimum, as specified in the solicitation for this cooperative agreement?

Organizational and Project Staff Background: 30 Points.

Do the skills, knowledge, and expertise of the organization and the proposed project staff demonstrate a high level of competency to carry out the tasks? Does the applicant/organization have the necessary experience and organizational capacity to carry out all goals of the project? If consultants and/or partnerships are proposed, is there a reasonable justification for their inclusion in the project and a clear structure to ensure effective coordination?

Budget: 10 Points.

Is the proposed budget realistic, does it provide sufficient cost detail/narrative, and does it represent good value relative to the anticipated results? Does the application include a chart that aligns the budget with project activities along a timeline with, at a minimum, quarterly benchmarks? In terms of program value, is the estimated cost reasonable in relation to work performed and project products?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

Applicants can obtain a DUNS number at no cost by calling the

dedicated toll-free DUNS number request line at 1–800–333–0505. Applicants who are sole proprietors should dial 1–866–705–5711 and select option 1.

Applicants may register in the CRR online at the CCR Web site, *http://www.ccr.gov.* Applicants can also review a CCR handbook and worksheet at this Web site.

Number of Awards: One.

NIC Opportunity Number: 11AD10. This number should appear as a reference line in the cover letter, where indicated on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.602

Executive Order 12372: This project is not subject to the provisions of Executive Order 12372.

NIC expects this award to be signed by September 13, 2011.

Morris L. Thigpen,

Director, National Institute of Corrections.

Appendix A

The states listed below are likely to be appropriate evaluation sites because they either (a) Currently have a Section 1115 Medicaid demonstration waiver to cover childless adults; (b) are early adopters of the Medicaid expansion under the Affordable Care Act; or, (c) use state-only funding to extend public health insurance coverage to childless adults.

Section 1115 Medicaid Waivers: Wisconsin, Maine, Indiana (expires end of 2012), New York, Vermont, California.

Early Medicaid Expansion Adopters: Connecticut, District of Columbia, Minnesota.

State-only Coverage of Childless Adults: District of Columbia, Washington, Minnesota, Pennsylvania, Massachusetts.

[FR Doc. 2011–16844 Filed 7–5–11; 8:45 am]

BILLING CODE 4410–36–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–058)]

National Environmental Policy Act; Santa Susana Field Laboratory

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of intent to conduct scoping and prepare an Environmental Impact Statement (EIS) for Demolition and Environmental Cleanup Activities for the NASA administered portion of the Santa Susana Field Laboratory (SSFL), Ventura County, California.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), as amended, (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500–1508), and NASA's NEPA policy and procedures (14 CFR Part 1216, subpart 1216.3), NASA intends to prepare an EIS for demolition and cleanup activities at SSFL in Ventura County, California. Furthermore, pursuant to 36 CFR Section 800.8(c) of the National Historic Preservation Act (NHPA), NASA will use the NEPA process and the EIS it produces to comply with Section 106 of NHPA in lieu of the procedures set forth in Sections 800.3 through 800.6.

The purpose of this notice is to apprise interested agencies, organizations, tribal governments, and individuals of NASA's intent to prepare the EIS. NASA will hold public scoping meetings to get the views of interested parties regarding appropriate action alternatives and significant environmental issues associated with the development of the EIS. The scoping meeting locations and dates identified at this time are provided under **SUPPLEMENTARY INFORMATION** below.

DATES: Interested parties are invited to submit comments on environmental issues and concerns, preferably in writing, on or before September 17, 2011, to assure full consideration during the scoping process.

ADDRESSES: Comments submitted by mail should be addressed to Allen Elliott, SSFL Project Director, NASA MSFC AS01, Building 4494, Huntsville, AL 35812. Comments may be submitted via e-mail to *msfc-ssfl-eis@mail.nasa.gov.*

FOR FURTHER INFORMATION CONTACT: Allen Elliott, SSFL Project Director, by phone at (256) 544–0662 or by e-mail at *msfc-ssfl-eis@mail.nasa.gov.* Additional information about NASA's SSFL site, the proposed demolition and cleanup activities, and the associated EIS planning process and documentation (as available) may be found on the internet at *http://ssfl.msfc.nasa.gov* or on the California Department of Toxic Substances Control (DTSC) Web site at *http://www.dtsc.ca.gov/SiteCleanup/Santa_Susana_Field_Lab/.*

SUPPLEMENTARY INFORMATION:

SSFL Site Background

The SSFL site is 2,850 acres located in Ventura County, California approximately seven miles northwest of Canoga Park and approximately 30 miles northwest of downtown Los Angeles. SSFL is comprised of four areas known as Areas I, II, III, and IV and two unnumbered areas known as the ''undeveloped land''. NASA administers 41.7 acres within Area I and all 409.5 acres of Area II. The Boeing Company manages the remaining 2,398.8 acres within Areas I, III, IV, and two undeveloped areas.

Since the mid-1950s, when the two federally-owned areas were owned by the U.S. Air Force, this site has been used for developing and testing rocket engines. Four test stand complexes were constructed in Area II between 1954 and 1957 named Alfa, Bravo, Coca, and Delta. Area II and the LOX Plant portion of Area I were acquired by NASA from the U.S. Air Force in the 1970s. These test stands and related ancillary structures have been found to have historical significance based on the historic importance of the engine testing and the engineering and design of the structures.

The NASA administered areas of SSFL also contain cultural resources not related to rocket development. SSFL is located near the crest of the Simi Hills that are part of the Santa Monica Mountains running east-west across Southern California. The diverse terrain consists of ridges, canyons and sandstone rock outcrops. The region was occupied by Native Americans from the earliest Chumash, Tongva, and Tataviam cultures. NASA has conducted several previous surveys to locate archaeological and architectural resources within its portion of the SSFL. As a result, NASA has identified one historic property, the Burro Flats Painted Cave, that is listed on the National Register of Historic Places (NRHP), as well as multiple buildings and structures that are either individually eligible for listing on the NRHP or are elements of NRHP-eligible historic districts containing multiple architectural resources.

Previous environmental sampling on the NASA administered property indicates that metals, dioxins, PCBs, volatile organics, and semi-volatile organics are present in the soils and upper groundwater (known as the Surficial Media Operable Unit). Volatile organics, metals, and semi-volatile organics are also present in the deeper groundwater (known as the Chatsworth Formation Operable Unit).

Environmental Commitments and Associated Environmental Review

Rocket engine testing has been discontinued at these sites and the property has been excessed to the

General Services Administration (GSA). GSA has conditionally accepted the Report of Excess pending (i) NASA's certification that all action necessary to protect human health and the environment with respect to hazardous substances on the property has been taken or receipt of EPA's written concurrence that an approved and installed remedial design is operating properly and successfully, OR (ii) the Governor's concurrence in the suitability of the property for transfer per CERCLA Section 120(h)(3)(C).

In 2007, a Consent Order among NASA, Boeing, DOE, and DTSC was signed addressing demolition of certain infrastructure and environmental cleanup of SSFL. NASA entered into an Administrative Order on Consent (AOC) for Remedial Action with DTSC on December 6, 2010 ''to further define and make more specific NASA's obligations with respect to the cleanup of soils at the Site.'' Based on the 2010 Order, NASA is required to complete a federal environmental review pursuant to NEPA, NASA Procedural Requirement (NPR) 8580.1, and Executive Order (EO) 12114. An EIS is being prepared by NASA to include demolition of site infrastructure and soil cleanup, pursuant to the AOC, and groundwater remediation within Area II and a portion of Area I (LOX Plant) of SSFL.

As part of the environmental review process, certain studies are being completed in order to characterize the existing conditions and inform the analysis and consultation. These include surveys for wildlife, critical habitat, rare plants, wetlands, and archaeological and cultural resources. The findings of these studies will be incorporated into the EIS.

Alternatives

In order to prepare SSFL for disposition, NASA proposes the demolition of SSFL structures and cleanup of the site to meet the AOC commitments. The EIS will consider a range of alternatives that meets NASA's objectives to clean up soil and groundwater contamination at the portion of the SSFL site administered by NASA. Implementation of this proposed action would occur by implementing one Demolition Alternative *and* one Environmental Cleanup Alternative, from the following:

Demolition Alternatives

- Demolition Alternative;
- No Demolition Alternative (No Action).

Environmental Cleanup Alternatives

- Alternative for Soil Cleanup to Background Levels and Groundwater Cleanup to Suburban Residential Cleanup Goals;
- Alternative for Soil and Groundwater Cleanup to Suburban Residential Cleanup Goals;
- Alternative for Soil and Groundwater Cleanup to Industrial Cleanup Goals;
- Alternative for Soil and Groundwater Cleanup to Recreational Cleanup Goals;
- No Environmental Cleanup Alternative (No Action).

Per NEPA, NASA is required to include analysis of the ''No Action'' alternative. For the purpose of this analysis two No Action Alternatives are presented. The No Action Alternative analysis involves no environmental cleanup at the site and/or no demolition of test stands and ancillary structures on the NASA-administered property.

NASA anticipates that the areas of potential environmental impact from each alternative of most interest to the public are likely to include: Soil removal/erosion; hazardous waste storage and disposal; potential impacts to threatened, endangered, and sensitive species; effects on critical habitat and wetlands; impacts to cultural and historic resources; air quality and greenhouse gas emissions; and disturbance to groundwater, surface water, or geologic structure.

Scoping Meetings

NASA plans to hold three public scoping meetings to introduce the SSFL project and EIS planning process and to solicit public comments regarding alternatives and environmental issues to be considered in the EIS. The public scoping meetings are scheduled as follows:

1. Chatsworth, Tuesday, August 16, 2011, 6–8:30 p.m. at the Chatsworth Hotel, 9777 Topanga Canyon Road, Chatsworth, CA 91311.

2. Simi Valley, Wednesday, August 17, 6–8:30 p.m. at the Grand Vista, 999 Enchanted Way, Simi Valley, CA 93065.

3. West Hills, Thursday, August 18, 9:30–12 at the Corporate Pointe at West Hills, 8413 Fallbrook Ave, West Hills, CA 91304 areas.

During the EIS planning process, the public will be provided several opportunities for involvement, the first of which is initiated with this NOI and is referred to as scoping. In accordance with NEPA, the purpose of scoping is to provide ''an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action''. Future opportunities for comment and involvement will include reviews of the Draft and Final EIS. The availability of these documents will be published in the **Federal Register** and through local news media to ensure that all members of the public have the ability to actively participate in the NEPA process.

In conclusion, written public input is hereby requested on alternatives and environmental issues and concerns, including impacts to historic properties, associated with Demolition and Environmental Cleanup Activities at NASA's SSFL site in Ventura County, California that should be addressed in the EIS.

Olga M. Dominguez,

Assistant Administrator, Office of Strategic Infrastructure.

[FR Doc. 2011–16819 Filed 7–5–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (11–057)]

Notice of Intent To Grant Partially Exclusive License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Intent to Grant Partially Exclusive License.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant a partially exclusive license in the United States to practice the inventions described and claimed in USPN 6,133,036, Preservation Of Liquid Biological Samples, NASA Case No. MSC–22616–2 and USPN 6,716,392, Preservation Of Liquid Biological Samples, NASA Case No. MSC–22616–3 to Advanced Preservation Technologies, LLC, having its principal place of business in Warner Robins, Georgia. The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective partially exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7.

DATES: The prospective partially exclusive license may be granted unless within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be

consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated partially exclusive license.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Objections relating to the prospective license may be submitted to Patent Counsel, Office of Chief Counsel, NASA/Johnson Space Center, 2101 NASA Parkway, Houston, Texas 77058, Mail Code AL; Phone (281) 483–3021; Fax (281) 483–6936.

FOR FURTHER INFORMATION CONTACT: Kurt G. Hammerle, Intellectual Property Attorney, Office of Chief Counsel, NASA/Johnson Space Center, 2101 NASA Parkway, Houston, Texas 77058, Mail Code AL; Phone (281) 483–1001; Fax (281) 483–6936. Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov/.*

Dated: June 28, 2011.

Richard W. Sherman,

Deputy General Counsel.

[FR Doc. 2011–16816 Filed 7–5–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL LABOR RELATIONS BOARD

Sunshine Act Meetings: July 2011

TIME AND DATES: All meetings are held at 2:30 p.m.: Tuesday, July 5, Wednesday, July 6, Thursday, July 7, Tuesday, July 12, Wednesday, July 13, Thursday, July 14, Wednesday, July 20, Thursday, July 21, Tuesday, July 26, Wednesday, July 27, and Thursday, July 28.

PLACE: Board Agenda Room, No. 11820, 1099 14th St., NW., Washington, DC 20570.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider ''the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto.'' See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION: Lester A. Heltzer, (202) 273–1067.

Dated: July 1, 2011.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2011–17013 Filed 7–1–11; 4:15 pm]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission [NRC–2011–0006].

DATE: Weeks of July 4, 11, 18, 25, August 1, 8, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of July 4, 2011

There are no meetings scheduled for the week of July 4, 2011.

Week of July 11, 2011—Tentative

Tuesday, July 12, 2011

9:30 a.m.

Briefing on the NRC Actions for Addressing the Integrated Regulatory Review Service (IRRS) Report (Public Meeting) (Contact: Jon Hopkins, 301–415–3027).

This meeting will be Web cast live at the Web address—*http://www.nrc.gov.*

Week of July 18, 2011—Tentative

Tuesday, July 19, 2011

9:30 a.m.

Briefing on the Task Force Review of NRC Processes and Regulations Following Events in Japan (Public Meeting) (Contact: Nathan Sanfilippo, 301–415–3951).

This meeting will be Web cast live at the Web address—*http://www.nrc.gov.*

Week of July 25, 2011—Tentative

Thursday, July 28, 2011

9 a.m.

Briefing on Severe Accidents and Options for Proceeding with Level 3 Probabilistic Risk Assessment Activities (Public Meeting) (Contact: Daniel Hudson, 301–251–7919).

This meeting will be Web cast live at the Web address—*http://www.nrc.gov.*

Week of August 1, 2011—Tentative

There are no meetings scheduled for the week of August 1, 2011.

Week of August 8, 2011—Tentative

There are no meetings scheduled for the week of August 8, 2011.

* * * * *

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by e-mail at *william.dosch@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555, (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov*.

Dated: June 30, 2011.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2011–16975 Filed 7–1–11; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–282 and 50–306; NRC–2009–0507]

Northern States Power Company—Minnesota; Prairie Island Nuclear Generating Plant, Units 1 and 2; Notice of Issuance of Renewed Facility Operating License Nos. DPR–42 and DPR–60 for an Additional 20-Year Period; Record of Decision

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC, the Commission) has issued Renewed Facility Operating License Nos. DPR–42 and DPR–60 to Northern States Power Company—Minnesota (licensee), the

operator of Prairie Island Nuclear Generating Plant, Units 1 and 2 (PINGP). Renewed Facility Operating License Nos. DPR–42 and DPR–60 authorize the licensee to operate PINGP at reactor core power levels not in excess of 1,677 megawatts thermal for each unit, in accordance with the provisions of the PINGP renewed licenses and technical specifications.

The notice also serves as the record of decision for Renewed Facility Operating License Nos. DPR–42 and DPR–60, consistent with Title 10 of the Code of Federal Regulations (10 CFR) 51.103, ''Record of Decision—General.'' NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 39, Regarding Prairie Island Nuclear Generating Plant, Units 1 and 2,'' issued May 2011, discusses the Commission's consideration of a range of reasonable alternatives, including replacement power from a new natural-gas-fired, combined-cycle plant; a combination of natural gas, wind, and wood-fired generation and conservation; a combination of wind, conservation, and continued operation of one of the PINGP units; and not renewing the licenses (the no-action alternative). The factors considered in the record of decision appear in the supplemental environmental impact statement (SEIS) for PINGP. Subsequent to the issuance of the final SEIS, the NRC received two letters commenting on the final SEIS. The first letter was from the U.S. Environmental Protection Agency, Region 5, dated June 15, 2011. The second letter was from the Prairie Island Indian Community, dated June 20, 2011. The NRC staff has reviewed the comments and has determined that the comments provide no new or significant information, and therefore, none of the findings in the final SEIS are changed as a result of the comments.

The PINGP units are pressurized-water reactors located within the city limits of Red Wing, MN, on the west bank of the Mississippi River in southeastern Minnesota. The application for the renewed licenses complied with the standards and requirements of the Atomic Energy Act of 1954, as amended, and the Commission's regulations. As required by the Atomic Energy Act and the Commission's regulations in 10 CFR chapter I, the Commission has made appropriate findings, which are set forth in the licenses. Prior public notice of the action involving the proposed issuance of the renewed licenses and of an opportunity for a hearing on the proposed issuance of the renewed licenses was published in the **Federal Register** on June 17, 2008 (73 FR 34335).

For further details with respect to this action, see (1) Northern States Power Company's license renewal application for PINGP dated April 11, 2008, as supplemented by letters dated through May 11, 2011; (2) the Commission's safety evaluation report, issued October 16, 2009, and supplemented on April 15, 2011; (3) the licensee's updated safety analysis report; and (4) the Commission's final environmental impact statement (NUREG–1437, Supplement 39), issued May 2011. These documents are available at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, and online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.*

Copies of Renewed Facility Operating License Nos. DPR–42 and DPR–60, may be obtained by writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Director, Division of License Renewal. Copies of the PINGP safety evaluation report and the final environmental impact statement (NUREG–1437, Supplement 39) may be purchased from the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22161, (*http://www.ntis.gov*), 703–605–6000, or Attention: Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250–7954, (*http://www.gpo.gov/fdsys*), 202–512–1800. All orders should clearly identify the NRC publication number and the requestor's Government Printing Office deposit account number or VISA or MasterCard number and expiration date.

Dated at Rockville, MD, this 27th day of June 2011.

For the Nuclear Regulatory Commission.

Bo M. Pham,

Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–16848 Filed 7–5–11; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17f–2(d); SEC File No. 270–36; OMB Control No. 3235–0028.

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 (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 17f–2(d) [17 CFR 240.17f–2(d)], under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17f–2(d) requires that records produced pursuant to the fingerprinting requirements of Section 17(f)(2) of the Act be maintained; permits the designated examining authorities of broker-dealers or members of exchanges, under certain circumstances, to store and maintain records required to be kept by this rule; and permits the required records to be maintained on microfilm. The general purpose for Rule 17f–2 is to: (i) Identify security risk personnel; (ii) provide criminal record information so that employers can make fully informed employment decisions; and (iii) deter persons with criminal records from seeking employment or association with covered entities. The rule enables the Commission or other examining authority to ascertain whether all required persons are being fingerprinted and whether proper procedures regarding fingerprint are being followed. Retention of these records for the term of employment of all personnel plus three years ensures that law enforcement officials will have easy access to fingerprint cards on a timely basis. This in turn acts as an effective deterrent to employee misconduct.

Approximately 5,300 respondents are subject to the recordkeeping requirements of the rule. Each respondent keeps approximately 60 new records per year, which takes approximately 2 minutes per record for the respondent to maintain, for an annual burden of approximately 2 hours (60 records times 2 minutes) per respondent or a total annual burden of approximately 10,300 hours (5,300 respondents times 2 hours) for all respondents. All records subject to the rule must be retained for the term of employment plus 3 years. In addition, we estimate the total cost to respondents is approximately $119,000.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to

comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: June 29, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16764 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rule 15b6–1 and Form BDW; OMB Control No. 3235–0018; SEC File No. 270–17]

Submission for OMB Review; Comment Request

Upon written request, copies available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

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 (''Commission'') has submitted to the Office of Management and Budget a request to revise the collection of information discussed below. The Code of Federal Regulations citation to this collection of information is the following rule: 17 CFR 240.15b6–1.

Registered broker-dealers use Form BDW (17 CFR 249.501a) to withdraw from registration with the Commission, the self-regulatory organizations, and the states. On average, the Commission estimates that it would take a broker-dealer approximately one hour to complete and file a Form BDW to withdraw from Commission registration as required by Rule 15b6–1. The Commission estimates that approximately 515 broker-dealers withdraw from Commission registration annually [1] and, therefore, file a Form BDW via the Internet with *Web CRD*, a computer system operated by the Financial Industry Regulatory Authority, Inc. that maintains information regarding registered broker-dealers and their registered personnel. Therefore, the 515 broker-dealers that withdraw from registration by filing Form BDW would incur an aggregate annual reporting burden of approximately 515 hours.[2]

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

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 e-mail to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: June 29, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16765 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–29711; File No. 812–13914]

J.P. Morgan Securities LLC, et al.; Notice of Application and Temporary Order

June 29, 2011.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 (''Act'').

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against J.P. Morgan Securities LLC (''J.P. Morgan Securities'') on June 29, 2011 by the United States District Court for the Southern District of New York (''Injunction''), until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: J.P. Morgan Securities; Bear Stearns Asset Management Inc. (''BSAM''); Bear Stearns Health Innoventures Management, L.L.C. (''BSHIM''); BSCGP Inc. (''BSCGP''); Constellation Growth Capital LLC (''Constellation''); Constellation Ventures Management II, LLC (''Constellation II''); Highbridge Capital Management, LLC (''Highbridge''); JF International Management Inc. (''JFIMI''); JPMorgan Asset Management (UK) Limited (''JPMAMUK''); JPMorgan Distribution Services, Inc. (''JPMDS''); J.P. Morgan Institutional Investments, Inc. (''JPMII''); J.P. Morgan Investment Management Inc. (''JPMIM''); J.P. Morgan Latin America Management Company, LLC (''JPMLAM''); J.P. Morgan Partners, LLC (''JPMP''); J.P. Morgan Private Investments Inc. (''JPMPI''); OEP Co-Investors Management II, Ltd. (''OEP II''); OEP Co-Investors Management III, Ltd. (''OEP III'', and together with OEP II, the ''OEP Entities''); Security Capital Research & Management Incorporated (''Security Capital''); Sixty Wall Street GP Corporation (''Sixty Wall GP''); Sixty Wall Street Management Company, LLC (''Sixty Wall Management''); and Technology Coinvestors Management, LLC (''TCM'') (collectively, the ''Applicants'').[1]

Filing Date: The application was filed on June 21, 2011 and amended on June 29, 2011.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on July 25, 2011, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants: J.P. Morgan

[1] This estimate is based on Form BDW data collected over the past three years. In fiscal year (from 10/1 through 9/30) 2008, 503 broker-dealers withdrew from registration. In fiscal year 2009, 533 broker-dealers withdrew from registration. In fiscal year 2010, 510 broker-dealers withdrew from registration. (503 + 533 + 510)/3 = 515.

[2] (515 × 1 hour) = 515 hours.

[1] Applicants request that any relief granted pursuant to the application also apply to any other company of which J.P. Morgan Securities is or may become an affiliated person within the meaning of Section 2(a)(3) of the Act (together with the Applicants, the ''Covered Persons'').

Securities, 338 Madison Avenue, New York, NY 10179; BSAM, BSHIM, BSCGP, Constellation II, JPMII, JPMIM, JPMLAM, JPMP, JPMPI, Sixty Wall GP, Sixty Wall Management, and TCM, 270 Park Avenue, New York, NY 10017; Constellation and Highbridge, 49 West 57th Street, 32nd Floor, New York, NY 10019; JFIMI, 21st Floor, Chater House, 8 Connaught Road Central, Hong Kong; JPMAMUK, 125 London Wall, London, UK EC2Y5AJ; JPMDS, 1111 Polaris Pkwy, Columbus, Ohio 43240; OEP Entities, 320 Park Avenue, 18th Floor, New York, NY 10022; and Security Capital, 10 South Dearborn Street, Suite 1400, Chicago, IL 60603.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, at (202) 551–6873, or Dalia Osman Blass, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a temporary order and a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

Applicants' Representations:

1. Each of the Applicants (other than Constellation and Highbridge) is either directly or indirectly a wholly-owned subsidiary of J.P. Morgan Chase & Co. (''JPMC''). Each of Constellation and Highbridge is an indirect, majority-owned subsidiary of JPMC. JPMC is a financial services holding company whose businesses provide a broad range of financial services. J.P. Morgan Securities is registered as a broker-dealer under the Securities Exchange Act of 1934, as amended (''Exchange Act'') and is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''). J.P. Morgan Securities does not currently serve as an investment adviser, sub-adviser, depositor or principal underwriter (as defined in section 2(a)(29) of the Act) for any of the registered investment companies (''Funds'') or employees' securities companies (''ESCs,'' and included in the term Funds), as defined in section 2(a)(13) of the Act. BSAM is registered as an investment adviser under the Advisers Act and serves as investment adviser or sub-adviser to various Funds, including as general partner that provides investment advisory services to various ESCs.[2] BSHIM, BSCGP, Constellation II, the OEP Entities and TCM serve as general partners that provide investment advisory services to various ESCs. Constellation serves as a sub-adviser to various ESCs. Highbridge, JFIMI, JPMAMUK, JPMIM, JPMPI, and Security Capital are registered as investment advisers under the Advisers Act and serve as investment advisers or sub-advisers to various Funds. JPMLAM, JPMP, Sixty Wall GP and Sixty Wall Management are registered as investment advisers under the Advisers Act and serve as investment advisers or sub-advisers to ESCs. JPMDS is registered as a broker-dealer under the Exchange Act and serves as principal underwriter to certain Funds. JPMII is registered as a broker-dealer under the Exchange Act and serves as placement agent to certain Funds.[3]

2. On June 29, 2011, the United States District Court for the Southern District of New York entered a judgment, which included the Injunction, against J.P. Morgan Securities (''Final Judgment'') in a matter brought by the Commission.[4] The conduct of J.P. Morgan Securities alleged in the Complaint involved an offering of a largely synthetic collateralized debt obligation (''CDO'') whose portfolio consisted primarily of credit default swaps referencing other CDO securities. The Complaint alleged that J.P. Morgan Securities represented in marketing materials that the collateral manager selected the CDO's investment portfolio but failed to disclose that a hedge fund that purchased the subordinated notes (or ''equity''), which also took the short position on roughly half of the portfolio assets, played a significant role in the selection process. The Final Judgment would restrain and enjoin J.P. Morgan Securities from violating sections 17(a)(2) and 17(a)(3) of the Securities Act. Without admitting or denying any of the allegations in the Complaint, except as to personal and subject matter jurisdiction, J.P. Morgan Securities consented to the entry of the Final Judgment and other equitable relief including certain undertakings.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end company, registered unit investment trust or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines ''affiliated person'' to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state that J.P. Morgan Securities is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that the entry of the Injunction results in Applicants being subject to the disqualification provisions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to the applicants, are unduly or disproportionately severe or that the applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and other Covered Persons from the disqualification provisions of section 9(a) of the Act.

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, sub-adviser or depositor for any Fund (including as general partner providing investment advisory services to ESCs) or as principal underwriter for any registered open-end company, registered unit investment trust or registered face-

[2] Every Applicant that is a general partner that provides investment advisory services to one or more ESCs believes, for purposes of the application, that it is performing a function that falls within the definition of ''investment adviser'' in section 2(a)(20) of the Act.

[3] JPMII serves as placement agent to JPMorgan Institutional Trust with respect to three series. JPMorgan Institutional Trust is an open-end investment company registered under the Act, but its shares are not registered under the Securities Act of 1933, as amended. JPMII believes, for purposes of the application, that it is performing a function that falls within the definition of ''principal underwriter'' in Section 2(a)(29) of the Act.

[4] *U.S. Securities and Exchange Commission* v. *J.P. Morgan Securities LLC* (f/k/a J.P. Morgan Securities Inc.) Case No. 1:11–cv–04206–RMB (S.D.N.Y. June 29, 2011).

amount certificate company. Applicants also state that to the best of their knowledge, none of the current directors, officers, or employees of the Applicants that are involved in providing services as investment adviser or sub-adviser of the Funds (including as general partner providing investment advisory services to ESCs) or principal underwriter for any registered open-end company (or any other persons in such roles during the time period covered by the Complaint) participated in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction. Applicants further represent that the personnel at J.P. Morgan Securities who participated in the conduct alleged in the Complaint to have constituted the violations that provided a basis for the Injunction have had no, and will not have any, involvement in providing advisory, depositary (including as general partner providing investment advisory services to ESCs) to the Funds or principal underwriting services to any registered open-end company, registered unit investment trust, or registered face-amount certificate company on the behalf of the Applicants or other Covered Persons. Applicants also represent that because the personnel of the Applicants (other than those at J.P. Morgan Securities) did not participate in the conduct alleged in the Complaint to have constituted the violations that provide a basis for the Injunction, the shareholders of those Funds were not affected any differently than if those Funds had received services from any other non-affiliated investment adviser or principal underwriter. Applicants state that the alleged conduct did not involve any Fund or the assets of any Fund.

5. Applicants state that their inability to continue to provide investment advisory and subadvisory services to the Funds (including as general partner providing investment advisory services to ESCs) and principal underwriting services to any registered open-end company would result in potential hardship for the Funds and their shareholders. Applicants state that they will, as soon as reasonably practical, distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds (''Boards'') (excluding, for this purpose, the ESCs) for which the Applicants serve as investment adviser, investment sub-adviser or principal underwriter, including the directors who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel, if any, describing the circumstances that led to the Injunction and any impact on the Funds, and the application. Applicants state they will provide the Boards with the information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the Federal securities laws.

6. Applicants also state that, if they were barred from providing services to the Funds, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establishing expertise in providing advisory and distribution services to Funds. Applicants further state that prohibiting them from providing such services would not only adversely affect their businesses, but would also adversely affect about 940 employees who are involved in those activities. Applicants also state that disqualifying certain Applicants from continuing to provide investment advisory services to the ESCs is not in the public interest or in the furtherance of the protection of investors. Because the ESCs have been formed for certain key employees, officers and directors of JPMC and its affiliates, it would not be consistent with the purposes of the ESC provisions of the Act or the terms and conditions of the ESC orders to require another entity not affiliated with JPMC to manage the ESCs. In addition, participating employees of JPM and its affiliates likely subscribed for interests in the ESCs with the expectation that the ESCs would be managed by an affiliate of JPMC.

7. Certain of the Applicants previously have applied for and received exemptions under section 9(c) as the result of conduct that triggered section 9(a) of the Act, as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including, without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

It is hereby ordered, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from June 29, 2011, until the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–16818 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, July 7, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, July 7, 2011 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

An adjudicatory matter; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: June 30, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–16951 Filed 7–1–11; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64768; File No. SR–BX–2011–040]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX BX, Inc. To Amend the BOX Fee Schedule

June 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 28, 2011, NASDAQ OMX BX, Inc. (the ''Exchange'') 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 self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX'').[5] While changes to the BOX Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on July 1, 2011. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room, on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings* and on the Commission's Web site at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 8 of the BOX Fee Schedule currently imposes a fee of $0.50 per contract for all Eligible Orders sent to Away Exchanges in excess of 10,000 contracts per month for each BOX Options Participant.[6] Additionally, BOX currently exempts outbound Eligible Orders sent to Away Exchanges, up to a maximum of 10,000 contracts per month, from the fees and credits of Section 7 of the BOX Fee Schedule, as these transactions are deemed to neither 'add' nor 'take' liquidity from the BOX Book. The Exchange proposes an amendment to Section 8 of the BOX Fee Schedule to eliminate the $0.50 per contract fee on Eligible Orders sent to Away Exchanges. Additionally, the Exchange proposes a corresponding change to Section 7 so that all Eligible Orders sent to Away Exchanges are exempt from Section 7 of the BOX Fee Schedule. Therefore, Eligible Orders sent to Away Exchanges will be subject only to the applicable transaction fees listed in Sections 1 through 3 of the BOX Fee Schedule.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[7] in general, and Section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities.

The Exchange believes that it is equitable to permit BOX Participants to have orders routed to away exchanges without being assessed a fee. The Exchange believes that BOX Options Participants may send additional order flow to BOX, to the benefit of all market participants, if there is no fee assessed when Participant orders may be sent to an Away Exchange. The Exchange believes that the proposed change is an equitable allocation of fees because the order routing fee structure applies to all BOX Participants.

Further, the Exchange believes the proposed change and the resulting order routing fee structure are fair and reasonable and must be competitive with similar fees in place on other exchanges. BOX operates within a highly competitive market in which market participants can readily direct order flow to any of eight other competing venues if they deem fee levels at a particular venue to be excessive. The change to allow BOX Participants to have more orders routed away at no cost is intended to attract order flow to BOX and provide BOX Participants additional flexibility in their execution decisions. The Exchange believes all market participants can benefit from greater liquidity on BOX and that it is appropriate to provide a fee structure intended to attract additional order flow. In particular, the proposed change will allow BOX to remain competitive with other exchanges, and allow BOX to maintain a fee structure which is equitable among all BOX Participants. The Exchange believes that this competitive marketplace impacts the fees present on BOX today and influences this proposal.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

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[9] and Rule 19b–

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The BOX Fee Schedule can be found on the BOX Web site at *http://bostonoptions.com/pdf/BOX_Fee _Schedule.pdf.*

[6] *See* Securities Exchange Act Release No. 64583 (June 2, 2011), 76 FR 33014 (June 7, 2011) (SR–BX–2011–031). The proposed change will have no effect on the billing of orders of non-BOX Options Participants.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

4(f)(2) thereunder,[10] because it establishes or changes a due, fee, or other charge applicable only to a member.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BX–2011–040 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2011–040. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NW., 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 Number SR–BX–2011–040 and should be submitted on or before July 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16823 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64771; File No. SR–CHX–2011–14]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Concerning the CHX Connect Service

June 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on June 24, 2011, the Chicago Stock Exchange, Inc. (''CHX'' or the ''Exchange'') 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 CHX. CHX has filed this proposal pursuant to Exchange Act Rule 19b–4(f)(6)[3] which is effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CHX proposes to add Article 4, Rule 2 (CHX Connect) to include an explicit description of the Exchange's CHX Connect order routing service. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*) and in the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

New Article 4, Rule 2 describes the operation of the CHX Connect routing network. CHX Connect is an electronic communications service owned and operated by the Exchange which allows Participants to transmit orders and related transaction information directly to any destination designated by the order sending Participant (such as an over-the-counter market maker or order-routing vendor) connected to the service without being submitted to the Exchange's trading facilities. The CHX Connect communications service was described in a rule filing made with the Commission in 2006, but which did not update the Exchange's rules.[4] In order to remove any potential ambiguity about the nature of the Exchange's technology and communications offerings, we are now proposing to add language to our rules describing CHX Connect. The CHX Connect service has not changed in any material respect since the 2006 filing. Use of the CHX Connect service by any Exchange Participant is entirely optional and is not required to direct orders to our Matching System for execution or display.

The Exchange believes that certain order senders may have an interest in the CHX Connect service in order to efficiently route orders which cannot be accepted into the Matching System directly. For example, an order sender may have received a market order to buy a NMS security normally traded in the CHX Matching System.[5] Since the Matching System does not accept market orders, the order sender cannot route that order to our trading facilities. An order sender can use the CHX

[4] Exchange Act Release No. 54846 (Nov. 30, 2006), 71 FR 71003 (Dec. 7, 2006).

[5] Similar examples would be All or None orders or orders in securities not traded by the Exchange.

Connect service to transmit that order to a destination which is also connected to the service and which accepts and executes market orders, such as an over-the-counter market maker. CHX Connect can be used to transmit order information to other destinations in any security approved by the Exchange for use within the system, including, but not limited to, securities approved for trading within the Matching System. The Exchange plays no role in determining where the order is sent.

Participants may also elect to use CHX Connect to transmit orders in an electronic format to the Exchange's Matching System, to Institutional Brokers registered with the Exchange pursuant to Article 17 of our rules, and to other destinations which are connected to the CHX's network. The Matching System will only accept orders in securities listed on the Exchange or eligible for Unlisted Trading Privileges. The Exchange believes that certain Participants may be interested in using CHX Connect to send orders to our facilities as an alternative to private order routing systems or vendors, which perform the same function. Participants may designate where an order is to be directed on a security-by-security or order-by-order basis. Instructions received on an order-by-order basis shall supersede previously-received instructions on a security-by-security basis. Use of the CHX Connect service is subject to the approval of the Exchange. The Exchange evaluates all potential users on an equal and non-discriminatory basis. The criteria by which potential users of the service are evaluated relate solely to preserving the security and integrity of the Exchange's systems, and to ensuring the proper formatting of messages sent via CHX Connect in generally accepted industry protocols, such as Financial Information eXchange (FIX) Protocol. The fees and charges for a subscription to the CHX Connect Service are set forth in the Exchange's published Schedule of Fees and Assessments, and apply equally to all users of the system.[6]

This service is a facility of the Exchange. As a result, the Exchange would submit fee changes, and any applicable changes to its rules, to the Commission as required by Exchange Act Rule 19b–4 in connection with the CHX Connect service.

The Exchange would provide these routing services in compliance with its rules and with the provisions of the Exchange Act and the rules thereunder, including, but not limited to, the requirements of Sections 6(b)(4) and (5) of the Act that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general, and furthers the objectives of Section 6(b)(1) of the Act in particular, in that it allows the Exchange to be organized and have the capacity to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of the Act) to enforce compliance by its members and persons associated with such members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. As discussed herein, CHX Connect is a communications service offered by the Exchange to its Participants to either send orders to the Matching System or to another destination of its choosing. The CHX Connect communications service was described in a rule filing made with the Commission in 2006, but which did not update the Exchange's rules.[7] In order to remove any potential ambiguity about the nature of the Exchange's technology and communications offerings, we are now proposing to add language to our rules describing CHX Connect. The CHX Connect service has not changed in any material respect since the 2006 filing. By adding a description of the nature of the CHX Connect service to the Exchange's rules, this proposal advances the purposes of the Exchange Act by providing added clarity about the nature and extent of certain services offered by the Exchange to its Participants, and thereby contributing to the ability of our members in complying with the requirements related to those services.

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. As noted above, the Exchange believes that its CHX Connect service will compete with the existing order routing networks operated by broker-dealers or other service providers. By providing Participants a means of effectively directing orders which cannot be accepted into the Matching System to a destination which can handle such orders, the Exchange is attempting to provide ready solutions to potential order senders, with the ultimate goal of maximizing order flow to the Exchange's trading facilities.

The CHX Connect service is entirely optional and Participants are not required to utilize it to send order to the Exchange or elsewhere. The Exchange notes that the routing and connectivity services of CHX Connect appear to be very similar manner to those offered by the Secure Financial Transaction Infrastructure® (''SFTI'') system, which is provided by NYSE Technologies, an affiliated company of the New York Stock Exchange, Inc. By competing with SFTI and other service providers of secure connectivity among market participants, CHX Connect would offer additional options for participants looking for systems to deliver their orders.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

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

[6] The Exchange charges only those Participants which receive (and not those which solely transmit) orders through the CHX Connect service. The current fee for receiving orders via CHX Connect is $5,000 per month. *See,* CHX Schedule of Fees and Assessments, Section M.

[7] Exchange Act Release No. 54846 (Nov. 30, 2006), 71 FR 71003 (Dec. 7, 2006).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CHX–2011–14 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–CHX–2011–14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2011–14 and should be submitted on or before July 27, 2011.

[10] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16854 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64773; File No. SR–NYSEAmex–2011–43]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Operation of Its New Market Model Pilot Until the Earlier of Securities and Exchange Commission Approval To Make Such Pilot Permanent or January 31, 2012

June 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 21, 2011, NYSE Amex LLC (''NYSE Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by 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 proposes to extend the operation of its New Market Model Pilot, currently scheduled to expire on August 1, 2011, until the earlier of Securities and Exchange Commission (''Commission'') approval to make such pilot permanent or January 31, 2012. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the operation of its New Market Model Pilot (''NMM Pilot'') that was adopted pursuant to its merger with the New York Stock Exchange LLC (''NYSE'').[3] The NMM Pilot was approved to operate until October 1, 2009. The Exchange filed to extend the operation of the Pilot to November 30, 2009, March 30, 2010, September 30, 2010, January 31, 2011, and August 1, 2011, respectively.[4] The Exchange now seeks to extend the operation of the NMM Pilot, currently scheduled to expire on August 1, 2011, until the earlier of Commission approval to make such pilot permanent or January 31, 2012.

The Exchange notes that parallel changes are proposed to be made to the rules of NYSE.[5]

Background [6]

In December 2008, NYSE Amex implemented significant changes to its equities market rules, execution technology and the rights and obligations of its equities market participants all of which were designed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NYSE Euronext acquired The Amex Membership Corporation (''AMC'') pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC. *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex–2008–62) (approving the Merger). Subsequently NYSE Alternext US LLC was renamed NYSE Amex LLC and continues to operate as a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the ''Act''). *See* Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR–NYSEALTR–2009–24).

[4] *See* Securities Exchange Act Release No. 60758 (October 1, 2009), 74 FR 51639 (October 7, 2009) (SR–NYSEAmex–2009–65). *See also* Securities Exchange Act Release Nos. 61030 (November 19, 2009), 74 FR 62365 (November 27, 2009) (SR–NYSEAmex–2009–83); 61725 (March 17, 2010), 75 FR 14223 (March 24, 2010) (SR–NYSEAmex–2010–28); Securities Exchange Act Release No. 62820 (September 1, 2010), 75 FR 54935 (September 9, 2010) (SR–NYSEAmex–2010–86); and 63615 (December 29, 2010), 76 FR 611 (January 5, 2011) (SR–NYSEAmex–2010–123).

[5] *See* SR–NYSE–2010–29.

[6] The information contained herein is a summary of the NMM Pilot. *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) for a fuller description.

to improve execution quality on the Exchange. These changes are all elements of the Exchange's enhanced market model that it implemented through the NMM Pilot.

As part of the NMM Pilot, NYSE Amex eliminated the function of equity specialists on the Exchange creating a new category of market participant, the Designated Market Maker or DMM.[7] The DMMs, like specialists, have affirmative obligations to make an orderly market, including continuous quoting requirements and obligations to re-enter the market when reaching across to execute against trading interest. Unlike specialists, DMMs have a minimum quoting requirement[8] in their assigned securities and no longer have a negative obligation. DMMs are also no longer agents for public customer orders.[9]

In addition, the Exchange implemented a system change that allowed DMMs to create a schedule of additional non-displayed liquidity at various price points where the DMM is willing to interact with interest and provide price improvement to orders in the Exchange's system. This schedule is known as the DMM Capital Commitment Schedule (''CCS'').[10] CCS provides the Display Book® [11] with the amount of shares that the DMM is willing to trade at price points outside, at and inside the Exchange Best Bid or Best Offer (''BBO''). CCS interest is separate and distinct from other DMM interest in that it serves as the interest of last resort.

The NMM Pilot further modified the logic for allocating executed shares among market participants having trading interest at a price point upon execution of incoming orders. The modified logic rewards displayed orders that establish the Exchange's BBO. During the operation of the NMM Pilot orders, or portions thereof, that establish priority[12] retain that priority until the portion of the order that established priority is exhausted. Where no one order has established priority, shares are distributed among all market participants on parity.

The NMM Pilot was originally scheduled to end operation on October 1, 2009, or such earlier time as the Commission may determine to make the rules permanent. The Exchange filed to extend the operation of the Pilot on five occasions[13] in order to prepare a rule filing seeking permission to make the above described changes permanent. The Exchange is currently still preparing such formal submission but does not expect that filing to be completed and approved by the Commission before August 1, 2011.

Proposal To Extend the Operation of the NMM Pilot

NYSE Amex established the NMM Pilot to provide incentives for quoting, to enhance competition among the existing group of liquidity providers and add a new competitive market participant. The Exchange believes that the NMM Pilot allows the Exchange to provide its market participants with a trading venue that utilizes an enhanced market structure to encourage the addition of liquidity, facilitate the trading of larger orders more efficiently and operates to reward aggressive liquidity providers. As such, the Exchange believes that the rules governing the NMM Pilot should be made permanent. Through this filing the Exchange seeks to extend the current operation of the NMM Pilot until January 31, 2012, in order to allow the Exchange time to formally submit a filing to the Commission to convert the pilot rules to permanent rules.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') for this proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed 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. The Exchange believes that the instant filing is consistent with these principles because the NMM Pilot provides its market participants with a trading venue that utilizes an enhanced market structure to encourage the addition of liquidity, facilitate the trading of larger orders more efficiently and operates to reward aggressive liquidity providers. Moreover, the instant filing requesting an extension of the NMM Pilot will permit adequate time for: (i) The Exchange to prepare and submit a filing to make the rules governing the NMM Pilot permanent; (ii) public notice and comment; and (iii) completion of the 19b–4 approval process.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if

[7] *See* NYSE Amex Equities Rule 103.

[8] *See* NYSE Amex Equities Rule 104.

[9] *See* NYSE Amex Equities Rule 60; *see also* NYSE Amex Equities Rules 104 and 1000.

[10] *See* NYSE Amex Equities Rule 1000.

[11] The Display Book system is an order management and execution facility. The Display Book system receives and displays orders to the DMMs, contains the order information, and provides a mechanism to execute and report transactions and publish the results to the Consolidated Tape. The Display Book system is connected to a number of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems.

[12] *See* NYSE Amex Equities Rule 72(a)(ii).

[13] *See supra* note 5.

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAmex–2011–43 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–2011–43. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2011–43, and should be submitted on or before July 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16887 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64772; File No. SR–NYSEAmex–2011–44]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Operation of Its Supplemental Liquidity Providers Pilot Until the Earlier of the Securities and Exchange Commission's Approval To Make Such Pilot Permanent or January 31, 2012

June 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 21, 2011, NYSE Amex LLC (''NYSEAmex'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by 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 proposes to extend the operation of its Supplemental Liquidity Providers Pilot (''SLP Pilot'' or ''Pilot'') (See Rule 107B—NYSE Amex Equities), currently scheduled to expire on August 1, 2011, until the earlier of the Securities and Exchange Commission's (''Commission'') approval to make such Pilot permanent or January 31, 2012. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the operation of its Supplemental Liquidity Providers Pilot,[3] currently scheduled to expire on August 1, 2011, until the earlier of Commission approval to make such Pilot permanent or January 31, 2012.

Background [4]

In October 2008, the New York Stock Exchange LLC (''NYSE'') implemented significant changes to its market rules, execution technology and the rights and obligations of its market participants all of which were designed to improve execution quality on the NYSE. These changes were all elements of the NYSE's and the Exchange's enhanced market model referred to as the ''New Market Model'' (''NMM Pilot'').[5] The NYSE SLP

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61308 (January 7, 2010), 75 FR 2573 (January 15, 2010) (SR–NYSEAmex–2009–98) (establishing the NYSE Amex Equities SLP Pilot). *See also* Securities Exchange Act Release Nos. 61841 (April 5, 2010), 75 FR 18560 (April 12, 2010) (SR–NYSEAmex–2010–33) (extending the operation of the SLP Pilot to September 30, 2010); 62814 (September 1, 2010), 75 FR 54671 (September 8, 2010) (SR–NYSEAmex–2010–88) (extending the operation of the SLP Pilot to January 31, 2011); 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108) (establishing the SLP Pilot); 59869 (May 6, 2009), 74 FR 22796 (May 14, 2009) (SR–NYSE–2009–46) (extending the operation of the SLP Pilot to October 1, 2009); 60756 (October 1, 2009), 74 FR 51628 (October 7, 2009) (SR–NYSE–2009–100) (extending the operation of the New Market Model and the SLP Pilots to November 30, 2009); 61075 (November 30, 2009), 74 FR 64112 (December 7, 2009) (SR–NYSE–2009–119) (extending the operation of the SLP Pilot to March 30, 2010); 61840 (April 5, 2010), 75 FR 18563 (April 12, 2010) (SR–NYSE–2010–28) (extending the operation of the SLP Pilot to September 30, 2010); 62813 (September 1, 2010), 75 FR 54686 (September 8, 2010) (SR–NYSE–2010–62) (extending the operation of the SLP Pilot to January 31, 2011); and 63615 (December 29, 2010), 76 FR 611 (January 5, 2011) (SR–NYSEAmex–2010–123) (extending the operation of the SLP Pilot to August 1, 2011).

[4] The information contained herein is a summary of the NMM Pilot and the SLP Pilot. *See supra* note 4 [sic] and *infra* note 6 [sic] for a fuller description of those pilots.

[5] *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46).

Pilot was launched in coordination with the NMM Pilot (see NYSE Rule 107B).

As part of the NMM Pilot, NYSE eliminated the function of specialists on the Exchange creating a new category of market participant, the Designated Market Maker or ''DMM.'' [6] Separately, the NYSE established the SLP Pilot, which established SLPs as a new class of market participants to supplement the liquidity provided by DMMs.[7]

The NYSE adopted NYSE Rule 107B governing SLPs as a six-month pilot program commencing in November 2008. This NYSE pilot has been extended several times, most recently to August 1, 2011.[8] The NYSE is in the process of requesting an extension of their SLP Pilot until January 31, 2012 or until the Commission approves the pilot as permanent.[9] The extension of the NYSE SLP Pilot until January 31, 2012 runs parallel with the extension of the NMM pilot until January 31, 2012, or until the Commission approves the NMM Pilot as permanent.

Proposal to Extend the Operation of the NYSE Amex Equities SLP Pilot

NYSE Amex Equities established the SLP Pilot to provide incentives for quoting, to enhance competition among the existing group of liquidity providers, including the DMMs, and add new competitive market participants. NYSE Amex Equities Rule 107B is based on NYSE Rule 107B. NYSE Amex Rule 107B was filed with the Commission on December 30, 2009, as a ''me too'' filing for immediate effectiveness as a pilot program.[10] The NYSE Amex Equities SLP Pilot is scheduled to end operation on August 1, 2011 or such earlier time as the Commission may determine to make the rules permanent.

The Exchange believes that the SLP Pilot, in coordination with the NMM Pilot and the NYSE SLP Pilot, allows the Exchange to provide its market participants with a trading venue that utilizes an enhanced market structure to encourage the addition of liquidity, facilitate the trading of larger orders more efficiently and operates to reward aggressive liquidity providers. As such, the Exchange believes that the rules governing the SLP Pilot (NYSE Amex Equities Rule 107B) should be made permanent.

Through this filing the Exchange seeks to extend the current operation of the SLP Pilot until January 31, 2012, in order to allow the Exchange to formally submit a filing to the Commission to convert the Pilot rule to a permanent rule. The Exchange is currently preparing a rule filing seeking permission to make the NYSE Amex Equities SLP Pilot permanent, but does not expect that filing to be completed and approved by the Commission before August 1, 2011.[11]

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') for this proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed 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. The Exchange believes that the instant filing is consistent with these principles because the SLP Pilot provides its market participants with a trading venue that utilizes an enhanced market structure to encourage the addition of liquidity and operates to reward aggressive liquidity providers. Moreover, the instant filing requesting an extension of the SLP Pilot will permit adequate time for: (i) The Exchange to prepare and submit a filing to make the rules governing the SLP Pilot permanent; (ii) public notice and comment; and (iii) completion of the 19b–4 approval process.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[14]

A proposed rule change filed under Rule 19b–4(f)(6) [15] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[16] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[6] *See* NYSE Rule 103.

[7] *See* NYSE and NYSE Amex Equities Rules 107B.

[8] *See* Securities Exchange Act Release Nos. 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108) (adopting SLP pilot program); 59869 (May 6, 2009), 74 FR 22796 (May 14, 2009) (SR–NYSE–2009–46) (extending SLP pilot program until October 1, 2009); 60756 (October 1, 2009), 74 FR 51628 (October 7, 2009) (SR–NYSE–2009–100) (extending SLP pilot program until November 30, 2009); 61075 (November 30, 2009), 74 FR 64112 (December 7, 2009) (SR–NYSE–2009–119) (extending SLP pilot program until March 30, 2010); 61840 (April 5, 2010), 75 FR 18563 (April 12, 2010) (SR–NYSE–2010–28) (extending the SLP Pilot until September 30, 2010); 62813 (September 1, 2010), 75 FR 54686 (September 8, 2010) (SR–NYSE–2010–62) (extending the SLP Pilot until January 31, 2011); and 63616 (December 29, 2010), 76 FR 612 (January 5, 2011) (SR–NYSE–2010–86) (extending the operation of the SLP Pilot to August 1, 2011).

[9] *See* SR–NYSE–2011–30.

[10] *See* Securities Exchange Act Release No. 61308 (January 7, 2010), 75 FR 2573 (January 15, 2010) (SR–NYSEAmex–2009–98).

[11] The NMM Pilot was scheduled to expire on August 1, 2011 as well. On June 21, 2011, the NYSE filed to extend the NMM Pilot until January 31, 2012 (See SR–NYSE–2011–29) (extending the operation of the New Market Model Pilot to January 31, 2012).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 240.19b–4(f)(6)(iii).

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2011–44 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2011–44. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the 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–NYSEAmex–2011–44, and should be submitted on or before July 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16888 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64770; File No. SR–Phlx–2011–87]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Listing and Trading Various Russell Products

June 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on June 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 the Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to amend Exchange Rules 1079, 1001A and 1101A to list and trade new options on various Russell [5] Indexes based upon the (i) full values of the Russell U.S. Indexes (''Full Value Russell U.S. Indexes'') and (ii) one-tenth values of the Russell U.S. Indexes (''Reduced Values Russell U.S. Indexes'').[6] The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend its Exchange Rules 1079 (FLEX Index, Equity and Currency Options), 1001A (Position Limits), and 1101A (Terms of Options Contracts) to list and trade cash-settled, European-style options, including FLEX [7] options and LEAPS,[8] on the following products (collectively ''Russell U.S. Indexes''): Russell 3000® Index,[9] Russell 3000® Value Index,[10] Russell 3000® Growth Index,[11] Russell 2500™ Index,[12] Russell 2500™ Value Index,[13] Russell 2500™ Growth Index,[14] Russell 2000® Value Index,[15] Russell 2000® Growth

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] Russell refers to the Frank Russell Company. Information about the Russell U.S. Indexes can also be found at *http://www.russell.com/us/indexes/us/definitions.asp.*

[6] The Exchange currently lists cash-settled, European-style FULL Value Russell Options and Reduced Value Russell Options, including FLEX options and LEAPS, on the Russell 2000® Index and the Mini-Russell 2000.

[7] FLEX Options are flexible exchange-traded index, equity, or currency option contracts that provide investors the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. FLEX Options may have expiration dates within five years. *See* Exchange Rules 1079 and 1012.

[8] LEAPS or Long Term Equity Anticipation Securities are long term options that generally expire from twelve to thirty-nine months from the time they are listed.

[9] The Russell 3000 Index measures the performance of the largest 3000 U.S. companies representing approximately 98% of the investable U.S. equity market.

[10] The Russell 3000 Value Index measures the performance of the broad value segment of the U.S. equity universe. It includes those Russell 3000 companies with lower price-to-book ratios and lower forecasted growth values.

[11] The Russell 3000 Growth Index measures the performance of the broad growth segment of the U.S. equity universe. It includes those Russell 3000 companies with higher price-to-book ratios and higher forecasted growth values.

[12] The Russell 2500 Index measures the performance of the small to mid-cap segment of the U.S. equity universe, commonly referred to as ''smid'' cap. The Russell 2500 Index is a subset of the Russell 3000® Index.

[13] The Russell 2500 Value Index measures the performance of the small to mid-cap value segment of the U.S. equity universe. It includes those Russell 2500 companies with lower price-to-book ratios and lower forecasted growth values.

[14] The Russell 2500 Growth Index measures the performance of the small to mid-cap growth segment of the U.S. equity universe. It includes those Russell 2500 companies with higher price-to-book ratios and higher forecasted growth values.

[15] The Russell 2000 Value Index measures the performance of small-cap value segment of the U.S. equity universe. It includes those Russell 2000 companies with lower price-to-book ratios and lower forecasted growth values.

Index,[16] Russell 1000® Index,[17] Russell 1000® Value Index,[18] Russell 1000® Growth Index,[19] Russell Top 200® Index,[20] Russell Top 200® Value Index,[21] Russell Top 200® Growth Index,[22] Russell MidCap® Index,[23] Russell MidCap® Value Index,[24] Russell MidCap® Growth Index,[25] Russell Small Cap Completeness® Index,[26] Russell Small Cap Completeness® Value Index [27] and Russell Small Cap Completeness® Growth Index.[28] The Exchange also proposes to list and trade long-term options on each of the Full Value Russell U.S. Indexes and Reduced Value Russell U.S. Indexes noted above (''Russell LEAPS'').[29]

Index Design and Composition

The Russell U.S. Indexes are designed to be a comprehensive representation of the investable U.S. equity market. These indexes are capitalization-weighted and include only common stocks belonging to corporations domiciled in the United States. These indexes are traded on NYSE, NYSE Amex and/or NASDAQ. Stocks are weighted by their ''available'' market capitalization, which is calculated by multiplying the primary market price by the ''available'' shares; that is, total shares outstanding less corporate cross-owned shares; shares owned by Employee Stock Ownership Plans (''ESOPs'') and Leveraged Employee Stock Ownership Plans (''LESOPs'') that comprise 10% or more of shares outstanding; shares that are part of unlisted share classes; and shares held by an individual, a group of individuals acting together, or a corporation not in the index that owns 10% or more of the shares outstanding; and shares subject to Initial Public Offering lock-ups.

All equity securities listed on NYSE, NYSE Amex or NASDAQ are considered for inclusion in the Russell U.S. Indexes, with the following exceptions: (1) Stocks trading less than $1.00 per share on average during the month of May; (2) stocks of non-U.S. companies; (3) preferred and convertible preferred stocks; (4) redeemable shares; (5) participating preferred stocks; (6) warrants and rights; (7) trust receipts; (8) royalty trusts; (9) limited liability companies; (10) Bulletin Board and Pink Sheet stocks; (11) closed-end investment companies; (12) limited partnerships; and (13) foreign stocks. All of these stocks are ''reported securities'' as defined by Rule 11Aa3–1(a)(4) under the Act.[30] [sic]

As of May 31, 2010, the stocks comprising the Russell 1000® Index had an average market capitalization of $12.24 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $0.14 billion (Seahawk Drilling Inc.). The number of available shares outstanding averaged 401.41 million, ranging from a high of 28.98 billion (Citigroup Inc.) to a low of 6.17 million (NVR Inc.). The Russell 1000® Index has a total capitalization of approximately $11.7 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 1000® Growth Index had an average market capitalization of $13.20 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $0.14 billion (Seahawk Drilling Inc.). The number of available shares outstanding averaged 355.18 million, ranging from a high of 8.76 billion (Microsoft Corp.) to a low of 6.17 million (NVR Inc.). The Russell 1000® Growth Index has a total capitalization of approximately $8.2 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 1000® Value Index had an average market capitalization of $11.31 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $0.14 billion (Seahawk Drilling Inc.). The number of available shares outstanding averaged 429.04 million, ranging from a high of 28.98 billion (Citigroup Inc.) to a low of 6.17 million (NVR Inc.). The Russell 1000® Value Index has a total capitalization of approximately $7.6 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 2000® Growth Index had an average market capitalization of $623.07 million, ranging from a high of $4.53 billion (Human Genome Sciences Inc.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 44.06 million,

[16] The Russell 2000 Growth Index measures the performance of the small-cap growth segment of the U.S. equity universe. It includes those Russell 2000 companies with higher price-to-book ratios and higher forecasted growth values.

[17] The Russell 1000 Index measures the performance of the large-cap segment of the U.S. equity universe. It is a subset of the Russell 3000® Index and includes approximately 1,000 of the largest securities based on a combination of their market cap and current index membership. The Russell 1000 represents approximately 92% of the Russell 3000 Index.

[18] The Russell 1000 Value Index measures the performance of the large-cap value segment of the U.S. equity universe. It includes those Russell 1000 companies with lower price-to-book ratios and lower expected growth values.

[19] The Russell 1000 Growth Index measures the performance of the large-cap growth segment of the U.S. equity universe. It includes those Russell 1000 companies with higher price-to-book ratios and higher forecasted growth values.

[20] The Russell Top 200 Index measures the performance of the largest cap segment of the U.S. equity universe. The Russell Top 200 Index is a subset of the Russell 3000® Index. It includes approximately 200 of the largest securities based on a combination of their market cap and current index membership and represents approximately 65% of the U.S. market.

[21] The Russell Top 200 Value Index measures the performance of the especially large cap segment of the U.S. equity universe represented by stocks in the largest 200 by market cap that exhibit value characteristics. It includes Russell Top 200 companies with lower price-to-book ratios and lower forecasted growth values. These stocks also are members of the Russell 1000® Value Index.

[22] The Russell Top 200 Growth Index offers measures the performance of the especially large cap segment of the U.S. equity universe represented by stocks in the largest 200 by market cap that exhibit growth characteristics. It includes Russell Top 200 Index companies with higher price-to-book ratios and higher forecast growth values. The companies also are members of the Russell 1000® Growth Index.

[23] The Russell Midcap Index measures the performance of the mid-cap segment of the U.S. equity universe. The Russell Midcap Index is a subset of the Russell 1000® Index. It includes approximately 800 of the smallest securities based on a combination of their market cap and current index membership. The Russell Midcap Index represents approximately 27% of the total market capitalization of the Russell 1000 companies.

[24] The Russell Midcap Value Index measures the performance of the mid-cap value segment of the U.S. equity universe. It includes those Russell Midcap Index companies with lower price-to-book ratios and lower forecasted growth values.

[25] The Russell Midcap Growth Index measures the performance of the mid-cap growth segment of the U.S. equity universe. It includes those Russell Midcap Index companies with higher price-to-book ratios and higher forecasted growth values.

[26] The Russell Small Cap Completeness measures the performance of the Russell 3000® Index companies excluding S&P 500 constituents.

[27] The Russell Small Cap Completeness Value Index measures the performance of the Russell 3000® Index companies excluding S&P 500 constituents. It includes those Russell Small Cap Completeness Index companies with lower price-to-book ratios and lower forecasted growth values.

[28] The Russell Small Cap Completeness Growth Index measures the performance of the Russell 3000® Index companies excluding S&P 500 constituents. It includes those Russell Small Cap Completeness Index companies with higher price-to-book ratios and higher forecast growth values.

[29] Each of these Russell U.S. Indexes is a capitalization-weighted index containing various groups of stocks drawn from the largest 3,000 companies incorporated in the United States. All index components are traded on the New York Stock Exchange (''NYSE''), the NYSE Amex, Inc. (''NYSE Amex'') and/or the NASDAQ Stock Market LLC (''NASDAQ''). Options on all of the indexes, currently trade on the International Securities Exchange, LLC (''ISE'') and options on all of the indexes, except for the Russell 2500 Index (regular, value, and growth) and the Russell Small Cap Completeness Index (regular, value, and growth), currently trade on the Chicago Board Options Exchange (''CBOE''). The Russell 2000® Index is traded on Phlx and the Boston Options Exchange (''BOX''). All of the Russell U.S. Indexes are subsets of the Russell 3000 Index. The growth and value versions of each primary index (Russell 3000, Russell 2500, Russell 2000, Russell 1000, Russell Top 200, Russell Midcap, and Russell Small Cap Completeness) may contain common components, but the capitalization of those components is apportioned so that the sum of the total capitalization of the growth and value indexes equals the total capitalization of the respective primary index.

[30] 17 CFR 240.11Aa3–1(a)(4). [sic]

ranging from a high of 658.72 million (Cell Therapeutics) to a low of 2.02 million (Atrion Corp.). The Russell 2000® Growth Index has a total capitalization of approximately $0.8 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 2000® Value Index had an average market capitalization of $579.57 million, ranging from a high of $3.34 billion (UAL Corp.) to a low of $26.15 million (Cardiac Science Corp.). The number of available shares outstanding averaged 46.19 million, ranging from a high of 2.20 billion (E*Trade Financial Corp.) to a low of 1.23 million (Seaboard Corp.). The Russell 2000® Value Index has a total capitalization of approximately $0.8 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 3000® Index had an average market capitalization of $4.39 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 161.73 million, ranging from a high of 28.98 billion (Citigroup Inc.) to a low of 1.23 million (Seaboard Corp.). The Russell 3000® Index has a total capitalization of approximately $12.9 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 3000® Growth Index had an average market capitalization of $4.77 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 146.50 million ranging from a high of 8.76 billion (Microsoft Corp.) to a low of 2.02 million (Atrion Corp.). The Russell 3000® Growth Index has a total capitalization of approximately $9.0 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 3000® Value Index had an average market capitalization of $4.10 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $26.15 million (Cardiac Science Corp.). The number of available shares outstanding averaged 171.82 million, ranging from a high of 28.98 billion (Citigroup Inc.) to a low of 1.23 million (Seaboard Corp.). The Russell 3000® Value Index has a total capitalization of approximately $8.4 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Midcap® Index had an average market capitalization of $4.59 billion, ranging from a high of $18.79 billion (TJX Cos Inc.) to a low of $0.14 billion (Seahawk Drilling Inc.). The number of available shares outstanding averaged 173.74 million, ranging from a high of 1.74 billion (Qwest Communications International) to a low of 6.17 million (NVR Inc.). The Russell Midcap® Index has a total capitalization of approximately $3.5 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Midcap® Growth Index had an average market capitalization of $4.71 billion, ranging from a high of $18.79 billion (TJX Cos Inc.) to a low of $0.14 billion (Seahawk Drilling Inc.). The number of available shares outstanding averaged 163.59 million, ranging from a high of 1.38 billion (Xerox Corp.) to a low of 6.17 million (NVR Inc.). The Russell Midcap® Growth Index has a total capitalization of approximately $2.3 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Midcap® Value Index had an average market capitalization of 4.43 billion, ranging from a high of $15.48 billion (Las Vegas Sands Corp.) to a low of $0.14 billion (Seahawk Drilling Inc.). The number of available shares outstanding averaged 187.15 million, ranging from a high of 1.74 billion (Qwest Communications International) to a low of 6.17 million (NVR Inc.). The Russell Midcap® Value Index has a total capitalization of approximately $2.4 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Top 200® Index had an average market capitalization of $42.92 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $2.24 billion (AOL Inc.). The number of available shares outstanding averaged 1.31 billion, ranging from a high of 28.98 billion (Citigroup Inc.) to a low of 48.90 million (Liberty Media Corp.—Starz). The Russell Top 200® Index has a total capitalization of approximately $8.2 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Top 200® Growth Index had an average market capitalization of $44.74 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $9.11 billion (Boston Scientific Corp.) The number of available shares outstanding averaged 1.07 billion, ranging from a high of 8.76 billion (Microsoft Corp.) to a low of 64.32 million (Blackrock Inc.). The Russell Top 200® Growth Index has a total capitalization of approximately $5.9 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Top 200® Value Index had an average market capitalization of $41.52 billion, ranging from a high of $295.03 billion (Exxon Mobil Corp.) to a low of $2.24 billion (AOL Inc.). The number of available shares outstanding averaged 1.49 billion, ranging from a high of 28.98 billion (Citigroup Inc.) to a low of 48.90 million (Liberty Media Corp.—Starz). The Russell Top 200® Value Index has a total capitalization of approximately $5.2 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 2500™ Index had an average market capitalization of $1.06 billion, ranging from a high of $10.19 billion (Centurylink Inc.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 62.53 million, ranging from a high of 2.20 billion (E*Trade Financial Corp.) to a low of 1.23 million (Seaboard Corp.). The Russell 2500™ Index has a total capitalization of approximately $2.6 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 2500™ Growth Index had an average market capitalization of $1.07 billion, ranging from a high of $7.62 billion (Genworth Financial Inc.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 57.71 million, ranging from a high of 673.37 million (Advanced Micro Devices Inc.) to a low of 2.02 million (Atrion Corp.). The Russell 2500™ Growth Index has a total capitalization of approximately $1.7 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell 2500™ Value Index had an average market capitalization of $1.05 billion, ranging from a high of $10.19 billion (Centurylink Inc.) to a low of $26.15 million (Cardiac Science Corp.). The number of available shares outstanding averaged 65.34 million, ranging from a high of 2.20 billion (E*Trade Financial Corp.) to a low of 1.23 million (Seaboard Corp.). The Russell 2500™ Value Index has a total capitalization of approximately $1.8 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Small Cap Completeness Index had an average market capitalization of $1.11 billion, ranging from a high of $31.67 billion (Blackrock Inc.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 61.07 million, ranging from a high of 1.66 billion (Level 3 Communications Inc.) to a low of 1.23 million (Seaboard Corp.). The Russell Small Cap Completeness Index has a total capitalization of approximately $2.7 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Small Cap Completeness Growth Index had an average market capitalization of $1.17 billion, ranging from a high of $31.67 billion (Blackrock Inc.) to a low of $14.57 million (Repros Therapeutics Inc.). The number of available shares outstanding averaged 59.29 million, ranging from a high of 1.24 billion (Activision Blizzard Inc.) to a low of 2.02 million (Atrion Corp.). The Russell Small Cap Completeness Growth Index has a total capitalization of approximately $1.8 trillion as of May 31, 2010.

As of May 31, 2010, the stocks comprising the Russell Small Cap Completeness Value Index had an average market capitalization of $1.08 billion, ranging from a high $31.67 billion (Blackrock Inc.) to a low of $26.15 million (Cardiac Science Corp.). The number of available shares outstanding averaged 62.61 million, ranging from a high of 1.66 billion (Level 3 Communications Inc.) to a low of 1.23 million (Seaboard Corp.). The Russell Small Cap Completeness Value Index has a total capitalization of approximately $1.8 trillion as of May 31, 2010.

Index Calculation and Index Maintenance

The value of each Russell Index is currently calculated by Reuters Limited (''Reuters'')[31] on behalf of Russell and is disseminated every 15 seconds during regular Exchange trading hours to market information vendors via RussellTick™.[32]

The methodology used to calculate the value of the Russell U.S. Indexes is similar to the methodology used to calculate the value of other well known market-capitalization-weighted indexes. The level of each index reflects the total market value of the component stocks relative to a particular base period and is computed by dividing the total market value of the companies in each index by the respective index divisor. The divisor is adjusted periodically to maintain consistent measurement of the index. Below is a table of base dates and the respective index levels as of May 26, 2011:

Index	Total value	Price value
Russell 3000 ®	3587.75086	1457.85247
Russell 3000 ® Growth	2879.89383	2426.1502
Russell 3000 ® Value	3817.44497	2589.28728
Russell 1000 ®	3602.4988	1418.35062
Russell 1000 ® Growth	529.47313	403.83622
Russell 1000 ® Value	725.61762	416.2859
Russell Top 200 ®	2939.54016	546.63736
Russell Top 200 ® Growth	910.11636	672.12634
Russell Top 200 ® Value	1071.03283	651.91595
Russell Midcap ®	6401.81184	2797.43808
Russell Midcap ® Growth	1341.84209	1065.26732
Russell Midcap ® Value	1793.62334	1125.65007
Russell 2000 ®	3726.27315	2064.91582
Russell 2000 ® Growth	3201.14137	2903.97679
Russell 2000 ® Value	5864.70724	3980.15914
Russell 2500 ™	1061.26992	772.74832
Russell 2500 ™ Growth	3547.792	3254.40744
Russell 2500 ™ Value	5493.08424	3839.81694
Russell Small Cap Completeness ®	2229.12739	1905.30123
Russell Small Cap Completeness ® Growth	1726.03596	1624.91776
Russell Small Cap Completeness ® Value	2732.41535	2105.81535
Russell 3000E ® Index	1298.3572	1156.55132
Russell 3000E ® Growth Index	1297.56505	1211.74568
Russell 3000E ® Value Index	1066.61795	938.33245
Russell Microcap ® Index	1196.56615	1116.96383
Russell Microcap ® Growth Index	1119.15656	1093.12822
Russell Microcap ® Value Index	953.92585	870.2775
Russell 3000 ® Dynamic Index ™	1059.29034	1054.09067
Russell 3000 ® Defensive Index ™	1073.79788	1063.74849
Russell 1000 ® Dynamic Index ™	1059.42851	1053.97672
Russell 1000 ® Defensive Index ™	1073.99375	1063.61825
Russell 2000 ® Dynamic Index ™	1057.89868	1055.42339
Russell 2000 ® Defensive Index ™	1071.77749	1065.42301

In recent years, the value of the Russell U.S. Indexes has increased significantly. As a result, the premium for options on the Full Russell U.S. Indexes has also increased, causing these index options to trade at a level that may be uncomfortably high for retail investors. Therefore, the Exchange also proposes to trade Reduced Value Russell U.S. Indexes. The Exchange believes that listing reduced value options would attract a greater source of customer business than if it listed only full value options on the Full Value Russell U.S. Indexes. The Exchange further believes that listing reduced value options would provide an opportunity for investors to hedge, or speculate on, the market risk associated with the stocks comprising the Russell U.S. Indexes and use this trading vehicle while extending a smaller outlay of capital. The Exchange believes that this should attract additional investors and, in turn, create a more active and liquid trading environment.[33]

[31] Reuters is a ThomsonReuters company.

[32] RussellTick™, developed by NASDAQ OMX Information, LLC, is a premier data feed that consolidates the distribution of the Russell Family of Indexes. NASDAQ OMX is the primary distribution source for all real-time Russell U.S. Indexes.

[33] The Exchange believes that reduced value options on Russell U.S. Indexes have generated considerable interest from investors, as measured, by their robust trading volume on CBOE and ISE.

Options on the Russell U.S. Indexes would expire on the Saturday following the third Friday of the expiration month (''Expiration Saturday''). Trading in options on the Russell U.S. Indexes would normally cease at 4:15 p.m. Eastern Standard Time (''EST'')[34] on the Thursday preceding an Expiration Saturday. The exercise settlement value at expiration of each new index option would be calculated by Reuters on behalf of Russell, based on the opening prices of the index's component securities on the last business day prior to expiration (''Settlement Day'').[35] The Settlement Day is normally the Friday preceding Expiration Saturday. If a component security in a Russell Index does not trade on Settlement Day, the last reported sales price in the primary market from the previous trading day would be used to calculate both full and reduced settlement values. Settlement values for the Full and Reduced Value Russell U.S. Indexes would be disseminated via RussellTick™.

The Russell U.S. Indexes are monitored and maintained by Russell, which is responsible for making all necessary adjustments to the index to reflect component deletions, share changes, stock splits, stock dividends (other than ordinary cash dividends), and stock price adjustments due to restructuring, mergers, or spin-offs involving the underlying components. Some corporate actions, such as stock splits and stock dividends, require simple changes to the available shares outstanding and the stock prices of the underlying components. Other corporate actions, such as share issuances, change the market value of an index and require the use of an index divisor to effect adjustments.

The Russell U.S. Indexes are re-constituted annually on the last Friday in June (unless the last Friday is the 27th or later of the month, in which case the re-constitution occurs on the prior Friday), based on prices and available shares outstanding as of the preceding May 31. New index components are added only as part of the annual re-constitution, after which, should a stock be removed from an index for any reason, it could not be replaced until the next re-constitution except in the case of a spin-off where the new company resulting from the spin-off meets the membership criteria of one of the existing indexes.

The Exchange represents that it would monitor the Russell U.S. Indexes on a quarterly basis, and would not list any additional series for trading and would limit all transactions in such options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors if: (i) The number of securities in the Index drops by one-third or more; (ii) 10% or more of the weight of the Index is represented by component securities having a market value of less than $75 million; (iii) less than 80% of the weight of the Index is represented by component securities that are eligible for options trading pursuant to Exchange Rules 1000A *et seq.;* (iv) 10% or more of the weight of the Index is represented by component securities trading less than 20,000 shares per day; or (v) the largest component security accounts for more than 25% of the weight of the Index or the largest five components in the aggregate account for more than 50% of the weight of the Index. The Exchange represents that, if the Index ceases to be maintained or calculated, or if the Index values are not disseminated every 15 seconds by a widely available source, it would not list any additional series for trading and would limit all transactions in such options to closing transactions only for the purpose of maintaining a fair and orderly market and protecting investors.

Contract Specifications

The proposed contract specifications for the options on the Russell U.S. Indexes are based on the contract specifications of similar options currently listed on CBOE, NYSE Amex and ISE.[36] The Russell U.S. Indexes are broad-based indexes, as defined in Exchange Rule 1101A(a). Options on the Russell U.S. Indexes would be European-style and a.m. cash-settled. The Exchange's standard trading hours for index options (9:30 a.m. to 4:15 p.m. E.S.T.), as set forth in Exchange Rule 1101A at Commentary .01, would apply to options on the Russell U.S. Indexes. Exchange Rules that apply to the trading of options on broad-based indexes also would apply to options on both the Full and Reduced Value Russell Indexes.[37] The trading of these options also would be subject to, among others, Exchange Rules governing margin requirements[38] and trading halt procedures[39] for index options.

For options on the Full Value Russell U.S. Indexes, the Exchange proposes to establish an aggregate position limit of 50,000 contracts on the same side of the market, provided that no more than 30,000 of such contracts are in the nearest expiration month series. Full Value Russell Index contracts would be aggregated with Reduced Value Russell Index contracts, where ten Reduced Value Russell Index contracts would equal one Full Value Russell Index contract.[40] These limits are identical to the limits applicable to options based on the Russell U.S. Indexes that currently trade on ISE.[41]

Additionally, Commentary .01 to Exchange Rule 1001A provides that under certain circumstances index options positions may be exempted from established position limits for each contract ''hedged'' by an equivalent dollar amount of the underlying component securities. Furthermore, Commentary .02 to that same Rule provides that member organizations may receive exemptions of up to two times the applicable position limit where the index options positions are in proprietary accounts used for the purpose of facilitating orders for customers of those member organizations.[42] The Exchange proposes to apply existing index margin requirements for the purchase and sale of options on the Russell U.S. Indexes.[43] Exchange Rule 1003 describes a member or member organizations obligations to file with the Exchange a report of that member or member organization's positions.[44]

The Exchange proposes to set strike price intervals for these index options at $2.50 when the strike price of Full or Reduced Value Options Russell U.S. Indexes is below $200, and at least $5.00 strike price intervals otherwise.[45] The minimum tick size for series trading below $3 would be $0.05 and for series trading at or above $3 would be $0.10.[46]

Exchange Rule 1101A provides that after a particular class of stock index options has been approved for listing

[34] *See* Exchange Rule 1001A. [sic]

[35] The aggregate exercise value of the option contract is calculated by multiplying the index value by the index multiplier, which is 100.

[36] *See* note 27.

[37] *See generally* Exchange Rules 1001A through 1107A (Rules Applicable to Trading Options on Indices) and Exchange Rules 1000 through 1094 (Rules Applicable to Trading of Options on Stocks, Exchange-Traded Fund Shares and Foreign Currencies).

[38] *See* Exchange Rule 721 (Proper and Adequate Margin).

[39] *See* Exchange Rule 1047A (Trading Rotations, Halts or Reopenings).

[40] *See* Exchange Rule 1001A(e). The same limits that apply to position limits would apply to exercise limits for these products. *See* Exchange Rule 1002A.

[41] *See* ISE Rule 2004.

[42] *See* Exchange Rule 1001A (Position Limits).

[43] *See* Exchange Rule 721 (Proper and Adequate Margin).

[44] *See* Exchange Rule 1003 (Reporting of Options Positions).

[45] *See* proposed Exchange Rule 1101A.

[46] *See* Exchange Rule 1034 (Minimum Increments) and proposed 1101A (Position Limits).

and trading on the Exchange, the Exchange shall from time to time open for trading series of options therein. Within each approved class of stock index options, the Exchange may open for trading series of options expiring in consecutive calendar months (''consecutive month series''), series of options expiring at three-month intervals (''cycle month series''), and/or series of options having up to thirty-six months to expiration (''long-term options series''). Prior to the opening of trading in any series of stock index options, the Exchange shall fix the expiration month and exercise price of option contracts included in each such series.[47]

The Exchange therefore, proposes to list options on the Full and Reduced Value Russell U.S. Indexes in the three consecutive near-term expiration months, plus up to three successive expiration months in the March cycle. For example, consecutive expirations of June, July and August, plus September, December and March expirations would be listed.[48] The trading of long-term options on the Russell U.S. Indexes would be subject to the same rules that govern all the Exchange's index options, including sales practice rules, margin requirements, and trading rules.

All of the specifications and calculations for options on the Reduced Value Russell U.S. Indexes would be the same as those used for the Full Value Russell U.S. Indexes with position limits adjusted accordingly for the Reduced Value Russell Options. The reduced-value options would trade independently of, and in addition to, the full-value options. Options on all the Russell U.S. Indexes would be subject to the same rules that presently govern all Exchange index options, including sales practice rules, margin requirements, trading rules, and position and exercise limits.

Exchange Rules are designed to protect public customer trading. Specifically, Rule 1024 prohibits members and member organizations from accepting a customer order to purchase or write an option unless such customer's account has been approved in writing by a designated Options Principal of the Member.[49] Additionally, Exchange Rule 1026, regarding suitability, is designed to ensure that options are only sold to customers capable of evaluating and bearing the risks associated with trading in this instrument.[50] Further, Exchange Rule 1027 permits members and employees of member organizations to exercise discretionary power with respect to trading options in a customer's account only if the member or employee of a member organization has received prior written authorization from the customer and the account had been accepted in writing by a designated Options Principal.[51] Finally, Exchange Rule 1025, Supervision of Accounts, Rule 1028, Confirmations, and Rule 1029, Delivery of Options Disclosure Documents, will also apply to trading in of options on the Russell Indexes.

Surveillance and Capacity

The Exchange represents that it has an adequate surveillance program in place for options on the Russell U.S. Indexes and intends to apply those same procedures that it applies to the Exchange's other index options. Additionally, the Exchange is a member of the Intermarket Surveillance Group (''ISG'') under the Intermarket Surveillance Group Agreement, dated June 20, 1994. The members of the ISG include all of the national securities exchanges. These members work together to coordinate surveillance and share information regarding the stock and options markets. In addition, the major futures exchanges are affiliated members of the ISG, which allows for the sharing of surveillance information for potential intermarket trading abuses.

The Exchange also represents that it has the necessary systems capacity to support the new options series that would result from the introduction of options on the Full and Reduced Value Russell U.S. Indexes, including LEAPS on the Full Value Russell U.S. Indexes.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[52] in general, and furthers the objectives of Section 6(b)(5) of the Act[53] in particular, in that it will permit trading in options on Full and Reduced Value Russell U.S. Indexes pursuant to the rules designed to prevent fraudulent and manipulative acts and practices to protect investor and the public interest, promote just equitable principles of trade. The Exchange also represents that it has the necessary systems capacity to support the new options series. As stated in the filing, the Exchange has rules in place designed to protect public customer trading.

The Exchange believes that the Russell U.S. Indexes would provide investors additional trading opportunities. The Exchange believes that listing reduced value options would attract a greater source of customer business than if it listed only full value options on the Full Value Russell U.S. Indexes. The Exchange further believes that listing reduced value options would provide an opportunity for investors to hedge, or speculate on, the market risk associated with the stocks comprising the Russell U.S. Indexes and use this trading vehicle while extending a smaller outlay of capital.

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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act[54] and Rule 19b–4(f)(6)[55] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the

[47] *See* Exchange Rule 1101A(b) as it currently exists.

[48] *See* Exchange Rule 1101A.

[49] *See* Exchange Rule 1024 (Conduct of Accounts for Options Trading).

[50] *See* Exchange Rule 1026 (Suitability).

[51] *See* Exchange Rule 1027 (Discretionary Accounts). Further, this Rule states that discretionary accounts shall receive frequent review by a Registered Options Principal qualified person specifically delegated such responsibilities under Rule 1025, who is not exercising the discretionary authority.

[52] 15 U.S.C. 78f(b). *See* Exchange Rules 1101A and 1012 (Series of Options Open for Trading).

[53] 15 U.S.C. 78f(b)(5).

[54] 15 U.S.C. 78s(b)(3)(A).

[55] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–Phlx–2011–87 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–2011–87. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2011–87 and should be submitted on or before July 27, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16843 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64769; File No. SR–NSCC–2011–04]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change To Amend Rules Relating to Discontinuing Dividend Settlement Service, Funds Only Settlement Service, Data Distribution Box Services, and Changes to the Envelope Settlement Service

June 29, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder[2] notice is hereby given that on June 15, 2011, National Securities Clearing Corporation (''NSCC'') 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 primarily by NSCC.[3] 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 purpose of this proposed rule change is to amend NSCC's rules relating to NSCC's incorporation of its Dividend Settlement Service (''DSS'') and Funds Only Settlement Service (''FOSS'') into the Envelope Settlement Service (''ESS'') and NSCC's discontinuing of its Data Distribution Boxes Service (''DDBS''). The proposed rule change would also make certain changes to ESS processing.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

DSS, FOSS, and ESS operate similarly in that they are non-guaranteed services of NSCC through which NSCC members exchange physical envelopes through a centralized location at NSCC. Pursuant to Rule 43 of NSCC's Rules and Procedures, DSS centralizes claims processing for collection and payment of dividends and interest between NSCC members through the exchange of envelopes through the facilities of NSCC. Pursuant to Rule 41 of NSCC's Rules and Procedures, FOSS centralizes money-only settlements for NSCC members through the exchange of paperwork delivered to and received by NSCC members through NSCC's facilities. Pursuant to Rule 9 and Addendum D of NSCC's Rules and Procedures, ESS allows an NSCC member to physically deliver a sealed envelope containing securities and such other items as NSCC may from time to time permit to a specified NSCC member. The money settlement associated with ESS, DSS, and FOSS transactions occurs through NSCC's end-of-day settlement process.

Discontinuing FOSS and DSS and Merging Functionality into ESS

NSCC has offered DSS since its founding. FOSS was created in 1983 to remove money-only settlement activity, which prior to that time was included in ESS, from ESS in order to facilitate what was then NSCC's guaranty of settlement of securities transactions processed through ESS.[5] The use of each of these services has steadily declined in recent years due to increased dematerialization of securities and automation of transactions. In light of this decline and the elimination of the guaranty of ESS transactions, NSCC is proposing to amend its rules to discontinue the separate DSS and FOSS services and to allow members to

[56] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The text of the proposed rule change is attached as Exhibit 5 to NSCC's filing, which is available at *http://www.dtcc.com/downloads/legal/rule_filings/2011/nscc/2011-04.pdf.*

[4] The Commission has modified the text of the summaries prepared by NSCC.

[5] The guaranty of ESS settlement was in effect from 1983 until 2010. Securities Exchange Act Notice 34–61618 (March 1, 2010) [File No. SR–NSCC–2010–01], 75 FR 10542 (March 8, 2010).

process dividends and funds-only settlement activities through ESS.[6]

Closing of DDBS

DDBS was traditionally used to distribute hard copy Important Notices, clearing reports, and other informational documents to NSCC members. Today members: (a) receive Important Notices through the Web site of NSCC's parent, The Depository Trust & Clearing Corporation, at *http://www.dtcc.com,* (b) receive clearing reports through electronic communications, and (c) exchange other information that previously might have been transferred through DDBS, via email, facsimile, courier services, the U.S. Postal Service, and other delivery mechanisms. The DDBS service has become obsolete as a result of the use of these other more efficient means of distribution. Accordingly, NSCC is proposing to amend its rules to discontinue DDBS.

ESS Processing Changes

Increased Transparency

NSCC performs certain regulatory tracking and reporting functions (*e.g.,* OFAC screening) for securities transactions processed through NSCC. With respect to some NSCC services, such as Continuous Net Settlement (''CNS''),[7] NSCC electronically receives information as to security identification and transaction size that facilitates such tracking and reporting. However, similar electronic information is not available for securities transferred through ESS. In order to facilitate transparency in this regard, NSCC is proposing (1) to require its members to provide a security identifier (*i.e.,* CUSIP or ISIN) and include quantity delivered for all securities delivered through ESS, (2) to restrict members to one security issue per envelope, and (3) to prohibit the comingling of securities with other items. The proposed rule change would also allow NSCC to require its members provide it with additional information that NSCC from time to time deems necessary to facilitate ESS processing.

Separately, the proposed rule change would also allow for automatic updates to NSCC's Obligation Warehouse service with respect to securities transactions that settle though ESS where the delivering member includes an Obligation Warehouse control number with the respective envelope delivery to ESS. However, this feature will not be implemented concurrently with the other changes proposed by this filing, but rather it would be announced by Important Notice at a later date.[8]

NSCC Facilities Used for ESS Deliveries

Under the proposed rule change, NSCC's rules would be updated to change references to ESS deliveries and receives occurring through NSCC's New York City facility to use general language allowing NSCC to provide the service through any NSCC facility as announced by Important Notice.

Segregation of Activity Within ESS

As mentioned above, the rule change proposes to require that members not comingle different issues of securities in the same envelope or with other activity conducted through ESS. Pursuant to the proposed rule changes, NSCC would also be allowed to prohibit comingling between funds-only and dividend settlement items.

Proposed Rule Changes

With respect to the above, NSCC proposes to make changes to its rules and procedures as follows:

Rule 6—Distribution Facilities

NSCC's Rule 6 presently provides for the establishment of DDBS. Under the proposed rule change, the text of this rule would be deleted to reflect the elimination of DDBS.

Rule 9—Delivery and Receipt of Securities

Under the proposed rule change, NSCC's Rule 9 (currently entitled ''Delivery and Receipt of Securities''), pursuant to which NSCC offers ESS, would be renamed as ''Envelope Settlement Service'' and would be amended to: (1) Reflect the incorporation of FOSS and DSS into ESS, (2) incorporate the ESS processing changes described above, (3) allow for automatic updates to NSCC's Obligation Warehouse service with respect to securities transactions that settle through ESS where the delivering member includes an Obligation Warehouse Control Number with the respective envelope delivery to ESS, and (4) make other conforming changes to integrate rule provisions relating to FOSS and DSS into Rule 9.

Rule 41—Funds Only Settlement Service

NSCC's Rule 41 provides for the establishment of and procedures for FOSS. Under the proposed rule change, the text of this rule will be deleted to reflect the elimination of FOSS as a separate service.

Rule 43—Dividend Settlement Service

NSCC's Rule 43 provides for the establishment of and procedures for DSS. Under the proposed rule change, the text of this rule would be deleted to reflect the elimination of DSS as a separate service.

Addendum A—Fee Structure

NSCC's Fee Schedule would be revised to delete charges for the discontinued services mentioned above. Under the proposed rule change, all services offered under the newly combined ESS would be subject to the existing ESS charge for deliveries and receives.[9]

Addendum D—Statement of Policy—Envelope Settlement Service, Mutual Fund Services, Insurance and Retirement Processing and Other Services Offered by the Corporation

Addendum D, a statement of policy with regard to ESS and other NSCC services, provides, among other things, that money-only settlement charges should not be processed through ESS. NSCC proposed to amend Addendum D to conform to the changes proposed above. The proposed revised Addendum D would also include a technical change that clarifies that NSCC may reverse a member's debits or credits that are related to the Commission Bill Service.

Implementation Date

Upon Commission approval of this rule filing, the implementation date of the proposed changes described above will be announced by Important Notice; however, the elimination of DDBS will not take effect until approximately (but no less than) 30 days from the date of the Commission's approval.

The proposed rule change is consistent with the requirements of the

[6] In order to distinguish securities transfers from other ESS activity, NSCC would add a required indicator for input by members to disclose whether or not a security is included in an envelope.

[7] CNS is an on-going automated accounting system operated by NSCC which nets today's settling trades with yesterday's closing positions in eligible securities to produce new short or long positions per security issue for each NSCC member. Since NSCC is always the contraside for all transactions, NSCC is able to identify the securities for transactions submitted to CNS.

[8] For information on the Obligation Warehouse service, see Exchange Act Release 63588 (December 21, 2010), 75 FR 82112 (December 29, 2010) [File No. SR–NSCC–2010–11].

[9] In addition, two separate line items relating to ESS fees will be consolidated into one and reflect that the combined fee applies to all ESS deliveries and receives (including intercity). Also, as a technical change, fees relating to the New York Window Service would be deleted from the Fee Schedule as that service is no longer an offering of NSCC and certain other fees relating to physical processing functions that have become obsolete (which appear in the Fee Schedule as items A through F under the heading ''Other Service Fees'') would also be deleted. For additional information on the discontinuation of the New York Window Service at NSCC, see Exchange Act Release No. 40179 (July 8, 1998), 63 FR 38221 (July 15, 1998) (File Nos. SR–DTC–98–09, SR–NSCC–98–05).

Act, as amended, and the rules and regulations thereunder applicable to NSCC because it facilitates the prompt and accurate clearance and settlement of securities transactions by increasing processing efficiencies through the merger of several similar services for physical processing. In addition, the proposed rule change is consistent with Recommendation 12 of the CPSS/IOSCO Recommendations for Central Counterparties because it promotes efficiency in services offered to members by assimilating several modes of physical processing into a single service.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within forty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSCC–2011–04 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 submission should refer to File Number SR–NSCC–2011–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://www.dtcc.com/downloads/legal/rule filings/2011/nscc/2011–04.pdf*. 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–NSCC–2011–04 and should be submitted on or before July 27, 2011.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–16822 Filed 7–5–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7515]

30-Day Notice of Proposed Information Collection: DS–573, DS–574, DS–575, and DS–576, Overseas Schools—Grant Request Automated Submissions Program (GRASP)

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Grant Request Automated Submissions Program (GRASP).
- *OMB Control Number:* 1405–0036.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Office of Overseas Schools, A/OPR/OS.
- *Form Number:* DS–573, DS–574, DS–575, and DS–576.
- *Respondents:* Recipients of grants.
- *Estimated Number of Respondents:* 196.
- *Estimated Number of Responses:* 196.
- *Average Hours Per Response:* 90 minutes.
- *Total Estimated Burden:* 294 hours.
- *Frequency:* Annually.
- *Obligation to Respond:* Required to obtain a benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from July 6, 2011.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Keith Miller, Office of Overseas Schools, U.S. Department of State, Room H–328, 2301 C Street, NW., Washington, DC 20522–0132, who may be reached on 202–261–8200 or at *millerkd2@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary to properly perform our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

The Office of Overseas Schools of the Department of State (A/OPR/OS) is responsible for determining that adequate educational opportunities exist at Foreign Service posts for dependents of U.S. Government personnel stationed abroad and for assisting American-sponsored overseas schools to demonstrate U.S. educational philosophy and practice. The information gathered enables A/OPR/OS to advise the Department and other foreign affairs agencies regarding current and constantly changing conditions, and enables A/OPR/OS to make judgments regarding assistance to schools for the improvement of educational opportunities.

Methodology

Information is collected via electronic media.

Additional Information:

Dated: May 24, 2011.

Matthew S. Klimow,

Executive Director, Bureau of Administration, Department of State.

[FR Doc. 2011–16899 Filed 7–5–11; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice 7516]

Privacy Act; System of Records Notice: State-26, Passport Records

SUMMARY: Notice is hereby given that the Department of State proposes to amend an existing system of records, Passport Records, State-26, pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a) and Office of Management and Budget Circular No. A–130, Appendix I. The Department's report was filed with the Office of Management and Budget on June 15, 2011.

It is proposed that the current system will retain the name ''Passport Records.'' It is also proposed that the amended system description will include revisions/additions to the following sections: Categories of individuals; Categories of records; Routine uses; Retrievability; Safeguards; System manager and address; Systems exempted from certain provisions of the Act; and other administrative updates. The following sections have been added to the system of records, Passport Records, State-26, to ensure Privacy Act of 1974 compliance: Purpose and Contesting Records Procedures. Any persons interested in commenting on the amended system of records may do so by writing to the Director, Office of Information Programs and Services, A/GIS/IPS, Department of State, SA–2, 515 22nd Street, Washington, DC 20522–8001. This system of records will be effective 40 days from the date of publication, unless we receive comments that will result in a contrary determination.

The amended system description, ''Passport Records, State-26,'' will read as set forth below.

Dated: June 16, 2011.

William H. Moser,

Deputy Assistant Secretary for Logistics Management, Bureau of Administration, U.S. Department of State.

STATE–26

SYSTEM NAME:

Passport Records.

SECURITY CLASSIFICATION:

Classified and Unclassified.

SYSTEM LOCATION:

Department of State; Passport Services; State Annex 17; 1111 19th Street, NW., Washington, DC 20522–1705.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Records are maintained in the Passport Records system about individuals who:

(a) Have applied for the issuance, amendment, extension, or renewal of U.S. passport books and passport cards;

(b) Were issued U.S. passport books or passport cards, or had passports amended, extended, renewed, limited, revoked, or denied;

(c) Have applied to have births overseas reported as births of U.S. citizens overseas;

(d) Were issued a Consular Report of Birth Abroad of U.S. citizens or for whom Certification(s) of Birth have been issued;

(e) Were born and/or died in the former Panama Canal Zone;

(f) Applied at American diplomatic or consular posts for registration and have so registered;

(g) Were issued Cards of Registration and Identity as U.S. citizens;

(h) Were issued Certificates' of Loss of Nationality of the United States by the Department of State;

(i) Applied at American diplomatic or consular posts for issuance of Certificates of Witness to marriage and individuals who have been issued Certificates of Witness to Marriage;

(j) Deceased individuals for whom a Report of Death of an American Citizen Abroad has been obtained;

(k) Although U.S. citizens, are not or may not be entitled under relevant passport laws and regulations to the issuance or possession of U.S. passport books, passport cards, or other documentation nor service(s);

(l) Have previous passport records that must be reviewed before further action can be taken or their passport application or request for other consular services;

(m) Requested their own or another's passport records under FOIA or Privacy Act, whether successfully or not; or

(n) Have corresponded with Passport Services concerning various aspects of the issuance or denial of a specific applicant's U.S. passport books or passport cards.

CATEGORIES OF RECORDS IN THE SYSTEM:

Passport Services maintains U.S. passport records for passports issued from 1925 to present, as well as vital records related to births abroad, deaths, and witnesses to marriage abroad. The passport records system does not maintain evidence of travel such as entrance/exit stamps, visas, or residence permits, since this information is entered into the passport book after it is issued. The passport records system includes the following categories of records:

(a) Passport books and passport cards, applications for passport books and passport cards, and applications for additional visa pages, amendments, extensions, replacements, and/or renewals of passport books or passport cards (including all information and materials submitted as part of or with all such applications, to the extent retained by the Department);

(b) Applications for registration at American diplomatic and consular posts as U.S. citizens or for issuance of Cards of Identity and Registration as U.S. Citizens;

(c) Consular Reports of Birth Abroad of United States citizens;

(d) Panama Canal Zone birth certificates and death certificates;

(e) Certificates of Witness to Marriage;

(f) Certificates of Loss of United States nationality;

(g) Oaths of Repatriation;

(h) Consular Certificates of Repatriation;

(i) Reports of Death of an American Citizen Abroad;

(j) Cards of Identity and Registration as U.S. citizens;

(k) Lookout files which identify those persons whose applications for a consular or related services required other than routine examination or action;

(l) Lost, Stolen or Revoked passport status; and/or

(m) Miscellaneous materials, which are documents and/or records maintained separately, if not in the application, including but not limited to the following types of documents:

- Investigatory reports compiled in connection with granting or denying passport and related services or prosecuting violations of passport criminal statutes;
- Transcripts and opinions on administrative hearings, appeals and civil actions in Federal courts;
- Legal briefs, memoranda, judicial orders and opinions arising from administrative determinations relating to passports and citizenship;
- Birth and baptismal certificates;
- Copies of state-issued driver's licenses and identity cards;
- Court orders;
- Arrest warrants;
- Medical, personal and financial reports;
- Affidavits;
- Inter-agency and intra-agency memoranda, telegrams, letters and other miscellaneous correspondence;
- An electronic index of all passport applications records created since 1978, and passport applications records created between 1962 and 1978; and/or
- An electronic index of Department of State Reports of Birth of American Citizens abroad.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

(a) 8 U.S.C. 1401–1503 (2010) (Acquisition and Loss of U.S. Citizenship or U.S. Nationality; Use of U.S. Passport);

(b) 18 U.S.C. 911, 1001, 1541–1546 (2010) (Crimes and Criminal Procedure);

(c) 22 U.S.C. 211a–218, 2651a, 2705 (2010); Executive Order 11295, August 5, 1966, 31 FR 10603 (Authority of the Secretary of State in granting and issuing U.S. passports); and

(d) 8 U.S.C. 1185 (2010) (Travel Control of Citizens).

PURPOSE(S):

The information maintained in the Passport Services records is used to establish the U.S. citizenship and identity of persons for a variety of legal purposes including, but not limited to, the adjudication of passport applications and requests for related services, social security benefits, employment applications, estate settlements, and Federal and state law enforcement and counterterrorism purposes.

ROUTINE USES OF RECORDS MAINTAINED IN SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The principal users of this information outside the Department of State include the following users:

(a) Department of Homeland Security for border patrol, screening, and security purposes; law enforcement, counterterrorism, and fraud prevention activities; and for verification of passport validity to support employment eligibility and identity corroboration for public and private employment;

(b) Department of Justice, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the U.S. Marshals Services, and other components, for law enforcement, counterterrorism, border security, fraud prevention, and criminal and civil litigation activities;

(c) Internal Revenue Service for the mailing and permanent addresses of specifically identified taxpayers in connection with pending actions to collect taxes accrued, for examinations, and/or other tax-related assessment and collection activities; and an annual transmission of certain data from the applications of those U.S. citizens residing abroad consistent with applicable requirements of 26 U.S.C. Section 6039E;

(d) INTERPOL and other international organizations for law enforcement, counterterrorism, fraud prevention, and criminal activities related to lost and stolen passports;

(e) National Counterterrorism Center to support strategic operational planning and counterterrorism intelligence activities;

(f) Office of Personnel Management (OPM), other Federal agencies, or contracted outside entities to support the investigations OPM, other Federal agencies and contractor personnel conduct for the Federal government in connection with verification of employment eligibility and/or the issuance of a security clearance;

(g) Social Security Administration to support employment-eligibility verification for public and private employers and for support in verification of social security numbers used in processing U.S. passport applications;

(h) Federal law enforcement and intelligence agencies to support their efforts in identifying, verifying identity, and investigating individuals potentially involved in or associated with criminal or terrorist activities and individuals with other ties or connections to terrorism who may pose a threat to the United States;

(i) Federal, state, local, or other agencies having information on an individual's history, nationality, or identity, to the extent necessary to obtain information from these agencies relevant to adjudicating an application for a passport or related service, or where there is reason to believe that an individual has applied for or is in possession of a U.S. passport fraudulently or has violated the law;

(j) Federal, state, local or other agencies for use in legal proceedings as government counsel deems appropriate, in accordance with any understanding reached by the agency with the U.S. Department of State;

(k) Public and private employers seeking to confirm the authenticity of the U.S. passport when it is presented as evidence of identity and eligibility to work in the United States;

(l) Immediate family members when the information is required by an individual of the immediate family;

(m) Private U.S. citizen ''wardens'' designated by U.S. embassies and consulates to serve, primarily in emergency and evacuation situations, as channels of communication with other U.S. citizens in the local community;

(n) Attorneys representing an individual in administrative or judicial passport proceedings when the individual to whom the information pertains are the client of the attorney making the request;

(o) Members of Congress when the information is requested on behalf of or at the request of the individual to whom the record pertains;

(p) Contractor personnel conducting data entry, scanning, corrections, and modifications on behalf of an entity, and for a purpose, otherwise covered by this notice;

(q) Commercial vendors conducting applicant identity verification against commercial databases upon request of the Department of State;

(r) Foreign governments, to permit such governments to fulfill passport control and immigration duties and their own law enforcement, counterterrorism, and fraud prevention functions, and to support U.S. law enforcement, counterterrorism, and fraud prevention activities; and

(s) Government agencies other than the ones listed above that have statutory or other lawful authority to maintain such information may also receive

access on a need-to-know basis; however, all information is made available to users only for a previously-established routine use.

The Department of State periodically publishes in the **Federal Register** its standard routine uses that apply to all of its Privacy Act systems of records. These notices appear in the form of a Prefatory Statement. These standard routine uses apply to the Passport Records, State-26.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy and electronic media.

RETRIEVABILITY:

By individual name, social security number, passport book or passport card number.

SAFEGUARDS:

All users are given cyber security awareness training which covers the procedures for handling Sensitive but Unclassified information, including personally identifiable information (PII). Annual refresher training is mandatory. In addition, all Foreign Service and Civil Service employees and those Locally Engaged Staff (LES) who handle PII are required to take the FSI distance learning course instructing employees on privacy and security requirements, including the rules of behavior for handling PII and the potential consequences if it is handled improperly. Before being granted access to, Passport Records a user must first be granted access to the Department of State computer system.

Remote access to the Department of State network from non-Department owned systems is authorized only through a Department-approved access program. Remote access to the network is configured with the Office of Management and Budget Memorandum M–07–16 security requirements, which include but are not limited to two-factor authentication and time out function.

All Department of State employees and contractors with authorized access have undergone a thorough background security investigation. Access to the Department of State, its annexes and posts abroad is controlled by security guards and admission is limited to those individuals possessing a valid identification card or individuals under proper escort. All paper records containing personal information are maintained in secured file cabinets in restricted areas, access to which is limited to authorized personnel. Access to computerized files is password-protected and under the direct supervision of the system manager. The system manager has the capability of printing audit trails of access from the computer media, thereby permitting regular and ad hoc monitoring of computer usage.

When it is determined that a user no longer needs access, the user account is disabled.

RETENTION AND DISPOSAL:

Retention of these records varies depending upon the specific record involved. They are retired or destroyed in accordance with published record schedules of the Department of State and as approved by the National Archives and Records Administration. More specific information may be obtained by writing to the Director; Office of Information Programs and Services; A/GIS/IPS; SA–2; Department of State; 515 22nd Street, NW., Washington, DC 20522–8100.

SYSTEM MANAGER AND ADDRESS:

Deputy Assistant Secretary of State for Passport Services; Room 6811; Department of State; 2201 C Street, NW., Washington DC 20520–4818.

NOTIFICATION PROCEDURE:

An individual seeking to determine whether Passport Services maintains records must submit a signed and notarized written request including all pertinent facts associated with the occasion or justification for the request, along with a copy of the requester's valid photo identification. Only the subject, a parent of a minor, or legal guardian may request notification of whether the system of records contains a record pertaining to the subject. The following information must be included in the request:

(a) General Background Information

- Date of request
- Purpose/justification for request
- Document requested
- Number of documents requested
- Current mailing address, daytime telephone number, and e-mail address
- Each parent's name
- Each parent's date and place (state/country) of birth

(b) Previous Passport Information (If Known)

- Date of issuance
- Passport number
- Date of inclusion (passport issued in another name but included you)

(c) Current Passport Information

- Name of bearer
- Date of issuance
- Passport number (if known)

A request to search Passport Records, State-26, will be treated also as a request to search Overseas Citizens Services Records, State-05, when it pertains to passport, registration, citizenship, birth, or death records transferred from State-05 to State-26. Requests should be mailed to the following address: Department of State; Passport Services; Office of Law Enforcement Liaison Division; Room 500; 1111 19th Street NW., Washington, DC 20523–1705. Responses to such requests will consist of a letter indicating the records that exist in the passport records system. Additional information regarding applicable fees, third-party requests, certified copies, and frequently asked questions is available at *http://www.travel.state.gov/passport/services/copies/copies_872.html.*

RECORD ACCESS AND AMENDMENT PROCEDURES:

Individuals who wish to gain access to or amend records pertaining to themselves or their minor children should write to the appropriate address listed below. There are several ways individuals may gain access to or amend passport records pertaining to themselves or their minor children. First, individuals may request access to records in their name and the records of any minor children under the Privacy Act of 1974, 5 U.S.C. 552a (2010). Alternatively, third parties may request access to records under the guidelines of the Freedom of Information Act, 5 U.S.C. 552 (2010). Additionally, individuals may request access to their passport and/or vital records through the applicable Passport Office request process, as described below. Access may be granted to third parties to the extent provided under applicable laws and regulations. Please refer to *http://www.travel.state.gov* for detailed information regarding applicable fees, third-party requests certified copies and frequently asked questions. The appropriate methods by which passport records and vital records may be requested are as follows:

I. PRIVACY ACT OF 1974 AND FREEDOM OF INFORMATION ACT

Under the Privacy Act of 1974, individuals have the right to request access to their records at no charge, and to request that the Department of State amend any such records that they believe are not accurate, relevant, timely or complete, 5 U.S.C. 552a(d)(2) (2010). Additionally, third parties may request passport and vital records information from 1925 to the present, within the guidelines of the Privacy Act and/or the Freedom of Information Act, 5 U.S.C. 552 (2010). Written requests for access to or amendment of records must comply with the Department's

regulations published at 22 CFR part 171 (2010).

In accordance with 22 CFR 171.32 and 171.33, amendment requests must include the following information:

(a) Verification of personal identity (including full name, current address, and date and place of birth), either notarized or submitted under penalty of perjury;

(b) Any additional information if it would be needed to locate the record at issue;

(c) A description of the specific correction requested;

(d) An explanation of why the existing record is not accurate, relevant, timely or complete; and

(e) Any available documents, arguments or other data to support the request.

Requests under the Privacy Act and/or the Freedom of Information Act must be made in writing to the following office: Director; Office of Information Programs and Services; U.S. Department of State; SA–2; Room 8100; 515 22nd Street, NW., Washington, DC 20522–8100.

II. ACCESS TO RECORDS THROUGH THE PASSPORT OFFICE REQUESTS PROCESS

A. PASSPORT RECORDS

1. 1925 TO THE PRESENT

An individual seeking Passport Records must submit a signed and notarized written request including all pertinent facts associated with the occasion or justification for request, along with a copy of the requester's valid photo identification. Only the subject, a parent (if the subject is a minor), legal representative, or law enforcement authority may request for notification of whether the system of records contains a record pertaining to the subject. The following information must be included in the request:

GENERAL BACKGROUND INFORMATION

- Date of request
- Purpose/Justification for request
- Document requested
- Number of documents requested
- Current mailing address, daytime telephone number, and e-mail address
- Each parent's name
- Each parent's date and place (state/country) of birth

PREVIOUS PASSPORT INFORMATION (IF KNOWN)

- Date of issuance
- Passport number
- Date of inclusion (passport issued in another name but included you)

CURRENT PASSPORT INFORMATION

- Name of bearer
- Date of issuance
- Passport number (if known)

All requests for passport records issued from 1925 to the present should be submitted to the following address: Department of State; Passport Services; Law Enforcement Liaison Division; Room 500; 1111 19th Street, NW., Washington, DC 20522–1705.

2. PRIOR TO 1925

The National Archives and Records Administration maintains records for passport issuances prior to 1925, which may be requested by writing to the following address: National Archives and Records Administration; Archives 1; Reference Branch; 8th & Pennsylvania Ave., NW., Washington, DC 20408–0002.

B. VITAL RECORDS—CERTIFICATES OF BIRTH ABROAD, REPORT OF DEATH, CERTIFICATE OF WITNESS TO MARRIAGE, PANAMA CANAL ZONE BIRTH AND DEATH CERTIFICATES, AND CERTIFICATION OF NO RECORD

An individual seeking Passport Records must submit a signed and notarized written request including all pertinent facts associated with the occasion or justification for request, along with a copy of the requester's valid photo identification. Only the subject, a parent of a minor, or legal representative may request for notification of whether the system of records contains a record pertaining to him/her. The following information must be included in the request:

GENERAL BACKGROUND INFORMATION

- Date of request
- Purpose of request
- Document Requested (Certificate of Birth, Report of Death, Certificate of Witness of Marriage (prior to 1985), PCZ birth or death certificate, or Certification of No Record).
- Number of documents requested
- Current mailing address and daytime telephone number

FACTS OF BIRTH, DEATH, OR MARRIAGE

- Name (at birth/death/marriage)
- Name after adoption (if applicable)
- Country of birth/death/marriage
- Each parent's full name and date and place (state/country) of birth

PREVIOUS PASSPORT INFORMATION (IF KNOWN)

- Passport used to first enter the United States (if applicable).
- Name of bearer
- Date of issuance
- Passport number
- Date of inclusion (if applicable, and if passport was not issued to the subject)

CURRENT PASSPORT INFORMATION

- Name of bearer
- Date of issuance
- Passport number (if known)

If requesting an amendment or correction to a Consular Report of Birth Aboard, please include certified copies of all documents appropriate for effecting the change (*i.e.,* foreign birth certificate, marriage certificate, court ordered adoption or name change, birth certificates of adopting or legitimating parents, etc.). If the subject has reached majority, only the subject can request the record be amended or corrected. The original or replacement FS–240, or a notarized affidavit concerning its whereabouts also must be included.

All requests for vital records through the Passport Office Request Process should be mailed to the following address: U.S. Department of State; Passport Services; Vital Records Section; 1111 19th Street, NW., Suite 510, Washington, DC 20522–1705.

CONTESTING RECORD PROCEDURES:

See above.

RECORD SOURCE CATEGORIES:

These records contain information obtained primarily from the individual who is the subject of these records; law enforcement agencies; investigative intelligence sources, investigative security sources and officials of foreign governments.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Certain records contained within this system of records may be exempt from the requirements of the Privacy Act for reasons including when it is necessary to:

(a) Protect material required to be kept secret in the interest of national defense and security and foreign policy;

(b) Prevent individuals who are the subject of investigation from frustrating the investigatory process, to ensure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the confidence of foreign governments in the integrity of the procedures under which privileged or confidential information may be provided, and to fulfill commitments made to sources to protect their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel; or

(c) Preclude impairment of the Department's effective performance in carrying out its lawful protective responsibilities under 18 U.S.C. 3056 and 22 U.S.C. 4802.

Records meeting any of the above criteria are exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d),

(e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) 2007). See 22 CFR 171.36(b)(1), (b)(2), and (b)(3) (2007).

[FR Doc. 2011–16898 Filed 7–5–11; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF STATE

[Public Notice 7514]

Waiver of Restriction on Assistance to the Central Government of Uzbekistan

Pursuant to Section 7086(c)(2) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Division F, Pub. L.111–117), as carried forward by the Full-Year Continuing Appropriations Act, 2011 (Div. B, Pub. L. 112–10) (''the Act''), and Department of State Delegation of Authority Number 245–1, I hereby determine that it is important to the national interest of the United States to waive the requirements of Section 7086(c)(1) of the Act with respect to Uzbekistan and I hereby waive such restriction.

This determination shall be reported to the Congress, and published in the **Federal Register**.

Dated: June 24, 2011.

Thomas Nides,

Deputy Secretary of State for Management and Resources.

[FR Doc. 2011–16900 Filed 7–5–11; 8:45 am]

BILLING CODE 4710–31–P

TENNESSEE VALLEY AUTHORITY

Integrated Resource Plan

AGENCY: Tennessee Valley Authority.

ACTION: Issuance of Record of Decision.

SUMMARY: This notice is provided in accordance with the Council on Environmental Quality's regulations (40 CFR parts 1500 to 1508) and TVA's procedures for implementing the National Environmental Policy Act (NEPA). TVA has decided to adopt the preferred alternative in its final environmental impact statement (EIS) for the Integrated Resource Plan (IRP). The notice of availability (NOA) of the *Final Environmental Impact Statement for the Integrated Resource Plan* was published in the **Federal Register** on March 11, 2011. The TVA Board of Directors accepted the IRP and authorized staff to implement the preferred alternative at its April 14, 2011, meeting. This alternative, the Preferred Planning Direction, will guide TVA's selection of energy resource options to meet the energy needs of the Tennessee Valley region over the next 20 years. The energy resource options include new nuclear, natural gas-fired, and renewable generation, increased energy efficiency and demand reduction, decreased coal-fired generation, and new energy storage capacity.

FOR FURTHER INFORMATION CONTACT: Charles P. Nicholson, NEPA Compliance Manager, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 11D, Knoxville, Tennessee 37902–1499; telephone 865–632–3582, or e-mail *cpnicholson@tva.gov;* Randall E. Johnson, IRP Project Manager, Tennessee Valley Authority, 1101 Market Street, LP 5D–C, Chattanooga, Tennessee 37402; telephone 423–751–3520, or e-mail *rejohnson1@tva.gov.*

SUPPLEMENTARY INFORMATION: TVA is an agency and instrumentality of the United States, established by an act of Congress in 1933, to foster the social and economic welfare of the people of the Tennessee Valley region and to promote the proper use and conservation of the region's natural resources. One component of this mission is the generation, transmission, and sale of reliable and affordable electric energy. TVA operates the nation's largest public power system, producing 4 percent of all the electricity in the nation. TVA provides electricity to about 9 million people in an 80,000-square mile area comprised of most of Tennessee and parts of Virginia, North Carolina, Georgia, Alabama, Mississippi, and Kentucky. It provides wholesale power to 155 independent power distributors and 56 directly served large industrial and Federal customers. The TVA Act requires the TVA power system to be self-supporting and operating on a non-profit basis and directs TVA to sell power at rates as low as are feasible.

Dependable generating capacity on the TVA power system is about 37,200 megawatts (MW). TVA generates most of this power with 3 nuclear plants, 11 coal-fired plants, 9 combustion-turbine plants, 3 combined cycle plants, 29 hydroelectric plants, a pumped-storage facility, and several small renewable facilities. A portion of delivered power is provided through long-term power purchase agreements. TVA has generated an annual average of about 153,100 gigawatt hours (GWh) of power in recent years. The major sources for this power were coal (52 percent), nuclear (28 percent), hydroelectric (6 percent), and natural gas (1 percent). Other sources comprised less than 1 percent of TVA generation.

The recently completed IRP updates TVA's 1995 IRP, entitled *Energy Vision 2020.* Consistent with Section 113 of the Energy Policy Act of 1992, the IRP planning process evaluated a range of existing and incremental resources, including new power supplies, energy conservation and efficiency, and renewable energy resources in order to provide TVA's customers adequate and reliable service at the lowest system cost.

Future Demand for Energy

TVA uses state-of-the-art energy forecasting models to predict future demands on its system. Because of the uncertainty in predicting future demands, TVA developed high, medium, and low forecasts for both peak load (in MW) and annual net system energy (in GWh) through 2029. Peak load is predicted to grow at an average annual rate of 1.3 percent in the medium-growth Spring 2010 Reference Case, decrease slightly and then remain flat under the low-growth forecast, and grow at an annual rate of 2.0 percent under the high-growth forecast. Net system energy is predicted to grow at an average annual rate of 1.1 percent in the medium-growth case, decrease slightly and then remain flat under the low-growth forecast, and grow at an annual rate of 1.9 percent under the high-growth forecast.

Based on these load growth forecasts, TVA's current firm capacity (including TVA generation, energy efficiency and demand response (EEDR) measures, and power purchase agreements), and a 15 percent reserve capacity requirement, TVA would need additional capacity and generation or EEDR in the future. The medium growth case need for additional generating capacity or EEDR programs is about 9,600 MWs and 29,100 GWhs of generation in 2019 and about 15,500 MWs and 45,000 GWhs in 2029. Corresponding needs for the high growth forecast are about 15,000 MWs and 63,000 GWhs in 2019 and 27,000 MWs and 98,000 GWhs in 2020. Corresponding needs for the low growth forecast are about 1,500 MWs in 2019 and 2,000 MWs in 2029; no additional generation would be required.

Alternatives Considered

Five alternative energy resource strategies were evaluated in the Draft EIS and IRP. These resource planning strategies were identified as potential alternative means to meet future electrical energy needs on the TVA system (load demand) and achieve a sustainable future, consistent with the Board's vision and the TVA Environmental Policy. These alternative strategies are:

Strategy A—Limited Change in Current Resource Portfolio: Under this strategy, TVA would continue to operate its existing generating resources as long as possible, continue to implement its existing Energy Efficiency and Demand Response (EEDR) programs, add renewable energy resources, and rely on power purchases to meet additional load demands on the TVA system.

Strategy B—Baseline Plan Resource Portfolios: Under this strategy, which is the No Action Alternative, TVA would continue TVA's current power planning approach including increasing its EEDR programs, adding more renewable energy resources, and idling some existing coal-fired generating units. Increased load demands above the capacity of these resources primarily would be met by additional natural gas and nuclear capacity.

Strategy C—Diversity Focused Resource Portfolio: Under this strategy, compared to Strategy B, TVA would increase EEDR efforts, the amount of renewable energy resources added to the power system, and the amount of coal-fired capacity idled. To help manage increased amounts of renewable resources and to further diversify the energy resources on the TVA system, additional energy storage resources would be constructed in the form of hydro-electric pump storage capacity. Increased load demands above the capacity of these resources primarily would be met by additional natural gas and nuclear capacity.

Strategy D—Nuclear Focused Resource Portfolio: Under this planning strategy, additional EEDR, renewable, and energy storage resources would be added to the power system similar to those in Strategy C. However, this strategy includes the largest amount of idled coal capacity (7,000 MWs), and the likelihood that more nuclear capacity would be used to meet load demands is greater than in Strategy C.

Strategy E—EEDR and Renewables Focused Resource Portfolio: Under this planning strategy, the largest amounts of EEDR and renewable resources would be added to the TVA power system. Of the strategies, the highest level of transmission system upgrades would be needed in Strategy E.

The strategies were analyzed in the context of eight different scenarios. A scenario is a set of uncertainties relevant to power system planning and describes plausible future economic, financial, regulatory and legislative conditions, as well as social trends and adoption of technological innovations. One of the eight scenarios served as the IRP reference or baseline case. Potential 20-year energy resource plans or portfolios were developed for each combination of strategy and scenario using a capacity planning model. The capacity planning model built each portfolio from a range of potential energy resource options that included TVA's existing demand-side and supply-side resources and new EEDR programs, coal-fired generation with carbon capture and sequestration, natural gas-fired generation, nuclear generation, renewable generation such as hydroelectric, solar, biomass, and wind energy, and energy storage resources. Each portfolio was optimized for the lowest net Present Value of Revenue Requirements while meeting energy balance, reserve, operational, and other requirements. The portfolios were then evaluated using an hourly production costing program to determine detailed revenue requirements and short-term rates. Additional metrics developed to rank the portfolios included financial risk, carbon dioxide emissions, thermal cooling requirements, waste handling costs, and changes in total employment and personal income.

The two alternative strategies ranked highest for the cost and risk factors were Strategy C and Strategy E. Strategy B ranked in the middle of the range and Strategy D and Strategy A ranked lowest. Strategies D and E had the best (*i.e.,* lowest) scores for the environmental metrics and strategies A and B had the worst scores. The environmental scores for Strategy A were lowest due to the continued operation of all TVA coal plants and the likely reliance on natural gas for most future capacity additions through power purchase agreements. The other four strategies all had reductions in coal capacity and, under most scenarios, nuclear capacity additions; these factors resulted in their lower carbon dioxide emissions. The ranking of the strategies by the two economic development metrics was similar. Strategies B and D performed similarly and had greatest increases in total employment and personal income under the high-growth scenarios. Strategies D and E also performed similarly and were in the middle of the range. Strategy A consistently ranked lowest for the economic development metrics.

Based on this comparison two alternative strategies, Strategy A—Limited Change Resource Portfolio and Strategy D—Nuclear Focused Resource Portfolio were eliminated from further consideration. An additional alternative strategy was later developed from a blend of features from the initial strategies in response to public comments on the Draft IRP and EIS and additional analyses.

Strategy R—Recommended Planning Direction: Under this strategy which was staff's recommended planning direction, an optimized mix of diversified energy resources would be added to the TVA power system. Major components of this mix are as follows:

- EEDR—3,600 to 5,100 MW (11,400 to 14,400 GWh) by 2020, with subsequent further investment depending upon program success;
- Renewable additions—1,500 to 2,500 MW of cost effective energy by 2020;
- Coal-fired capacity idled—2,400 to 4,700 MW of maximum net dependable capacity by 2017, with consideration for increasing the amount of coal capacity idled;
- Energy storage—850 MW of pumped storage capacity in 2020–2024;
- Nuclear additions—1,150 to 5,900 MW in 2013–2029;
- Coal additions—0 to 900 MW with carbon capture ability in 2025—2029;
- Natural gas additions—900 to 9,300 MW in 2012–2029 used as intermediate supply source.

This planning strategy is a blend of Strategies C and E which performed well financially, environmentally, and in terms of risk and was identified as the preferred alternative in the Final EIS.

Public Involvement

TVA published a notice of intent to prepare the IRP EIS in the **Federal Register** on June 15, 2009. TVA then actively engaged the public through public scoping and public briefings during the development of the IRP and EIS. Participants could attend the briefings in person or by Web conference. TVA also established a Stakeholder Review Group with members consisting of individuals from government agencies and business, civic, and environmental organizations including TVA customers and the Tennessee Valley Public Power Association. These individuals were actively involved in the preparation of the IRP and provided TVA comments and critiques of IRP analyses and process steps.

The Notice of Availability of the Draft IRP and EIS was published in the **Federal Register** by the U.S. Environmental Protection Agency (USEPA) on September 24, 2010. TVA accepted comments on the draft plan and EIS until November 15, 2010. During the comment period, TVA held five public meetings to describe the project and accept comments. Stakeholders could also participate in the meetings by Web conference. TVA received 501 comment submissions on

the Draft IRP and EIS. After considering and responding to all substantive comments, developing the new alternative Strategy R, and further evaluating the strategies, TVA issued the Final IRP and EIS. The NOA for the Final IRP and EIS was published in the **Federal Register** on March 11, 2011.

Environmentally Preferred Alternative

Alternative Strategy E—EEDR and Renewables Focused Resource Portfolio would result in the lowest overall environmental impacts and is the environmentally preferred alternative. Strategy R—Recommended Planning Direction had the second lowest level of impacts to most environmental resource areas. The difference in impacts between Strategy E and Strategy R would be reduced if the amount of coal generating capacity that is idled as Strategy R is implemented approaches or exceeds the upper end of the 2,400 to 4,700 MW range.

Decision

On April 14, 2011, the TVA Board of Directors accepted the IRP and authorized staff to implement the preferred alternative, the Recommended Planning Direction. The Board also directed staff to repeat the integrated resource planning process beginning no later than 2015.

Compared to the best-performing of the initially considered alternative strategies, Strategy C—Diversity Focused Resource Portfolio, and Strategy E—EEDR and Renewables Focused Resource Portfolio, the recommend planning direction typically performed best under the various scenarios on total plan cost and risk/benefit comparisons and performed similarly to these other strategies with respect to general economic conditions in the Tennessee Valley region represented by total employment and personal income. However, it performed slightly worse than Strategy E, but better than Strategy C, with respect to environmental impacts.

Mitigation Measures

The reduction of environmental impacts was a major goal in TVA's integrated resource planning process. As TVA deploys specific energy resources, it will appropriately review and take measures to reduce their potential environmental impacts. TVA's siting processes for generation and transmission facilities, as well as processes for modifying these facilities, are designed to avoid and/or minimize potential adverse environmental impacts. Potential impacts will also be reduced through pollution prevention measures and environmental controls such as air pollution control systems, wastewater treatment systems, and thermal generating plant cooling systems. Other potentially adverse unavoidable impacts will be mitigated by measures such as compensatory wetlands mitigation, payments to in-lieu stream mitigation programs and related conservation initiatives, enhanced management of other properties, documentation and recovery of cultural resources, and infrastructure improvement assistance to local communities.

Dated: June 24, 2011.

Van M. Wardlaw,

Executive Vice President, Enterprise Relations.

[FR Doc. 2011–16840 Filed 7–5–11; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35495]

CSX Transportation, Inc.—Lease Exemption—Consolidated Rail Corporation

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of Exemption.

SUMMARY: Under 49 U.S.C. 10502, the Board is granting a petition for exemption from the prior approval requirements of 49 U.S.C. 11323–25, for CSX Transportation, Inc. (CSXT), to lease from Consolidated Rail Corporation (Conrail) approximately 1,303 feet of rail line (the Line) in the South Jersey/Philadelphia Shared Assets Area between mileposts 5.20 and 5.45 in Philadelphia, PA. Under the lease, CSXT proposes to construct an additional connection between its Trenton Subdivision Line (Trenton Line) and the Line. The new connection would facilitate operations on the Trenton Line and an Amtrak-owned, Conrail-operated line (the Delair Branch).

DATES: Petitioner has asked for expedited consideration of the petition; consequently, the exemption will be effective on July 16, 2011. Petitions to stay must be filed by July 11, 2011.

ADDRESSES: An original and 10 copies of all pleadings, referring to Docket No. FD 35495, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of all pleadings must be served on petitioner's representative: Louis E. Gitomer, 600 Baltimore Ave., Suite 301, Towson, MD 21204.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board granted the petition by decision served on July 6, 2011, subject to standard employee protective conditions.

Board decisions and notices are available on our Web site at: *http://www.stb.dot.gov.*

Decided: June 30, 2011.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–16870 Filed 7–5–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8823

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 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.

DATES: Written comments should be received on or before September 6, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to, Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to, Joel Goldberger (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: Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.

OMB Number: 1545–1204.

Form Number: 8823.

Abstract: Under Internal Revenue Code section 42(m)(1)(B)(iii), state housing credit agencies are required to notify the IRS of noncompliance with the low-income housing tax credit provisions. A separate form must be filed for each building that is not in compliance. The IRS uses this information to determine whether the low-income housing credit is being correctly claimed and whether there is any credit recapture.

Current Actions: Form 8823 was not revised; however, adjustments were made to the burden computation to accurately reflect the total burden hours associated with this collection, which resulted in a decrease of 69,000 hours, making the new burden hours 303,200.

Type of Review: Revision of a currently approved collection.

Affected Public: State or local government housing credit agencies.

Estimated Number of Respondents: 20,000.

Estimated Total Annual Burden Hours: 303,200.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request For Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 24, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–16821 Filed 7–5–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 3491

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 3491, Consumer Cooperative Exemption Application.

DATES: Written comments should be received on or before September 6, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Evelyn J. Mack, (202) 622–7381, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Evelyn.J.Mack@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Consumer Cooperative Exemption Application.

OMB Number: 1545–1941.

Form Number: A cooperative uses Form 3491 to apply for exemption from filing information returns (Forms 1099–PATR) on patronage distributions of $10 or more to any person during the calendar year.

Current Actions: There are no changes being made to the Form 3491 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit, Individuals or households, and Farms.

Estimated Number of Respondents: 200.

Estimated Time Per Respondent: 44 minutes.

Estimated Total Annual Burden Hours: 148.

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: June 23, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–16826 Filed 7–5–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1120–PC

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 1120–PC, U.S. Property and Casualty Insurance Company Income Tax Return.

DATES: Written comments should be received on or before September 6, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Evelyn J. Mack, at (202) 622–7381, or at Internal Revenue Service, room 6231, 1111 Constitution, Avenue, NW., Washington, DC 20224, or through the Internet, at *Evelyn.J.Mack@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: U.S. Property and Casualty Insurance Company Income Tax Return.

OMB Number: 1545–1027.

Form Number: Form 1120–PC.

Abstract: Property and casualty insurance companies are required to file an annual return of income and pay the tax due. The data is used to insure that companies have correctly reported income and paid the correct tax.

Current Actions: On Form 1120–PC line changes were made, within Schedules E and H, to clarify the new restrictions on the deduction of 100% of unearned premiums by section 833 organizations, enable section 833 organizations to determine whether they meet the 85% medical loss ratio mandated by IRC 833(c)(5) and for qualifying section 833 organizations to compute the special deduction and the ending adjusted surplus (Pub. L. 111–148, section 9016 and IRC 833(c)(5)). A question was added to Schedule I for corporations to indicate whether they have uncertain tax positions (Announcements 2010–9 and 2010–17, and 2010–30).

On Form 1120–PC (Schedule M–3) two lines were added to monitor IRC sections 174 and 118, respectively, at the request of LMSB.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 4,200.

Estimated Time Per Respondent: 164 hrs., 59 min.

Estimated Total Annual Burden Hours: 671,746.

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: June 22, 2011.

Yvette B. Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–16820 Filed 7–5–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Monthly Median Cost of Funds Reporting, and Publication of Cost of Funds Indices

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice of Termination of OMB No. 1550–0021, Monthly Median Cost of Funds Reporting, and Publication of Cost of Funds Indices.

SUMMARY: The OTS is terminating the collection of data used to calculate and publish the Monthly Median Cost of Funds Index (MMCOF), the Quarterly Cost of Funds Index (QCOF), the Semiannual Cost of Funds Index (SCOF), and other related cost of funds ratios currently published monthly in the OTS's Cost of Funds (COF) Report.[1]

FOR FURTHER INFORMATION CONTACT: For further information about the changes discussed in this notice, please contact Jim Caton, Managing Director—Economic and Industry Analysis, at (202) 906–5680.

Copies of the reporting form, OMB No. 1550–0021 (OTS Form 1568), and instructions for cost of funds reporting requirements are available on the OTS Web site through the following link: *http://www.ots.treas.gov/?p=StatisticalReleases.*

SUPPLEMENTARY INFORMATION:

Abstract

Some institutions currently submit MMCOF data to the OTS monthly for the OTS's use in calculating a monthly median cost of funds index. Additionally, the OTS publishes two indices based on calculations from data included in the Thrift Financial Report (TFR): [2]

1. A quarterly average cost of funds index, and

2. A semiannual average cost of funds index.

These indices are used by certain mortgage lenders as benchmarks from which to base rate adjustments for adjustable rate mortgages (ARMs).

Effect of Recent Legislation

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (the Dodd-Frank Act), was enacted into law on July 21, 2010. Title III of the Dodd-Frank Act abolishes the OTS, provides for its integration with the Office of the Comptroller of the Currency (OCC) effective as of July 21, 2011 (the ''transfer date''), and transfers the OTS's functions to the OCC, the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC).

Under Title III of the Dodd-Frank Act, all functions of the OTS relating to Federal savings associations and rulemaking authority for all savings associations are transferred to the OCC. All functions of the OTS relating to state-chartered savings associations (other than rulemaking) are transferred

[1] Link to published COF reports: *http://www.ots.treas.gov/?p=StatisticalReleases.*

[2] Copies of the reporting forms and instructions for the TFR (OMB No. 1550–0023) can be obtained on the OTS Web site (*http://www.ots.treas.gov/?p=ThriftFinancialReports*).

to the FDIC. All functions of the OTS relating to supervision of savings and loan holding companies (including rulemaking) are transferred to the Board.

Current Actions

On February 8, 2011, the OTS requested public comment (76 FR 7089) [3] on its notice of intent to discontinue data collection and publication of the monthly median cost of funds index and related indices. The changes to savings associations' data reporting requirements will be effective January 31, 2012. At that time savings associations currently regulated by the OTS shall cease filing data used to calculate the MMCOF index. Further publication of the MMCOF, the QCOF, the SCOF, and other related cost of funds ratios currently published monthly in the COF Report shall cease as of January 31, 2012. The final COF Report shall be for the month of December 2011. Until the effective date of these changes, savings associations shall continue to file MMCOF data in the current manner using existing processes.

The OTS received two comments regarding its notice of intent. One comment was from a bank/thrift trade association and the other comment was from a savings association. The bank/thrift trade association did not object to the proposed changes becoming effective as of January 31, 2012, but requested that ''OTS provide guidance regarding converting ARM loans to an alternative index.'' In particular, the bank/thrift trade association requested that the guidance ''recognize situations where loan contracts might address circumstances where use of an alternative index may be necessary, as well as certain legacy ARM contracts that we understand may be silent or non-specific regarding such circumstances.''

The other comment was from a savings association. The commenter noted that there are ''numerous adjustable interest rate home loans including loans sold to the Federal National Mortgage Association (FNMA or Fannie Mae) and to the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) that use these indices.'' The commenter expressed concern for the difficulty of consumers agreeing ''on a substitution of indices as the cost of fund indices are generally considered to be a ''lagging index'' and stated it would be hard to replace that feature to the satisfaction of the consumer.

[3] Link to 76 FR 7089: *http://www.ots.treas.gov/_files/4830090.pdf*.

Index Substitution

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73 (FIRREA), was enacted into law on August 9, 1989. Section 402(e)(4) of FIRREA requires the OTS to designate acceptable substitute indices should it discontinue publication of indices used for ARM rate adjustments. The Director of OTS must determine, after notice and opportunity for comment, that (A) the new indices are based upon data substantially similar to that of the original indices; and (B) the substitution of the new indices will result in an interest rate substantially similar to the rate in effect at the time the original index became unavailable. Any such substitute index may be substituted by the holder of any such adjustable rate mortgage instrument upon notice to the borrower.

As described in the February 8, 2011 notice, the OTS analyzed the values and changes of 17 publicly available indices on a monthly basis from January 1990 through August 2010 to help designate acceptable substitute indices for the MMCOF, QCOF, and SCOF indices. The OTS compared the values and changes of the publicly available indices to those of the MMCOF, QCOF, and SCOF. Correlation coefficients [4] were calculated for each publicly available index value to the MMCOF, QCOF, and SCOF.

The bank/thrift trade association noted that each of the indices identified have adequately high correlation with the OTS's COF indices and did not express a particular preference for one substitute over the others. The bank/thrift trade association's members consider the Monthly Treasury Average (MTA) index to be less suitable as a direct substitute because of recent changes in interest rate relationships resulting from monetary policy actions. The OTS agrees.

The OTS also finds that the MTA is less of a lagging market index (LMI) than the 11th District COF or the Federal COF indices. Similarly, the National Average Contract Mortgage Rate index is less of an LMI than either of these COF indices.

The bank/thrift trade association commented that the 11th District COF index has the strongest correlation to the OTS COF indices, but is not as well known outside the 11th Federal Home Loan Bank District as some other substitute indices that OTS analyzed. The OTS agrees with this comment. Further, the OTS notes that only Arizona, California, and Nevada savings associations that are members of the Federal Home Loan Bank of San Francisco are eligible to be considered for inclusion in this COF index. Thus, a limited number of savings associations in a limited geographic area participate in providing data for this index. Given that this is a weighted average index with a limited number of participating institutions, the resulting values can be skewed by a few very large institutions.

The bank/thrift trade association noted that the Federal COF index is well known and highly correlated to the OTS's MMCOF, QCOF, and SCOF indices, but the future of the Federal COF index may depend on the outcome of reform of government-sponsored enterprises (GSEs), including Freddie Mac. The OTS believes that any reform of the GSEs would by necessity provide for either a continuation of the Federal COF or an acceptable substitute index to the Federal COF similar to FIRREA's provision for substitutes for the OTS's COF indices.

The savings association commenter mentioned there may be a large volume of loans using the OTS COF indices that have been sold to FNMA and FHLMC. As described in the February 8, 2011 notice, the OTS analyzed the trends in savings associations' ARMs tied to LMIs and found the volumes of these ARMs declined precipitously over the past ten years to currently very low levels. Moreover, the OTS analyzed the usage and trends of various indices used to base rate adjustments for ARMs held by, or serviced by, lenders of all types throughout the United States from 1999 through 2010. This analysis, based on lenders of all types, confirmed the analysis based on savings association-specific data. For example, based on data analyzed from the CoreLogic/LoanPerformance Servicing Database,[5] OTS found that less than 0.05 percent of the number and 0.01 percent of the balances of ARMs loans outstanding as of December 31, 2010, use the MMCOF for the index rate.

The savings association commenter also expressed concern about the difficulty of obtaining borrowers' consent to substitute indices proposed

[4] The correlation coefficient is a single number that describes the degree of relationship between two variables. A perfect positive correlation (a correlation coefficient of +1) implies that as one index moves, either up or down, the other index will move in lockstep, in the same direction.

[5] Data were calculated from the CoreLogic/LoanPerformance Servicing Database. The database includes 44.1 million active first mortgages for a total of $7.5 trillion active balances that are either held in portfolio as whole loans or securitized as of December 31, 2010. The data represent approximately 80 percent of outstanding first mortgages in the U.S.

by the holders of their mortgages. The OTS notes that, pursuant to FIRREA, substitute indices designated by the Director may be substituted by the holder of any such adjustable rate mortgage instrument upon notice to the borrower.

Given the Federal COF index's close correlation with the indices to be terminated, and pursuant to the requirements of FIRREA, the OTS is designating the Federal COF index [6] as an acceptable substitute index effective with the termination date of the discontinued indices. Further, the calculation of the Federal COF does not depend on a separate data collection from a limited amount of participants and is easily calculated.

In summary, after considering the comments received on the notice of intent, the OTS will terminate the collection of data used to calculate and publish the MMCOF, the QCOF, the SCOF, and other related cost of funds ratios currently published monthly in the OTS's COF Report. Savings associations shall cease filing the MMCOF data after the December 31, 2011, report date. Until the effective date of these changes, savings associations shall continue to file MMCOF data in the current manner using existing processes.

The holder of any adjustable rate mortgage instrument whose interest rate is adjusted based on the discontinued MMCOF, QCOF, and SCOF indices shall provide notice as soon as possible after publication of this termination notice to each affected borrower of the termination of such index.

Holders of MMCOF adjustable rate mortgage instruments shall begin using the Federal COF index for the index rate at adjustment determination dates beginning after December 31, 2011. Holders of QCOF adjustable rate mortgage instruments shall begin using an index rate calculated as the average of the three monthly Federal COF index values that were published immediately previous to adjustment determination dates beginning after December 31, 2011. Holders of SCOF adjustable rate mortgage instruments shall begin using an index rate calculated as the average of the six monthly Federal COF index values that were published immediately previous to adjustment determination dates beginning after December 31, 2011.

Dated: June 29, 2011.

John E. Bowman,

Acting Director, Office of Thrift Supervision.

[FR Doc. 2011–16809 Filed 7–5–11; 8:45 am]

BILLING CODE 6720–01–P

[6] Link to Federal COF index data: *http://www.freddiemac.com/news/finance/cof_index.htm.*

FEDERAL REGISTER

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Part II

Environmental Protection Agency

40 CFR Parts 85, 86, and 600

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 575

Revisions and Additions to Motor Vehicle Fuel Economy Label; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 85, 86, and 600

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 575

[EPA–HQ–OAR–2009–0865; FRL–9315–1; NHTSA–2010–0087]

RIN 2060–AQ09; RIN 2127–AK73

Revisions and Additions to Motor Vehicle Fuel Economy Label

AGENCY: Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) are issuing a joint final rule establishing new requirements for the fuel economy and environment label that will be posted on the window sticker of all new automobiles sold in the U.S. The labeling requirements apply for model year 2013 and later vehicles with a voluntary manufacturer option for model year 2012. The labeling requirements apply to passenger cars, light-duty trucks, and medium duty passenger vehicles such as larger sport-utility vehicles and vans. The redesigned label provides expanded information to American consumers about new vehicle fuel economy and fuel consumption, greenhouse gas and smog-forming emissions, and projected fuel costs and savings, and also includes a smartphone interactive code that permits direct access to additional Web resources. Specific label designs are provided for gasoline, diesel, ethanol flexible fuel, compressed natural gas, electric, plug-in hybrid electric, and hydrogen fuel cell vehicles. This rulemaking is in response to provisions in the Energy Independence and Security Act of 2007 that imposed several new labeling requirements and new advanced-technology vehicles entering the market. NHTSA and EPA believe that these changes will help consumers to make more informed vehicle purchase decisions, particularly as the future automotive marketplace provides more diverse vehicle technologies from which consumers may choose. These new label requirements do not affect the methodologies that EPA uses to generate consumer fuel economy estimates, or the automaker compliance values for NHTSA's corporate average fuel economy and EPA's greenhouse gas emissions standards. This action also finalizes a number of technical corrections to EPA's light-duty greenhouse gas emission standards program.

DATES: This final rule is effective on September 6, 2011. The incorporation by reference of certain publications listed in this regulation is approved by the Director of the Federal Register as of September 6, 2011.

ADDRESSES: EPA and NHTSA have established dockets for this action under Docket ID No. EPA–HQ–OAR–2009–0865 and NHTSA–2010–0087, respectively. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the following locations: *EPA:* EPA Docket Center (EPA/DC), EPA West, Room 334, 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. *NHTSA:* NHTSA: Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: *EPA:* Lisa Snapp, Office of Transportation and Air Quality, Transportation and Climate Division, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: 734–214–4282; fax number: 734–214–4958; e-mail address: *snapp.lisa@epa.gov*.

DOT/NHTSA: Rebecca Yoon, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: (202) 366–2992.

SUPPLEMENTARY INFORMATION:

A. Does this action apply to me?

This action affects companies that manufacture or sell new light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles, as defined under EPA's CAA regulations,[1] and passenger automobiles (passenger cars) and non-passenger automobiles (light trucks) as defined under NHTSA's CAFE regulations.[2] Regulated categories and entities include:

Category	NAICS codes [A]	Examples of potentially regulated entities
Industry	336111 336112.	Motor vehicle manufacturers.
Industry	811112 811198. 423110.	Commercial importers of vehicles and vehicle components.
Industry	336211	Stretch limousine manufacturers and hearse manufacturers.
Industry	441110	Automobile dealers.

[A] North American Industry Classification System (NAICS).

[1] ''Light-duty vehicle,'' ''light-duty truck,'' and ''medium-duty passenger vehicle'' are defined in 40 CFR 86.1803–01. Generally, the term ''light-duty vehicle'' means a passenger car, the term ''light-duty truck'' means a pick-up truck, sport-utility vehicle, or minivan of up to 8,500 lbs gross vehicle weight rating, and ''medium-duty passenger vehicle'' means a sport-utility vehicle or passenger van from 8,500 to 10,000 lbs gross vehicle weight rating. Medium-duty passenger vehicles do not include pick-up trucks.

[2] ''Passenger car'' and ''light truck'' are defined in 49 CFR Part 523.

This list is not intended to be exhaustive, but rather provides guidance on entities likely to be regulated by this action. To determine whether particular activities may be regulated by this action, you should carefully examine the regulations. You may direct questions regarding the applicability of this action to the person listed in **FOR FURTHER INFORMATION CONTACT**.

Table of Contents

List of Acronyms and Abbreviations

A/C Air Conditioning
AC Alternating Current
AIDA Automobile Information Disclosure Act
BTU British Thermal Units
CAA Clean Air Act
CAFE Corporate Average Fuel Economy
ARB California Air Resources Board
CBI Confidential Business Information
CD Charge Depleting
CFR Code of Federal Regulations
CH_4 Methane
CNG Compressed Natural Gas
CO Carbon Monoxide
CO_2 Carbon Dioxide
CREE Carbon-related Exhaust Emissions
CS Charge Sustaining
DOE Department of Energy
DOT Department of Transportation
E85 A mixture of 85% ethanol and 15% gasoline
EISA Energy Independence and Security Act of 2007
EO Executive Order
EPA Environmental Protection Agency
EPCA Energy Policy and Conservation Act
EPL Environmental Performance Label
EREV Extended Range Electric Vehicle
EV Electric Vehicle
FCV Fuel Cell Vehicle
FE Fuel Economy
FFV Flexible Fuel Vehicle
FTC Federal Trade Commission
FTP Federal Test Procedure
GHG Greenhouse Gas
GVWR Gross Vehicle Weight Rating
HCHO Formaldehyde
HEV Hybrid Electric Vehicle
HFC Hydrofluorocarbon
HFET Highway Fuel Economy Test
ICI Independent Commercial Importer
IT Information Technology
ICR Information Collection Request
LEV II Low Emitting Vehicle II
LEV II opt 1 Low Emitting Vehicle II, option 1
MDPV Medium Duty Passenger Vehicle
MPG Miles per Gallon
MPGe Miles per Gallon equivalent
MY Model Year
N_2O Nitrous Oxide
NAICS North American Industry Classification System
NCAP New Car Assessment Program
NEC Net Energy Change
NHTSA National Highway Traffic Safety Administration
NMOG Non-methane Organic Gases
NO_X Oxides of Nitrogen
NPRM Notice of Proposed Rulemaking
NTTAA National Technology Transfer and Advancement Act of 1995
O&M Operations and Maintenance
OCR Optical Character Recognition
OMB Office of Management and Budget
PEF Petroleum Equivalency Factor
PHEV Plug-in Hybrid Electric Vehicle
PM Particulate Matter
PZEV Partial Zero-Emissions Vehicle
R_{CDA} Actual Charge Depleting Range
RESS Rechargeable Energy Storage System
RFA Regulatory Flexibility Act
SAE Society of Automotive Engineers
SAFETEA–LU Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SBA Small Business Administration
SFTP Supplemental Federal Test Procedure
SOC State-of-Charge
SULEV II Super Ultra Low Emission Vehicles II
SUV Sport Utility Vehicle
UDDS Urban Dynamometer Driving Schedule
UF Utility Factor
ULEV II Ultra Low Emission Vehicles II
UMRA Unfunded Mandates Reform Act
ZEV Zero Emission Vehicle

I. Overview

A. Description of the Proposal

EPA and NHTSA co-proposed two label designs, each meeting statutory requirements and relying on the same underlying data, but differing in how the data were presented.[3] Label 1 utilized a vertical layout that featured a prominent letter grade to communicate the overall greenhouse gas emissions (and fuel economy, which is inversely proportional to GHG emissions for gasoline vehicles), along with projected five-year fuel cost or savings relative to the average new vehicle; fuel economy and annual fuel cost information was retained but displayed much less prominently. Label 2 was more similar to the traditional design and layout of the label and retained the current label's focus on fuel economy values and annual fuel cost projections, with the addition of environmental information in a less prominent position. The agencies also sought comment on an alternative Label 3 that retained the more traditional layout of Label 2 but used different graphical approaches.

B. Description of the Action

This final rule requires that a revised fuel economy and environmental label be affixed to all new automobiles sold in the U.S. starting with the 2013 model year and optionally for the remaining portion of the 2012 model year. The agencies heard a wide range of viewpoints and considered a wealth of input from market research, an expert panel, hearings, and public comments in deciding on the final label design and content. We also consulted with ARB with the intention of harmonizing labels that address vehicle environmental performance. The agencies have chosen to require a label that combines the cost-saving element of Label 1 and the GHG rating of Label 3 with key elements of the co-proposed Label 2, using a single additional color besides black and white.

[3] 75 FR 58078, September 23, 2010.

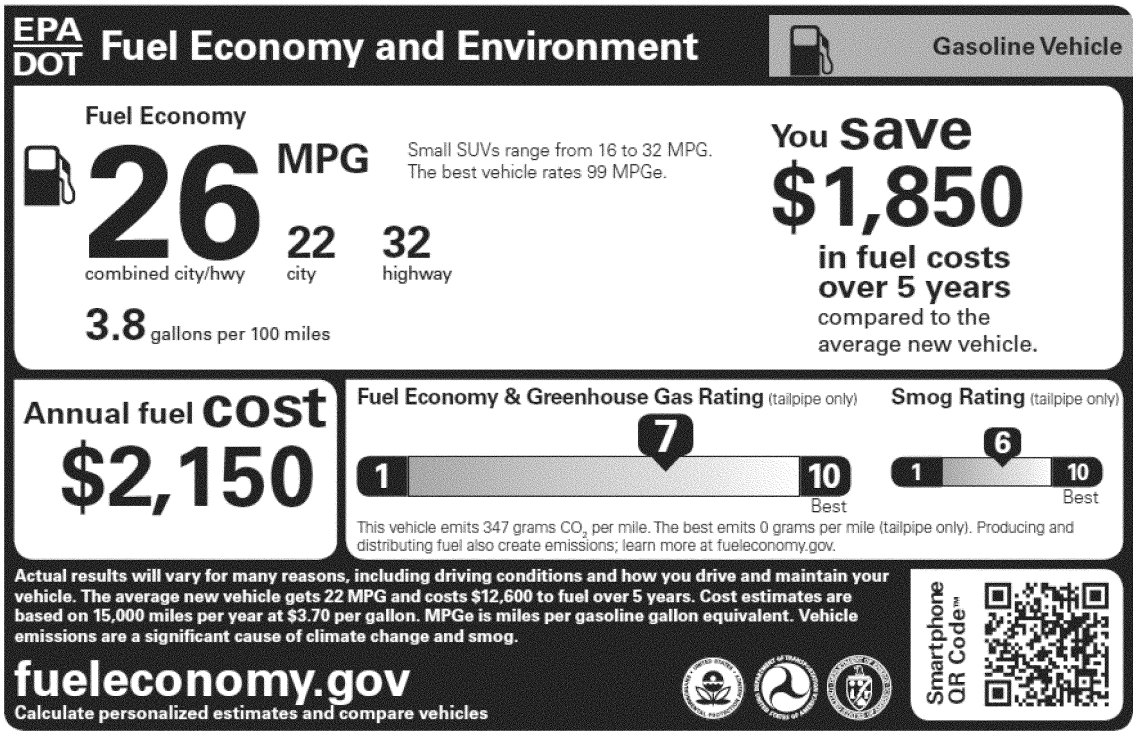
Labels are being required for seven different vehicle technologies: Gasoline, diesel, ethanol flexible fuel vehicles (FFV), compressed natural gas vehicles (CNG), battery electric vehicles (EV), fuel cell vehicles (FCV), and plug-in hybrid electric vehicles (PHEV). The final fuel economy and environment labels retain many of the attributes of the existing fuel economy label; specifically: Estimated annual fuel cost; city, highway, and combined MPG; and fuel economy relative to other vehicles in the same class will remain on the label, although their relative prominence is revised to create space for new features. Vehicles run on liquid fuels will display MPG, while vehicles run on other fuel types will display gasoline-energy equivalent MPG (or MPGe). Test procedures and methodologies for determining label values remain unchanged from proposal. This rulemaking action also requires fuel economy and emissions certification test procedure and calculation methodologies for electric and plug-in hybrid electric vehicles, essentially codifying the procedures that have been in use under EPA's general authority to develop procedures for technologies not specifically discussed in the regulations.

New label features include a vehicle fuel type identifier in the upper right corner, fuel consumption (the inverse of fuel economy), a fuel economy and greenhouse gas rating relative to all new vehicles, the vehicle's carbon dioxide emissions in grams per mile, the projected five-year fuel costs or savings of this vehicle compared to the average new vehicle, and an environmental rating for smog-forming pollutants. The vehicle's projected range when fully fueled will be required on dedicated alternative fuel vehicles such as compressed natural gas vehicles and battery electric vehicles, and also plug-in hybrid electric vehicles, and can be included at the manufacturer's discretion on flexible fuel vehicles, such as those that are E85-capable. This optional inclusion could potentially eliminate the need for manufacturers to apply a separate FTC-required Alternative Fuel Label, pending a formal decision by FTC. For vehicles that use an external electricity source, charge time at 220–240 V (or optionally at 120 V) will also be shown. Several features of the design of the label differ from the current labels, such as the removal of the large image of a fuel pump, the blocking of the label into various defined areas, and the name on the label, as well as other design changes.

Plug-in hybrid electric vehicle labels will reflect energy use during operation when the battery is fully charged (in this mode, some PHEVs operate on electricity only and others operate on both electricity and gasoline) and when the battery is not providing any assistance (the PHEV operates exclusively on gasoline or other non-electricity fuel). As with labels for other technologies, PHEV labels will feature a prominent MPG or MPGe metric, as well as fuel consumption values based on units of purchased fuel; for PHEV labels, these values will be presented for each operating mode. Several values on the label—fuel costs and savings, MPGe relative to other vehicles, carbon dioxide emissions in grams per mile, and the ratings—will be based on assumptions of the relative use of the two fuels, using a standard utility factor approach. For further information on utility factors, please see section III.N. PHEVs which do not operate in blended mode (*i.e.,* using both electricity and gasoline) will show range on electricity only (all electric range), PHEVs which do operate in blended mode will show the range for that mode, and all PHEVs will show total vehicle range for all fuels. Finally, charge time will be displayed as on electric vehicles.

The final label for gasoline-fueled vehicles is illustrated in Figure I–1. Discussion of the placement of specific label elements, along with illustrations of the labels for other vehicle technologies and fuel types, can be found in Section IV, along with information on where to find and view full color versions of the labels.

Figure I-1. Gasoline Vehicle



C. Rationale for Revising the Label

This joint final rule by EPA and NHTSA represents the most significant overhaul of the Federal government's fuel economy label or ''sticker'' since its inception over 30 years ago.

The current fuel economy label required by EPA on all new passenger cars, light-duty trucks, and medium-duty passenger vehicles focuses on city and highway fuel economy values in units of MPG, a comparison of the vehicle's combined city/highway fuel economy to a range of comparable vehicles, and estimated annual fuel cost. This final rule expands the current fuel economy label to a more comprehensive fuel economy and environment label that includes additional information related to vehicle fuel consumption, GHG and smog-forming emissions, and fuel costs or savings over a 5-year period relative to the average vehicle, a smartphone interactive code that links to a Web site for more detailed information and options for direct vehicle comparisons, and additional information for advanced technology vehicles such as driving range and battery charge time. Label designs for gasoline, diesel, ethanol flexible fuel, compressed natural gas, electric, plug-in hybrid electric, and hydrogen fuel cell vehicles are shown and discussed in section IV.

NHTSA and EPA are undertaking this joint final rule for several reasons.

First, both agencies have statutory responsibilities with respect to vehicle labels. This final rule satisfies each agency's statutory responsibilities in a manner that maximizes usefulness for the consumer, while avoiding unnecessary burden on the manufacturers who prepare the vehicle labels. The Energy Policy and Conservation Act (EPCA) of 1975 [4] mandated that auto manufacturers label all new automobiles pursuant to EPA requirements,[5] which EPA adopted beginning in model year 1977. As amended, EPCA requires that labels shall contain the following information:

(1) The fuel economy of the automobile;

(2) the estimated annual fuel cost of operating the automobile;

(3) the range of fuel economy of comparable vehicles of all manufacturers;

(4) a statement that a booklet is available from the dealer to assist in making a comparison of fuel economy of other automobiles manufactured by all manufacturers in that model year;

(5) the amount of the automobile fuel efficiency tax (''gas guzzler tax'') imposed on the sale of the automobile under section 4064 of the Internal Revenue Code of 1986 (26 U.S.C. 4064); and

(6) other information required or authorized by the EPA Administrator that is related to the information required by (1) through (4) above.[6]

In the Energy Independence and Security Act (EISA) of 2007,[7] Congress required that NHTSA, in consultation with EPA and the Department of Energy (DOE), establish regulations to implement several new labeling requirements for new automobiles.[8] NHTSA was required to develop a label program for new automobiles with information reflecting an automobile's performance with respect to fuel economy and greenhouse gas and other emissions over the useful life of the automobile based on criteria provided by EPA.[9] NHTSA was also tasked with developing a rating system, based on EPA criteria, that would help consumers easily compare the fuel economy and greenhouse gas and other emissions of automobiles at the point of purchase, including designations of automobiles with the lowest GHG emissions over the useful life of the vehicles and the highest fuel economy.[10]

Second, NHTSA and EPA believe that a single, coordinated fuel economy and environment label is the most appropriate way to meet the statutory requirements described above. The agencies believe that a single, joint label is preferable to a separate label addressing the new EISA requirements that could contain duplicative and overlapping information with the current fuel economy label, causing consumer confusion and imposing unnecessary burden on the manufacturers.[11] In addition, the agencies have consulted with other agencies (Federal and State) that currently require labels relating to vehicle fuel use or environmental performance, and have designed the new EPA/NHTSA fuel economy and environment label to maximize the potential that it might also satisfy some of the vehicle labeling requirements of the California Air Resources Board and the Federal Trade Commission, which could further reduce consumer confusion and manufacturer burden resulting from the presence of multiple labels on new automobiles. By including information on GHG emissions and fuel economy, this rule continues EPA's and NHTSA's recent efforts at harmonizing our regulatory requirements, such as the joint rulemaking that established harmonized Federal GHG emissions and corporate average fuel economy (CAFE) standards for new cars, light-duty trucks, and medium-duty passenger vehicles for model years 2012–2016.[12] This effort at harmonization is consistent with the requirements of Executive Order 13563, section 3, which specifically draws attention to the risk of ''redundant, inconsistent, or overlapping requirements,'' and which directs agencies to reduce costs by ''simplifying and harmonizing rules.''

Third, the agencies believe this is an opportune time to revise the label given the likelihood of a much more diverse vehicle technology marketplace in the near future that will require different label content to inform consumers of the capabilities of these new technologies. Since the fuel economy label was first established by EPA in 1977, over 99 percent of all new cars and light-duty trucks have been conventional, internal-combustion engine vehicles that run on petroleum-based fuels (or a liquid fuel blend dominated by petroleum). When manufacturers occasionally marketed a non-conventional technology, such as a compressed natural gas (CNG) vehicle, EPA generally addressed labels for new technology vehicles on a case-by-case basis.

Over the next several model years, however, the agencies expect to see increasing numbers of advanced technology vehicles entering the marketplace. By 2012, it is expected that there will be at least one original equipment manufacturer offering of a CNG vehicle, an electric vehicle (EV) and a plug-in hybrid electric vehicle (PHEV) with nationwide availability.[13]

[4] Pub. L. 94–163.

[5] 49 U.S.C. 32908(b).

[6] 49 U.S.C. 32908(b).

[7] Pub. L. 110–140.

[8] EISA Sec. 108, codified at 49 U.S.C. 32908(g).

[9] 49 U.S.C. 32908(g)(1)(a)(i).

[10] 49 U.S.C. 32908(g)(1)(a)(ii).

[11] The agencies also raised the issue of the upcoming labeling requirements in the joint rulemaking for MYs 2012–2016 CAFE and GHG standards for light-duty vehicles, 75 FR 25324 (May 7, 2010).

[12] 75 FR 25324, May 7, 2010.

[13] Honda has sold a dedicated CNG Civic in selected states for several years, and has announced plans to expand sales to the rest of the U.S. later this year—see ''2012 Honda Civic Concepts,'' Michael Harley, January 11, 2011, last accessed on March 15, 2011 at *http://www.vehix.com/articles/auto-previews—trends/2012-honda-civic-concepts;* Nissan began limited deliveries of its LEAF EV in December 2010 and plans to expand availability to the rest of the country in 2012—see ''Nissan Delivers Hawaii's First 100% Electric Nissan LEAF,'' January 31, 2011, last accessed on March 15, 2011 at *http://www.nissanusa.com/leaf-electric-car/index?intcmp=home_ev_micro.Promo.Homepage.Home.P1#/leaf-electric-car/news/press-releases;* the luxury Tesla Roadster EV is also

Continued

In the next few years, it is highly likely that there will be many more advanced technology vehicles offered for general sale, possibly including fuel cell vehicles (FCV) as well. The agencies believe that it is better to have a single unified approach for these advanced technology vehicle labels,[14] rather than addressing them on a case-by-case basis. This final rule specifically provides example labels for gasoline vehicles, diesel vehicles, ethanol flexible fuel vehicles, CNG vehicles, EVs, PHEVs,[15] and hydrogen FCVs. Communicating the energy and environmental performance of some of these advanced technologies can be challenging. For example, PHEVs use two fuels, with blended PHEV designs using the two fuels simultaneously. The two fuels—gasoline and electricity—are very different in many respects, and consumer behavior can have a large impact on PHEV energy and environmental performance (*e.g.,* the relative use of electricity and gasoline can vary greatly depending on the miles driven between battery charges as well as the frequency of battery charging). These technical complexities could lead to significant consumer confusion when multiple advanced technology vehicles begin to compete in the marketplace. We have tried to design the new labels to reduce the confusion and allow consumers to make more informed vehicle purchase decisions. The agencies expect to refine advanced technology vehicle labels over time as we have done with conventional vehicle labels. We also acknowledge the potential for other advanced technology vehicles to enter the marketplace in the future and, as we have historically done, will adapt the labels as needed to accommodate emerging technologies.

Finally, the agencies believe these new labeling requirements will improve the presentation of relevant information to consumers and thus promote more informed choices, and that the new requirements fit well with current consumer interests and potential changes in coming years. Based on projections from the U.S. Energy Information Administration that future inflation-adjusted gasoline prices will increase over coming decades due to global economic growth and oil demand, we expect that it is likely that consumer interest in fuel economy will continue to grow over time.[16] Manufacturers are providing more high fuel economy vehicle offerings, and one manufacturer is now including fuel economy information in its monthly sales reports.[17] In addition, providing information on environmental performance can help people who value this kind of information to make a more informed choice among different vehicles.

The new labels also have the potential to help consumers learn about fuel economy and vehicle emissions, and informed consumers may decide to place more weight on fuel economy and vehicle emissions for economic or environmental reasons. In this domain, consumers' tastes and values change over time. Of course, individual consumers will always determine the relative priority of fuel economy and environmental considerations vis-a-vis the many factors that go into a new vehicle purchase decision.

D. Market Research

As discussed above, the fuel economy and environment label must contain certain pieces of information by statute and may also contain other pieces of related information EPA considers helpful to consumers. Given that all of the label information should be presented so as to maximize usefulness and minimize confusion for the consumer, EPA and NHTSA embarked upon a consumer research program.

When EPA last redesigned the fuel economy label in 2006, consumer research was valuable in helping to inform the development of that label.[18] Since this final rule addresses important new elements being added to the existing label as well as new labels for advanced technology vehicles, EPA and NHTSA conducted more comprehensive research than that undertaken in 2006 to help inform the final label content and design. Our research program included a review of literature on the vehicle buying process,[19] three sets of consumer focus groups and a day-long facilitated consultation with an expert panel that helped inform the development of the proposed label designs, and an Internet survey to test the proposed labels with a wider audience.

Focus groups were held beginning in late February through May 2010 in four cities: Charlotte, Houston, Chicago, and Seattle. Overall, 32 focus groups were convened with a total of 256 participants. The focus groups were valuable in helping us to identify individual metrics that consumers wanted to see on labels as well as effective label designs. Overall, focus groups indicated that redesigned labels should:

- Create an immediate first impression for consumers
- Be easy to read and understand quickly
- Clearly identify vehicle technology (*e.g.,* gasoline, electric, plug-in hybrid)
- Utilize color
- Chunk information to allow people to deal with ''more information''
- Be consistent in content and design across technologies
- Allow for comparison across technologies
- Make it easy to identify the most fuel efficient and environmentally friendly vehicles [20]

Following the focus group research, we convened an expert panel for a one-day consultation on June 9, 2010, in Washington, DC. The expert panel provided individual feedback on the draft label designs we developed based on key findings from the focus groups.

on the U.S. market—see *http://www.teslamotors.com/roadster*, last accessed on March 15, 2011; Chevrolet introduced the Volt PHEV in December 2010 and plans to expand to nationwide availability later this year—see ''Curious About Chevy Volt Availability?'', Andrew Bornhop, February 2, 2011, last accessed on March 15, 2011 at *http://blog.roadandtrack.com/curious-about-chevy-volt-availability/*.

[14] The agencies do not claim that every advanced technology vehicle label is or will be exactly the same, that is not always possible due to unique vehicle designs and/or fuel properties, rather that the overall approach to advanced technology labels is consistent.

[15] Plug-in hybrid electric vehicles entail a family of different engineering approaches, and will continue to evolve based on technology maturation and consumer preferences. In Section IV, two basic PHEV label designs are provided that reflect current PHEV energy management strategies and the resultant operating modes. In the future, labels will be tailored to accommodate the operating modes specific to new PHEV designs as they are introduced into the market.

[16] Annual Energy Outlook 2010, Department of Energy, Energy Information Administration, DOE/EIA–0383 (2010), May 11, 2010, available at *http://www.eia.doe.gov/oiaf/aeo/index.html.*

[17] ''A Magic Mark: As Fuel Prices Rise, Shoppers Can Get High MPG Without Sticker Shock,'' Rich Kranz, Automotive News, March 28, 2011, which projects that by Fall 2011 there could be ten conventional gasoline, *i.e.,* non-hybrid, models with EPA highway ratings of 40 mpg or more; the automaker Hyundai recently began monthly reporting of vehicle sales with 40 mpg EPA highway fuel economy ratings as well as sales-weighted corporate average fuel economy data (see ''Hyundai Motor America Begins Voluntary Monthly Fuel Economy Reporting,'' February 3, 2011, last accessed on March 15, 2011 at *http://www.hyundaiusa.com/about-hyundai/news/Corporate_Fuel_economy_Reporting_release-20110203.aspx*).

[18] The current label was redesigned and implemented for model year (MY) 2008 vehicles. See 71 FR 77871–77969 (December 27, 2006).

[19] Environmental Protection Agency Fuel Economy Label: Literature Review, EPA420–R–10–906, August 2010.

[20] Environmental Protection Agency Fuel Economy Label: Phase 1 Focus Groups, EPA420–R–10–903, August 2010; Environmental Protection Agency Fuel Economy Label: Phase 2 Focus Groups, EPA420–R–10–904, August 2010; and Environmental Protection Agency Fuel Economy Label: Phase 3 Focus Groups, EPA420–R–10–905, August 2010.

We also asked the panel to assist us in identifying additional opportunities and strategies to provide information to consumers to help them assess the costs, emissions, and energy efficiency of different vehicles. The experts came from a variety of fields such as advertising and product development and were chosen because they had led successful national efforts to introduce new products or had spearheaded successful national educational campaigns.[21] After viewing the draft labels, the various members of the expert panel offered the agencies the following insights and guidance that were key in developing one of the co-proposed label designs (Label 1) and also informed the label content and design being required today, including:

- Keep it simple
- Consumers are likely to view the labels for a very short time—roll ratings and metrics up into a single score
- Use cost savings information—a very strong consumer motivator
- Develop a Web site that would be launched in conjunction with the new label. This consumer-focused Web site could provide more detailed information, along with access to tools, applications, and social media.[22]

We also undertook an Internet survey that was administered at the time of the release of the proposed rule in September, 2010, to determine whether any of the label designs had flaws that could undermine their ability to convey the desired information to the U.S. new car buying population. For the co-proposed labels and the alternative label, we designed the survey to test the understandability of the labels as well as whether the label designs affected consumers' abilities to select efficient and environmentally-friendly vehicles, given their typical travel pattern. The survey had nearly 3200 respondents of self-identified U.S. new vehicle purchasers, each of whom saw only one of the three label designs. Respondents were asked questions that sought to reveal understanding of the information on the label, as well as questions that sought to reveal variations in vehicle selection based on label design.

Overall, the results showed that the differences between the three label designs with respect to understandability were small in magnitude, with label 2 appearing to be a little more understandable than label 1.[23] Likewise, the variations with regard to vehicle selection were relatively small. Although in all cases the majority of people selected the vehicle with lower projected fuel costs and higher savings, label 1 somewhat enhanced this effect over label 2.[24] Because the survey did not uncover any ''fatal flaw'' with any of the three labels that would exclude it or any of its key elements from serious consideration in the final rule, the agencies continued to consider all elements of the three labels in developing the final rule. A report on that survey and its results is available in the public docket and on the Web site for this rule.[25]

II. Statutory Provisions and Legal Authority

A. Energy Policy and Conservation Act (EPCA)

Under EPCA, EPA is responsible for developing the fuel economy labels that are posted on all new light duty cars and trucks sold in the U.S and, beginning in MY 2011, all new medium-duty passenger vehicles as well. Medium-duty passenger vehicles are a subset of vehicles between 8,500 and 10,000 pounds gross vehicle weight that includes large sport utility vehicles and vans, but not pickup trucks.[26] EPCA requires the manufacturers of automobiles to attach the fuel economy label in a prominent place on each automobile manufactured in a model year and also requires auto dealerships to maintain the label on the automobile.[27]

EPCA specifies the information that is minimally required on every fuel economy label.[28] As stated above, labels must include:

- The fuel economy of the automobile,
- The estimated annual fuel cost of operating the automobile.
- The range of fuel economy of comparable automobiles of all manufacturers,
- A statement that a booklet is available from the dealer to assist in making a comparison of fuel economy of other automobiles manufactured by all manufacturers in that model year,
- The amount of the automobile fuel efficiency tax imposed on the sale of the automobile under section 4064 of the Internal Revenue Code of 1986; [29] and
- Other information required or authorized by the Administrator that is related to the information required [within the first four items].

Under the provision for ''other information'' EPA has previously required the statements ''your actual mileage will vary depending on how you drive and maintain your vehicle,'' and cost estimates ''based on 15,000 miles at $2.80 per gallon'' be placed on vehicle labels. EPA is adopting all of the labeling requirements discussed below and specified in EPA's regulations, based on its authority under section 32908(b). In addition, the regulations adopted by EPA satisfy the requirement to develop criteria for purposes of section 32908(g).

Additional labeling requirements are found in EPCA for ''dedicated'' automobiles and ''dual fueled'' automobiles. A dedicated automobile is an automobile that operates only on an alternative fuel.[30] Dedicated automobile labels must also display the information noted above.

A dual fueled vehicle is a vehicle which is ''capable of operating on alternative fuel or a mixture of biodiesel and diesel fuel * * *, and on gasoline or diesel fuel'' for the minimum driving range (defined by the DOT).[31] Dual fueled vehicle labels must:

[21] More information on the expert panel, including a list of participants is available in the docket: Environmental Protection Agency Fuel Economy Label: Expert Panel Report, EPA420–R–10–908, August 2010.

[22] Environmental Protection Agency Fuel Economy Label: Expert Panel Report, EPA420–R–10–908, August 2010.

[23] PRR, ''Internet Survey Results on the Effects of Fuel Economy Labels on Understanding and Selection'' November 2010, p. 1–8.

[24] Ibid, p. 9–12.

[25] PRR, ''Internet Survey Results on the Effects of Fuel Economy Labels on Understanding and Selection'' November 2010. The agencies are acutely aware of the central importance of the best available research to inform judgments about disclosure requirements and will continue to consider such research in the future (including, where feasible and appropriate, randomized controlled trials).

[26] EPA's 2006 labeling rule applied to passenger cars, light-trucks, and medium-duty passenger vehicles. Under section 32908(b), a manufacturer is to label each ''automobile,'' and EPA interpreted that provision as requiring labeling for vehicles that meet the definition of ''automobile'' under section 32901(a)(3), as well as vehicles under 8,500 pounds gross vehicle weight, whether or not they meet the definition of automobile, pursuant to section 32908(a)(1). See 71 FR 77872, 77876–87, 77915 (December 27, 2006). Since the 2006 rule, EISA revised the definition of automobile in section 32901(a)(3). As with the interpretation discussed in the 2006 rule, the requirements of section 32908(b) continue to apply to passenger cars, light-duty trucks, and medium-duty passenger vehicles.

[27] 49 U.S.C. 32908(b)(1).

[28] 49 U.S.C. 32908(b)(2)(A) through (F).

[29] 26 U.S.C. 4064.

[30] 49 U.S.C. 32901(a)(1) defines ''alternative fuel'' as including —(A) methanol; (B) denatured ethanol; (C) other alcohols; (D) except as provided in subsection (b) of this section, a mixture containing at least 85 percent of methanol, denatured ethanol, and other alcohols by volume with gasoline or other fuels; (E) natural gas; (F) liquefied petroleum gas; (G) hydrogen; (H) coal derived liquid fuels; (I) fuels (except alcohol) derived from biological materials; (J) electricity (including electricity from solar energy); and (K) any other fuel the Secretary of Transportation prescribes by regulation that is not substantially petroleum and that would yield substantial energy security and environmental benefits.''

[31] 49 U.S.C. 32901(a)(9), (c).

• Indicate the fuel economy of the automobile when operated on gasoline or diesel fuel.

• Clearly identify the automobile as a dual fueled automobile.

• Clearly identify the fuels on which the automobile may be operated; and

• Contain a statement informing the consumer that the additional information required by subsection (c)(2) [the information booklet] is published and distributed by the Secretary of Energy.[32]

EPCA defines ''fuel economy'' for purposes of these vehicles as ''the average number of miles traveled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator [of the EPA] under section 32904(c) [of this title].'' [33]

Moreover, EPA is required under EPCA to prepare a fuel economy booklet containing information that is ''simple and readily understandable.'' [34] The booklet is commonly known as the annual ''Fuel Economy Guide.'' EPCA further instructs DOE to publish and distribute the booklet. EPA is required to ''prescribe regulations requiring dealers to make the booklet available to prospective buyers.'' [35] While the booklet continues to be available in paper form, in 2006, EPA finalized regulations allowing manufacturers and dealers to make the Fuel Economy Guide available electronically to customers as an option.[36]

In this rule where we refer to EPA's statutory authority under EPCA, we are referring to these provisions.

B. Energy Independence and Security Act (EISA)

The 2007 passage of the Energy Independence and Security Act (EISA) amended EPCA by introducing additional new vehicle labeling requirements, to be implemented by the National Highway Traffic Safety Administration (NHTSA).[37] While EPA retained responsibility for establishing test methods and calculation procedures for determining the fuel economy estimates of automobiles for the purpose of posting fuel economy information on labels and in an annual Fuel Economy Guide, NHTSA gained responsibility for requiring automobiles to be labeled with additional performance metrics and rating systems to help consumers compare vehicles to one another more easily at the point of purchase.

Specifically, and for purposes of this rulemaking, subsection ''(g) Consumer Information'' was added to 49 U.S.C. 32908. Subsection (g), in relevant part, directed the Secretary of Transportation (by delegation, the NHTSA Administrator) to ''develop and implement by rule a program to require manufacturers—

(A) to label new automobiles sold in the United States with—

(i) information reflecting an automobile's performance on the basis of criteria that the [EPA] Administrator shall develop, not later than 18 months after the date of the of the Ten-in-Ten Fuel Economy Act, to reflect fuel economy and greenhouse gas and other emissions over the useful life of the automobile:

(ii) a rating system that would make it easy for consumers to compare the fuel economy and greenhouse gas and other emissions of automobiles at the point of purchase, including a designation of automobiles—

(I) with the lowest greenhouse gas emissions over the useful life of the vehicles; and

(II) the highest fuel economy* * *'' In this rule where we refer to NHTSA's statutory authority under EISA, we are referring to these provisions.

Thus, both EPA and NHTSA have authority over labeling requirements related to fuel economy and environmental information under EPCA and EISA, respectively. In order to implement that authority in the most coordinated and efficient way, the agencies are issuing this joint final rule with the revised labels presented below.

III. Public Participation and Comment

The agencies proposed the joint label rule on September 23, 2010,[38], and received over 6000 comments representing many perspectives. The agencies received oral testimony at two public hearings: one in Chicago on October 14, 2010, and one in Los Angeles on October 21, 2010. Additionally, the agencies received written comments from more than 50 organizations, including auto manufacturers and dealers, state and local governments, environmental groups, consumer organizations, other non-governmental organizations, and thousands of comments from private citizens.

This section addresses the key issues on which public comments were received on the proposed rule and discusses the agencies' final decisions on those issues. Our more detailed responses to public comments are available in the docket in the Response to Comments document associated with this final rule.

A. Energy Metrics

1. Fuel Economy

The agencies proposed to retain the current practice of placing MPG on the label for vehicles that use liquid fuels such as gasoline and diesel. There are two main reasons for this. First, representing the vehicle's fuel economy performance on the label with an estimate of miles per gallon is a core element of the fuel economy information requirements of EPCA, which specifically states that the label must display ''the fuel economy of the automobile'' [39] and defines ''fuel economy'' as ''the average number of miles travelled by an automobile for each gallon of gasoline (or equivalent amount of other fuel) used, as determined by the Administrator.'' [40] Historically, the label has presented this information in terms of gallons of purchased fuel, since this is the most meaningful for the consumer. Thus, gasoline vehicle labels have historically displayed miles per gallon of gasoline, while diesel vehicle labels have displayed miles per gallon of diesel.[41] The proposal retained this approach. Second, consumers are very familiar with the MPG metric, as it has been the ubiquitous fuel economy metric for liquid fuels on vehicle labels since 1977. The familiarity and ubiquity of the metric argue for its continued use (despite its limitation, as discussed below).

For those vehicles that do not use liquid fuels—such as EVs, PHEVs operating on electricity, and CNG vehicles [42]— we proposed to use miles

[32] 49 U.S.C. 32908(b)(3).

[33] 49 U.S.C. 32901(a)(11).

[34] 49 U.S.C. 32908(c).

[35] Id.

[36] 71 FR 77915, Dec. 27, 2006.

[37] Public Law 110–140.

[38] 75 FR 58078 (Sept. 23, 2010).

[39] 49 U.S.C. 32908(b)(1)(A). EISA also requires fuel economy information. See 32908(g)(1)(A).

[40] 49 U.S.C. 32901(a)(11).

[41] Similarly, for those manufacturers who elect to put E85 information on the label for a flexible-fueled vehicle, it would be displayed as miles per gallon of E85.

[42] While EPA did not propose explicit labels for hydrogen fuel cell vehicles (FCVs), we are including a label design for FCVs because the label design issues for FCVs are very similar to those for other dedicated, non-petroleum vehicles such as CNG vehicles and EVs. In addition, EPA has designed FCV labels in the past on an as-needed basis. EPA did not propose, and is therefore not finalizing, fuel economy and range test procedures for FCVs. Test procedures will continue to be as specified by EPA under the authority of 40 CFR 600.111–08(f), which allows the Administrator to prescribe ''special test procedures'' under certain circumstances. However, EPA expects to continue to specify the use of SAE J2572, (''Recommended Practice for Measuring Fuel Consumption and Range of Fuel Cell and Hybrid Fuel Cell Vehicles Fuelled by Compressed Gaseous Hydrogen'').

per gallon of gasoline-equivalent (MPGe). This metric is similar to MPG, but, instead of presenting miles per gallon of the vehicle's fuel type, it represents miles per amount of energy used, conveyed as the gallons of gasoline that have the equivalent amount of energy. We proposed MPGe for three reasons. First, as previously noted, EPCA requires a fuel economy value for all labels, defined as the miles travelled for each ''gallon of gasoline (or equivalent amount of other fuel) used.'' [43] Second, non-liquid fuels are not typically dispensed by the gallon, which makes it challenging to derive a metric reflecting gallons dispensed. However, a gasoline-equivalent gallon—that is, the amount of energy in the non-liquid fuel that is equivalent to that in a gallon of gasoline—can be derived for each fuel type.[44] Third, consumer groups preferred some type of comparative fuel economy metric that could be used across technologies, and MPGe allows such a comparison.[45]

On the other hand, the agencies discussed in the proposal that MPGe has some drawbacks for a fuel such as electricity: electricity is never purchased by the gallon, and MPGe requires the conversion of electricity to an energy-equivalent amount of gasoline, a fuel which is very different in many ways. An alternative approach for such vehicles that the agencies considered is miles per unit of purchased fuel—for example, miles per kilowatt-hour. Such a metric would be in terms of the fuel that the consumer purchases, which could be more useful for calculating fuel costs and for comparing with other vehicles of the same technology but would not be comparable across technologies. The agencies specifically asked for comments on the merits of using MPGe for non-liquid fuels.

Comments overwhelmingly supported the use of MPG for liquid fuels, although one commenter advocated that diesel vehicle fuel economy values be calculated on an MPGe basis in order to reflect the higher energy content of diesel fuel. The agencies are requiring the use of MPG for liquid fuels for the same reasons articulated in the proposal: Historical implementation of the EPCA requirements, consumer familiarity, and the fact that these fuels are purchased by the gallon. We believe that changing to MPGe for the fuel economy of diesel vehicles would be very confusing to consumers, as label MPGe values would then be inconsistent with all consumer calculations of fuel economy (since diesel is sold in volumetric gallons) as well as fuel economy values shown on vehicle dashboard displays.

The agencies proposed a range of options for ethanol flexible fuel vehicles, including maintaining the current policy of requiring only gasoline-based MPG on the label (with optional inclusion of E85-based MPG), requiring the addition of E85-based MPG, and requiring the addition of E85-based MPGe. Only a few commenters addressed ethanol flexible fuel vehicles, and most who commented on this option supported the current policy. The agencies are requiring a label for ethanol flexible fuel vehicles that is consistent with the principles of the current policy: All label metrics are based on gasoline operation, a statement is provided so that the consumer knows that the values are based on gasoline operation,[46] and EPA is finalizing that manufacturers may voluntarily include fuel economy estimates on E85 (which would be based on miles per gallon of E85, given that E85 is a liquid fuel).[47] Data show that, on average, FFVs operate on operate on gasoline nearly 99% of the time, and on E85 fuel about 1% of the time.[48] In light of this, the agencies believe it is appropriate to require only gasoline values on the label, and to provide E85 information on the Web site.

For non-liquid fuels, the comments on the use of MPGe as a fuel economy metric were split. Supportive comments focused on the value of having a metric that consumers could use to compare across technologies and that was similar to the MPG metric with which people are accustomed. These commenters supported the use of energy equivalency, as proposed, and agreed that this mathematical conversion was the best approach to create a practical comparative tool. One automaker explicitly viewed the MPGe metric to be in direct alignment with EPCA statutory authority for the new label to show a comparison of fuel economy of comparable automobiles.

Those opposed to the use of MPGe for non-liquid fuels directly challenged whether it was, in fact, a good comparative tool for consumers. These commenters argued that MPGe would be misleading by implying that different fuel types were substantially equivalent and ignoring the many effects of obtaining and using very different fuels, such as shifting dependence on foreign oil; that is, that MPGe oversimplifies a complex situation. Some also commented that mathematically converting between gasoline and other fuels on an energy equivalency basis ignores the energy loss inherent in any conversion process. As an alternative, one automaker suggested using miles per purchased unit of energy. No commenter, however, suggested an alternative fuel economy metric that would allow consumers to compare across technologies.

The agencies are requiring the use of MPGe as the fuel economy metric for non-liquid fuels.[49] Although we understand the concern of some commenters over using energy equivalency for different types of fuels, we continue to believe that one of the primary purposes of the label is to allow such comparisons, and to do so with metrics that do not allow direct comparisons would diminish the usefulness of the label. We believe that the purpose of the fuel economy metric on the label is not to address the differing effects of obtaining and using different fuels, or to consider the energy losses of converting from one to another, but rather to address the energy use of the vehicle itself. Thus, for example, MPGe allows consumers to compare the relative energy consumption of various EVs, thus providing a metric that differentiates between EVs on a factor that is within the automakers' control. We have also concluded, as a result of the market research that was undertaken for this rulemaking, that many

Manufacturers of FCVs should continue to work with EPA to ensure that the procedures are applied according to EPA requirements.

[43] 49 U.S.C. 32901(a)(11).

[44] While some non-liquid fuels are sold on a gasoline-equivalent basis (*e.g.,* CNG), some are not (*e.g.,* electricity), and some are not yet widely sold as a vehicle fuel (*e.g.,* hydrogen),

[45] Environmental Protection Agency Fuel Economy Label: Phase 3 Focus Groups, EPA420–R–10–905, August 2010, p. 35.

[46] ''Values are based on gasoline and do not reflect performance and ratings on E85.''

[47] In addition, as required under EPA's authority in EPCA, the Fuel Economy Guide and Web site will continue to provide the fuel economy estimates on E85, the driving range on E85, and information about how the performance might change when operating on mixtures of E85 and gasoline.

[48] In 2007, about 7.1 million FFVs were on the road, comprising about 2.8% of the 247,000,000 cars and trucks in use in the U.S. These vehicles used 54 million gallons of E85, which is about 0.04% of the transportation fuel used for automobiles and light trucks (8.8 million BPD or 135 billion gallons per year). The result is that about 1.4% of fuel used in FFVs is E85; the remainder is gasoline. All data from Transportation Energy Data book: Edition 29. U.S. Department of Energy, July 2010. Tables 1.14, 2.4, 3.3, and 6.1.

[49] As with MPG, the MPGe metric is based on the energy used by the vehicle over the EPA fuel economy and GHG test procedures. For an EV, this is the energy necessary to recharge the battery to its full charge after the test, as measured at the electrical outlet; thus, it includes the energy used to propel the vehicle as well as charging losses. It does not include transmission losses or the energy used at the powerplant.

consumers are likely to find it most useful to have an energy metric that allows them to compare vehicle energy efficiency across fuel types and vehicle technologies; the MPGe metric accomplishes this goal as well. In addition, as discussed above, there is a statutory requirement to provide a fuel economy metric per ''equivalent amount of other fuel,'' which MPGe clearly provides.

2. Fuel Consumption

In the past few years, many stakeholders and academics have suggested that a fuel consumption metric—such as gallons per 100 miles—could be beneficial on the fuel economy label as either a replacement for, or a complement to, MPG. The use of a fuel consumption metric could serve to address the fact that, with fuel economy, there is a non-linear relationship between gallons (or gasoline-equivalent gallons) used over a given distance and MPG (or MPGe). Accordingly, a certain MPG improvement at a lower MPG level saves much more fuel (and thus money) than the same MPG improvement at a higher MPG level. If a consumer trades in a car with a 14 MPG rating for one with a 17 MPG rating, he or she will save approximately as much gas and money for a given distance as does a consumer who replaces a 33 MPG car with a 50 MPG car. The non-linearity of the MPG measure is not widely understood and hence many consumers misunderstand the measure. In the empirical literature, this is known as the ''MPG illusion.'' [50]

Pointing to the MPG illusion, some stakeholders suggest that the public would be better equipped to make economically sound purchasing decisions with a metric that directly reflects fuel consumption and, correspondingly, fuel costs. In response to these suggestions and concerns over the MPG illusion, the proposal introduced fuel consumption on the label, in the form of gallons per 100 miles for combined city/highway operation, as a complement to the MPG metric for liquid fuels.

For non-petroleum fuels, EPA proposed to include fuel consumption based on the units in which each fuel is sold. For example, CNG is sold in gasoline-equivalent gallons; we proposed the fuel consumption metric of gasoline-equivalent gallons per 100 miles. Similarly, for EVs and PHEVs with all-electric operation, EPA proposed to show fuel consumption in kilowatt-hours per 100 miles. For blended PHEVs, EPA proposed gallons of gasoline equivalent per 100 miles, which represents the inverse of MPGe and combines the two fuels into one consumption metric; for the sake of reducing label clutter, EPA proposed to not show separate electricity and gasoline consumption values.

We received many comments on the general question of whether a fuel consumption metric should be added to gasoline vehicle labels, and there was broad support for doing so. Most supporters cited the non-linearity associated with the MPG illusion and suggested that it was important to begin the process of educating consumers about fuel consumption, while also keeping fuel economy metrics. There were a few opponents to including fuel consumption metrics, who generally argued that it was not important enough to warrant adding yet more numbers to the label.

The widespread commenter support for including fuel consumption metrics echoed EPA's concerns about the MPG illusion. EPA agrees that a fuel consumption metric is a better tool for making economically sound decisions and recognize that it will not become widely utilized if it is not first introduced on the label. Therefore, EPA is requiring the use of fuel consumption on the label—in the form of gallons per 100 miles for combined city/highway operation for liquid fuels—though in reduced prominence relative to the traditional MPG metric. As with MPGe, a further advantage of the energy consumption metric is that it allows consumers to compare the relative energy use of various EVs, thus providing an additional metric that differentiates between EVs.

The issue of the specific fuel consumption metrics for most types of vehicles that operate on non-liquid fuels generated little or no comment, with the exception of PHEVs operated in blended mode. EPA continues to believe that the metrics for vehicles other than blended PHEVs are reasonable and appropriate and are therefore requiring the proposed approaches for EVs and all-electric operation for PHEVs (kilowatt-hours per 100 miles) and for CNG vehicles (gasoline equivalent gallons per 100 miles). EPA is similarly requiring kilograms per 100 miles as the consumption metric for hydrogen FCVs, since hydrogen is sold by the kilogram.

Several comments were received on how to treat blended PHEVs, which use electricity and gasoline simultaneously. The commenters who opposed the use of MPGe also generally opposed the proposed approach of a single fuel consumption metric for blended PHEVs, pointing out that this would not allow a PHEV shopper to compare the relative use of electricity and gasoline. A few commenters suggested that labels for blended PHEVs should report both electricity and gasoline consumption.

While EPA recognizes the tradeoffs associated with adding yet more values to an already busy PHEV label, upon further consideration, EPA agrees with the commenters who suggested that consumers need to be able to differentiate between electricity and gasoline use in a blended PHEV. This will allow the consumer to assess and weigh the relative use of each type of energy as they deem appropriate. In addition, the fuel consumption metric for all other fuels is being finalized on the basis of the units in which the fuel is purchased, and it is reasonable to adopt a parallel approach for blended PHEVs. Accordingly, EPA is requiring fuel consumption separately for both gasoline (in gallons per 100 miles) and electricity (in kilowatt-hours per 100 miles) for a blended PHEV, rather than the gasoline-equivalent gallons per 100 miles as proposed. EPA believes that the combination of the MPGe metric (for those who want a simple comparative metric) and the two separate fuel consumption metrics (for those who want to compare relative gasoline and electricity use) will help to satisfy different consumer needs.

B. Rating Systems

1. Scope of the Ratings

EISA requires that the label include a ''rating system that would make it easy for consumers to compare the fuel economy and greenhouse gas and other emissions at the point of purchase . . . '', including a designation of the automobiles with the lowest greenhouse gas emissions over the useful life of the vehicles, and the highest fuel economy . . . '' [51]

The co-proposed label designs presented two primary variations on ratings systems for fuel economy and greenhouse gas emissions, based on two interpretations of the statutory language. The first approach, shown on labels 1

[50] Larrick, R.P. and J.B. Soll, ''The MPG illusion,'' Science 320:1593–1594 (2008). To understand the ''MPG illusion,'' note that a 20 MPG vehicle uses 25% less fuel than a 15 MPG vehicle, while a 40 MPG vehicles uses only 12.5% less fuel than a 35 MPG vehicle; that is, the same 5 MPG improvement will have different effects on fuel consumption (and fuel costs) depending on the starting point for the improvement. An extreme example is that, at a fuel economy of 1000 MPG, the fuel consumption is so minute (0.001 gallons per mile) that it no longer matters whether the fuel economy is increased to 1010 MPG, 2000 MPG, or even 1,000,000 MPG; the only fuel that can be further saved is some fraction of that 0.001 gallons per mile.

[51] 49 U.S.C. 32908(g)(1)(A)(iii).

and 3, combined fuel economy and greenhouse gas emissions into a single relative rating; we also sought comment on integrating emissions of other pollutants into this rating. The second approach, shown on labels 1 and 2, retained separate ratings for fuel economy, greenhouse gas emissions, and other pollutants. We noted that the two approaches are not mutually exclusive, and a label could display both.

The majority of those who commented on this topic said that these factors should each be displayed separately on the label. The key reason cited was that individual ratings would best provide clarity and transparency for those wishing to take these factors into consideration. On the other hand, some commenters felt that it is appropriate for the government to combine factors into a single rating in order to distill complex information into a more useable format. These commenters focused primarily on the relationship between energy consumption and greenhouse gas emissions, and suggested that a combined rating made sense. Other commenters on this topic contended that it was important for the ratings to show that greenhouse gases and fuel economy do diverge across fuel types, and so the ratings should be separate. Commenters also stated that there was no clear methodology for incorporating emissions of other air pollutants with greenhouse gases and did not support the proposed methodologies for doing so.

We are requiring separate ratings for fuel economy, greenhouse gases, and other emissions. The fuel economy and greenhouse gas ratings will be displayed on the same slider bar, and vehicles that have the same ratings for both factors will combine the two ratings with a single indicator. Vehicles operating on gasoline will always combine the two ratings since they will, by definition, receive the same score for both ratings. The agencies believe that this approach is consistent with the language in EISA, is allowed under the EPCA provisions, and will best allow consumers to compare each of these elements. The agencies also believe that using one slider bar for the fuel economy and greenhouse gas rankings will simplify the design of the label (an important consideration) and will improve the effectiveness of the label. The ratings for fuel economy, greenhouse gases, and other emissions are subsequently described in sections III.C, III.D, and III.F.

2. Span of the Ratings

Each of the ratings systems, as proposed, would include all new vehicles for which labeling is required in a single rating system;[52] that is, the ratings would be universal across all new vehicles, rather than broken out by vehicle class. This approach was based on the text of EISA requiring a rating ''that would make it easy for consumers to compare the fuel economy and greenhouse gas and other emissions of automobiles at the point of purchase * * *''[53] rather than the EPCA provisions in the statute.[54] NHTSA's interpretation was that this language was meant to require rating systems that would allow consumers to compare new vehicles against each other without restriction, and that it would not be satisfied by rating systems that spanned less than the entire fleet.

Many commenters supported the proposed approach of having universal rating systems that apply across all vehicle classes. These commenters stated that most people shop in more than one class, and, therefore, a rating system that was solely within class was not particularly useful because it would not allow these consumers to compare the vehicles in which they had interest. Commenters stated that a within-class approach could be misleading by displaying ratings that appear to be comparable but in fact are not, since ratings based on individual classes are not broadly applicable across all vehicles; they are applicable only within the class on which they are based. As such, a within-class approach could assign a high rating to a vehicle that does relatively well within its class, but which emits at relatively high levels compared to vehicles in other, lower-emitting classes. For example, a large car that is low-emitting relative to other large cars could score a 7, while a midsize car with average emissions for its class would score a 5, even though the midsize is lower-emitting than the large car. With a purely within-class approach, the consumer who is considering both of these vehicles would have no way to know that the midsize car is a better environmental choice.

On the other hand, several auto manufacturers commented that many consumers shop solely within vehicle classes, and that therefore a rating that applied across all classes would not be helpful, as it would not indicate the best performers within a class. One auto manufacturer further commented that NHTSA's interpretation of the EISA language is overly restrictive, stating that, in its view, the most useful information to consumers would compare among vehicles of the same class, and that doing so would be consistent with the EISA requirement for easy comparisons.

We are requiring, as proposed, ratings that span all vehicle classes for which labels are required. Although the agencies' consumer research indicates that many consumers narrow their vehicle choices early in the buying decision, our research also indicates that many and perhaps most do not focus narrowly on a single class. Focus group participants indicated that they shopped, on average, across two to three vehicle classes.[55] For these consumers to be able to compare vehicles in different classes, the information must necessarily span those classes, or it will be of little use or, worse, misleading: A vehicle that is ''best'' in one class, in terms of the metrics presented on the label, may be less so when compared to other classes. For those consumers shopping across classes who wish to know the relative performance of those choices, a single all-vehicles rating system will enable them to make accurate comparisons across whichever vehicles they choose to shop. Such an approach would still be useful within a class, since each metric will differentiate vehicles regardless of their class.

Additionally, as discussed in the NPRM, NHTSA believes that the clearest interpretation of EISA is that fuel economy, GHG, and other emissions rating systems should apply to all automobiles rather than to specific classes. 49 U.S.C. 32908(g)(1)(A)(ii) states that the agency must develop label rating systems ''that would make it easy for consumers to compare the fuel economy and greenhouse gas and other emissions of automobiles at the point of purchase,'' in clear contrast to EPCA's requirement, codified at 49 U.S.C. 32908(b)(1)(C) that fuel economy range information be presented for ''comparable automobiles.'' 32908(g)(1)(A)(ii) also requires that rating systems include designations of the automobiles with the ''lowest greenhouse gas emissions'' and ''highest fuel economy,'' which NHTSA believes

[52] This currently includes all passenger automobiles and light trucks as defined by NHTSA at 49 CFR part 523. More specifically, the rating system would span all automobiles up to 8,500 pounds gross vehicle weight, plus some vehicles (large SUVs and some passenger vans) between 8,500 and 10,000 pounds gross vehicle weight.

[53] 49 U.S.C. 32908(g)(1)(A)(ii).

[54] 49 U.S.C. 32908(b)(1)(F)

[55] Environmental Protection Agency Fuel Economy Label: Pre-Focus Groups Online Survey Report, EPA420–R–10–907, August 2010, p. 18.

is most meaningfully fulfilled by designating the automobiles with the best GHG and fuel economy ratings in the entire fleet. Given this statutory language, NHTSA believes that it is reasonable and appropriate to conclude that if Congress had intended the 32908(g) rating systems to apply only within class, it would have used language more like 32908(b)(1)(C), and that therefore rating systems for fuel economy, GHGs, and other emissions as described in 32908(g) should most reasonably apply to the entire fleet. And even if the statute were taken as ambiguous, NHTSA believes that the chosen approach is the most reasonable way of implementing the statutory goals.

In order to satisfy EPCA requirements,[56] the label also indicates the range of fuel economy values for the relevant vehicle class. This approach allows those consumers who shop within one class to see the fuel economy of the vehicle under consideration relative to other vehicles within its class. The agencies also believe it addresses the concern of the OEM commenter who argued that within-class comparisons might be more useful to certain consumers—in essence, the EISA and EPCA requirements, when combined, are able to provide consumers with both in-class and fleet-wide information on the metric that many have identified as most important to them, as discussed below.

C. Form of the Ratings

1. Fuel Economy Rating

EISA requires that the label include a ''rating system that would make it easy for consumers to compare the fuel economy and greenhouse gas and other emissions at the point of purchase . . .'' [57] This section addresses the rating for fuel economy, while sections III.D. and III.F. describe the ratings for greenhouse gases and for other emissions, respectively.

In addition to this new EISA requirement, EPCA specifies that fuel economy labels must include the range of fuel economy of comparable vehicles.[58] This requirement is currently met with a slider bar indicating the combined city/highway fuel economy of the vehicle model type, anchored at each end with the highest and lowest fuel economy values for all new vehicles within that fuel economy vehicle class.

The agencies proposed an absolute slider bar-type fuel economy rating system bounded by specific MPG values for the ''best'' and the ''worst'' vehicles in the fleet, and with specific fuel economy values for the vehicle model type in question identified in the appropriate location on the scale. The scales proposed on label 2 were essentially larger versions of those on label 1, with the addition of a within-class indicator on the fuel economy scale to meet the EPCA requirement for comparison across comparable vehicles. This latter requirement was addressed on label 1 through text indicating the fuel economy for all new vehicles in the model's fuel economy class.

The agencies received relatively few comments on this topic. One auto manufacturer supported the graphical representation of the within-class information as proposed on label 2. A government laboratory commented that the comparison should be on the basis of fuel consumption rather than fuel economy, to provide a linear comparison of the vehicle's energy use and to avoid a visual representation of the fuel economy illusion.

The agencies are requiring a one-to-ten relative fuel economy slider bar similar to the one on alternative label 3 included in the NPRM, which is combined with a one-to-ten relative greenhouse gas slider bar as discussed below. While the rating is expressed in terms of fuel economy, the methodology for determining vehicle ratings will be defined based on fuel consumption in order to mitigate the ''MPG illusion'' and to provide a more linear representation of vehicle energy use between ratings. The EISA requirement for indicating the highest fuel economy vehicle and the EPCA requirement for providing the fuel economy of vehicles in a comparable class will be met with text located near the vehicle's fuel economy numbers. The methodology for determining the combined fuel economy and greenhouse gas ratings is provided in section III.D.

2. Greenhouse Gas Rating

The agencies proposed several systems to address the EISA requirement for a rating that allows consumers to compare greenhouse gas emissions across new vehicles. Specifically, both labels 1 and 2 included an absolute rating scale that presented the specific tailpipe GHG emission values for the vehicle in grams per mile, bounded by emission rates for the ''best'' and ''worst'' vehicles in the fleet in the model year. In addition, label 1 featured a prominent letter grade that reflected the relative levels of tailpipe greenhouse gas emissions (and, for gasoline vehicles, fuel economy, given the inverse relationship of tailpipe GHG emissions and fuel consumption for gasoline vehicles) on an A+ to D scale. The agencies also sought comment on label 3, which, like label 1, included a rating that reflected relative tailpipe GHG emission rates; this approach substituted the letter grade with a numerical rating on a scale of one to ten. NHTSA sought comment on whether this would be an appropriate interpretation of EISA's requirements. The agencies proposed that GHG ratings would be based on combined 5-cycle tailpipe CO_2 emission rates.

About two-thirds of the more than 6,000 public comments expressed a preference either for or against the letter grade, and nearly every one of the more detailed comments submitted by corporations and organizations addressed the topic, indicating the strong level of interest in this proposed element. As a general rule, the letter grade was supported by consumer organizations, environmental organizations, and academics; about half of the general public that commented on the letter grade supported it. Conversely, it was opposed by most auto companies, auto dealers and their organizations, Federal laboratories, and about half of the general public that commented on this topic.

Commenters in favor of the letter grade spoke to its ease of use and eye-catching appeal; many said that it would be useful for those who do not find more detailed numerical information helpful or compelling and would, for the first time, take their needs into consideration on the label. The letter grade was likened to the New Car Assessment Program (NCAP) safety stars in its potential ability to spark public demand for new vehicle attributes—in this case, relative environmental and energy impact. For these commenters, the influential nature of the letter grade was viewed as a positive attribute.

On the other hand, those opposed to the letter grade commented that it implied an inappropriate value judgment of the vehicle, either in whole or in part. Many commenters indicated that letter grades, in particular, convey an assessment that is value-laden and not in accordance with the intent of the label. These commenters suggested that a prominent letter grade could be misleading insofar as it might imply an assessment of a vehicle's overall quality on a number of attributes beyond fuel economy and tailpipe greenhouse gas emissions. Finally, some commenters felt that its prominence was problematic, either by minimizing other important label elements, such as MPG,

[56] 49 U.S.C. 32908 (b)(1)(C).

[57] 49 U.S.C. 32908(g)(1)(A)(iii).

[58] 49 U.S.C. 32908(b)(1)(C).

or by overshadowing other Monroney [59] label elements, such as the NCAP safety stars.

A few commenters stated that the absolute tailpipe greenhouse gas rating in grams per mile was the most straightforward approach and felt that it would be helpful for those wishing to compare emissions across vehicles and clearly meet the EISA requirement. Others found the absolute scale unhelpful, stating that today's public has little awareness of tailpipe greenhouse gas emissions expressed in grams per mile. In particular, these commenters said that an absolute scale for GHGs would be confusing, given that the label also contained a one to ten rating for other emissions, and suggested that a consistent one to ten system for both ratings would be more understandable. Several commenters noted that one to ten ratings are readily understood and are in use today for vehicle emission ratings on both the EPA Green Vehicle Guide Web site and on the California Environmental Performance Label, and that it would be logical to extend that approach to this label.

The agencies are requiring a relative greenhouse gas rating on a one to ten scale, based on combined 5-cycle tailpipe CO_2 emission rates, as measured by EPA; this rating will be combined with the relative fuel economy rating scale discussed above. The relative GHG rating is intended to address the large number of comments received in support of a relative rating that allows a quick and easy assessment of a vehicle's relative environmental impact. While a letter grade rating can be readily understood, the agencies agree with some commenters' concerns that it may imply more meaning about overall vehicle attributes—such as an assessment of overall quality on a number of factors—than was intended. We recognize that the letter grade is a fairly significant departure from the current fuel economy label, which provides absolute numerical values and no relative ratings. The agencies believe that the one to ten rating fills a middle ground between the absolute numerical values of the current label and a letter grade rating, providing a similar ease of use without the risk of conveying any perceived value judgment that may be associated with a letter grade.

We also agree that having consistent systems for the two environmental ratings on the label may help to minimize confusion and increase comprehension. Finally, the use here of a one to ten system is a logical extension of its use on the EPA Green Vehicle Guide Web site and the California Environmental Performance Label, where it serves a similar purpose. The absolute tailpipe greenhouse gas emissions in grams per mile of the best performing vehicle will be noted in text near the slider bar. This approach meets the EISA requirements for displaying GHG performance information [60] and for indicating the lowest greenhouse gas vehicle.

Finally, to address concerns raised by some commenters that fuel economy ratings overshadow safety ratings component of the Monroney label, NHTSA is planning to conduct comprehensive consumer research to develop revised safety ratings based on revisions to the fuel economy component of the label under this rule. NHTSA will publish details of the consumer testing in a future **Federal Register** notice.

D. Fuel Economy and Greenhouse Gas Rating Methodology

The agencies proposed a variety of ways to provide information that would rank or rate a vehicle model compared to the rest of the fleet, based on its performance on greenhouse gases and fuel economy, including both absolute and relative scales. In the proposal, one method for a relative fuel economy and greenhouse gas rating was laid out, based on even increments of greenhouse gas emissions. One proposed rating system used a letter grade to represent relative performance. Since fuel economy and greenhouse gases are closely related, this rating was used to represent both of these factors. The CO_2 emission rates and the gasoline-equivalent MPG values were both provided in the preamble's table of ratings thresholds, with the CO_2 ratings proposed to be controlling. There was no differentiation across fuels.[61]

For this rating scale, the agencies proposed a system that assigned a letter grade rating for each vehicle relative to the tailpipe GHG emissions of all new vehicle models. Specifically, each of the ratings corresponded to a distinct range of combined 5-cycle tailpipe CO_2 emission rates. The middle of the rating system was defined as the tailpipe CO_2 emission rate for the median new vehicle and the range of each rating was defined using equal-sized increments of CO_2. Because vehicle GHG values clustered around the middle, the proposed rating system resulted in the majority of vehicles receiving ''average'' ratings, with the number of vehicles receiving higher or lower ratings falling off quickly. Very few vehicles received the highest or lowest ratings.

The majority of comments on this rating system focused on the form of the rating, generally, the use of a letter grade and its merits and drawbacks. However, some manufacturers and consumer organizations did provide feedback specific to the methodology used to define the ratings. These commenters all examined the distribution of vehicle ratings that resulted from the proposed methodology and requested that the agencies consider strategies to somewhat ''flatten'' the distribution. This would, in effect, provide more differentiation between vehicles and prevent the ratings from not being—or appearing to not be—technology-neutral. On the other hand, one automaker requested that the agencies consider reserving the highest rating exclusively for specific, pre-defined vehicle technologies.

Commenters also provided feedback on the impact of basing the fuel economy rating on greenhouse gases. Several noted that they are closely related and that having a single rating represent both is appropriate. Others indicated that the relationship between these two factors varies across fuels and that it is important for the label to reflect this fact.

As discussed previously, the label we are adopting will provide relative one to ten ratings for fuel economy and for greenhouse gases. Since fuel economy and tailpipe greenhouse gas emissions are closely related, the agencies have decided to simplify the label by using one slider bar for the two ratings and to combine the two ratings for vehicles that receive the same fuel economy and greenhouse gas scores. We will define the range of CO_2 emissions and MPG performance assigned to each number in the rating systems (1–10) on the basis of corresponding gasoline CO_2 emissions performance and gasoline mpg performance. The 1–10 ratings assigned to a model will be based on the tailpipe CO_2 emissions and MPG (or MPGe)

[59] The Monroney label, placed on the window of every new vehicle sold in the U.S., was mandated by the Automobile Information Disclosure Act of 1958, and since amended. It typically includes manufacturer's suggested retail price, vehicle specifications, equipments lists and pricing, warranty information, NHTSA crash test ratings, and the EPA fuel economy label requirements (as allowed under EPCA at 49 U.S.C. 32908(b)). Manufacturers may provide the fuel economy information on a separate label but have historically chosen to incorporate it into the Monroney sticker.

[60] 49 U.S.C. 32908(g)(1)(A)(i).

[61] For example, for both gasoline and diesel vehicles the CO_2 emissions rates would determine the rating, not the mpg rate. A gasoline and diesel vehicle with the same mpg performance would have different CO_2 emissions performance, given the difference in the energy content of the two fuels. The proposed rating thresholds would be determined based on the CO_2 emissions performance irrespective of the fuel at issue.

performance of that model, irrespective of the fuel. Gasoline vehicles will by definition have the same rating for both fuel economy and greenhouse gases. For those vehicles for which the greenhouse gas ratings diverge from the fuel economy ratings, such as some diesel and compressed natural gas vehicles, the slider bar will have a second indicator to reflect this fact. Thus, the fuel economy and greenhouse gas rating will demonstrate both that these factors are closely related and that this relationship is not the same across all fuels.[62]

We agree with some commenters that the ratings would be more meaningful and useful for both relative scales if it allowed greater differentiation between vehicles, and that therefore it would be beneficial to alter the rating methodology such that the resulting distribution of vehicle ratings is flatter than proposed, while still reflecting the distribution of the fleet. We also agree with the majority of commenters on this topic that the ratings should avoid the appearance of not being technology-neutral. The challenge to the agencies was to implement this change with a methodology that is simple to implement, robust enough to work for future vehicle fleets, and results in an appropriately flatter distribution of vehicle ratings over the fleet. Finally, the agencies also agreed with some commenters that the fuel economy rating would be most beneficial to consumers if it were in fact based on fuel consumption instead of fuel economy. Basing the rating on fuel consumption allows it to be directly proportional to the actual amount of energy used by the vehicle (and hence to refueling costs) and avoids the ''MPG illusion'' discussed previously. The range of performance that defines each number in the rating system is determined based on approximately equal increments of fuel consumption, with one adjustment. The use of a system based on equal increments means that the distribution of the fleet will be reflected in the distribution of the ratings.

We believe that, since fuel economy and fuel consumption are simply different mathematical representations of the same characteristic, that a fuel consumption-based rating system is consistent with the EISA requirement for a fuel economy rating system. To ensure that the fuel economy ratings correspond to the MPG or MPGe values displayed on the label, the thresholds for purposes of assigning this rating will be in terms of fuel economy (MPG or MPGe).

The fuel economy rating scale will be created by converting the fuel consumption thresholds into their corresponding fuel economy values and assigning a numeric one to ten rating based on 5-cycle combined fuel economy, rounded to the nearest integer (as reflected on the label). The combined fuel economy value prominently displayed on the label will be used by vehicle manufacturers to determine the fuel economy rating, thus making the connection between the two unambiguous and avoiding situations where two vehicles with the same fuel economy value would receive different fuel economy ratings—an outcome the agencies believe would be confusing to the public.[63] All liquid fuel vehicles will be evaluated in terms of volumetric gallons of fuel per mile, and all vehicles operating on non-liquid fuels will be evaluated in terms of gallons of gasoline equivalent per mile. The GHG rating scale, in turn, will assign a one to ten numeric rating based on the vehicle's 5-cycle combined tailpipe CO_2 emissions. For gasoline vehicles, the fuel economy rating and the greenhouse gas rating will be the same, and will be displayed as one rating on the fuel economy and greenhouse gas slider bar. For other fuel types, the ratings may diverge, reflecting the differing carbon content of various fuels. EPA will provide the thresholds that will define the range of values assigned to each of the one to ten ratings applicable to the upcoming model year in annual guidance based on the methodology described below. Ratings will be based on fuel economy data submitted by manufacturers to the EPA, using data from the most recent complete model year. The break point of the ratings (that is, the fuel economy value in integer terms that divides the ''5'' and 6'' categories on the ratings scale) will then be adjusted to reflect the projected achieved fleet wide CAFE level for the model year for which the ratings will apply.

In the proposal, the agencies divided the range of all vehicle CO_2 emissions (and, accordingly, gasoline equivalent fuel consumption), from the highest to lowest, into even increments to define the range of each individual letter grade or numeric rating. For the final label methodology, using fuel economy and tailpipe CO_2 emission data for all model year 2011 new light duty vehicles, the agencies considered several alternative methodologies for defining both rating scales. For all approaches, we first defined the center of the rating systems as either the mean or median of the fleet data. The analysis focused on two subsequent issues: First, how to define the upper and lower boundaries of the rating system and, second, how to define the range of each individual ratings within the upper and lower boundaries.

For example, we considered a system where the range of each rating effectively ''grows'' by 25% with each step away from the mean. This approach does somewhat flatten the distribution of ratings over the fleet. However, the agencies decided not to pursue this or similar options because choices such as the rate of bin growth appeared too subjective and would likely have to be reevaluated every year. We also considered a decile system, in which an equal number of vehicles are distributed into each rating, thus completely flattening the distribution. However, because vehicles tend to be clustered on the basis of fuel economy values, it is not possible to equally distribute them across the ratings. This approach also goes further than commenters suggested in flattening the curve.

The fuel consumption rate, and correspondingly, the CO_2 emissions rate of all new vehicle models, follows a roughly normal distribution. For a set of data with a normal distribution, approximately 95% of all data will fall within plus or minus two standard deviations of the mean. This allows for a mathematically robust methodology that can be applied each model year. The 1–10 rating system will be defined for each model year, using the most recent model year for which we have a complete data set, using an approach in which any vehicle model with a 5-cycle combined fuel consumption rate more than two standard deviations away from the mean vehicle model would receive either the lowest (1) or highest (10) rating. We acknowledge that fuel consumption for new vehicles does not perfectly follow a normal distribution; however, historically, approximately 97% of the fleet has been captured within this two standard deviation range. Assuming this trend continues, approximately 1–2% of new vehicle models will receive the top rating, and

[62] This could occur, for example, if a diesel vehicle receives a certain number rating based on mpg performance, which is measured in terms of gallons of diesel fuel, but achieves a different number rating based on CO_2 emissions performance, which is based on both the volume of fuel consumed as well as the carbon content of the fuel. This difference in rating can be expected to occur in a limited number of situations with another example being the mpg performance of a compressed natural gas fueled vehicle and its corresponding lower CO_2 emissions.

[63] For PHEVs, the ratings will be based on the combination of MPGs across driving modes using the utility factor approach described in section III.N.

approximately1–2% of new vehicle models will receive the lowest rating.

Thus, for a given year, the highest rating, a 10, will be defined by subtracting two standard deviations from the mean of the data from the most recent model year available, such that any vehicle that achieves a fuel consumption rate less than or equal to two standard deviations below the mean will receive a rating of 10. Conversely, any vehicle that is more than or equal to two standard deviations above the mean will receive the lowest rating, which is a 1. The ratings of 2 through 9, in turn, are defined based on even increments of 5-cycle combined fuel consumption rates between the highest and lowest ratings, with the following adjustment.

The break point of the rating system, which denotes the difference between a CO_2 emission and fuel economy rating of 5 and of 6 (that is, between the top half (6–10) and bottom half (1–5) of the rating scale), will be pegged to the CO_2 emissions and MPG values that correspond to the projected achieved CAFE values estimated by the agencies in advance for the fleet as a whole for the applicable model year of the label. That is, after the analysis to determine two standard deviations is complete and the thresholds for each of the ratings are established, the break point between a rating of 5 and a rating of 6 will be adjusted to reflect the projected average fleet label value that would correspond with the projected fleet wide CAFE value that the agencies estimate would be achieved for the model year to which the label applies.[64] This midpoint correction is important from a policy perspective, as the agencies believe it is appropriate to assign an above-average rating (6 or higher) only to those vehicles whose label value for fuel economy is at or above the projected fleet average for that model year. For model years 2012–2016, the projected achieved fuel economy values from the recent joint light-duty vehicle fuel economy and greenhouse gas rulemaking will be used as the basis for the midpoint defining the threshold between a 5 and a 6. Setting this break point in advance has the added advantage of allowing manufacturers to know their target to achieve an above average rating.

Because the 2012–2016 estimated achieved CAFE levels intended to be used to anchor the break point of the rating scale are based on the 2-cycle test, while label values are based in the 5-cycle test, EPA evaluated vehicle test data across all new light duty vehicles to determine an adjustment factor between the projected achieved fleet wide CAFE fuel economy values and the label values. This adjustment factor is derived in the same manner as an individual model's mpg value for CAFE compliance is adjusted for use on the label. Using this adjustment, EPA determined that the fuel economy midpoint values from 2012–2016 will be as shown in Table D.1.

TABLE D.1—LABEL BREAKPOINT VALUES FOR MY2012–2016[65]

2012	22
2013	23
2014	23
2015	24
2016	25

Using this approach, the fuel economy ratings for model year 2012, based on 2011 fuel consumption data and with a break point adjustment reflecting the average fuel economy projected to be achieved for model year 2012, would be assigned on the basis of the fuel economy integer values as shown in Table D–2.

TABLE D.2—MY2012 RATING SCALE FOR FUEL ECONOMY

Fuel economy rating	Fuel economy (Combined city/highway 5-cycle MPG or MPGe value)
10	38+
9	31–37
8	27–30
7	23–26
6	22
5	19–21
4	17–18
3	15–16
2	13–14
1	0–12

The agencies then had to consider how to structure the rating scale for GHG emissions, since it is combined for the final labels with the rating scale for fuel economy. Given the close relationship between fuel economy and greenhouse gases, the rating scales will be defined to give the same rating on each of these factors for gasoline vehicles, since gasoline-fueled vehicles constitute the great majority of the vehicles sold. Thus, the GHG rating scale will be determined by converting the fuel economy rating thresholds into gasoline equivalent GHG rating thresholds using a constant conversion factor of 8887 grams of tailpipe carbon dioxide emissions per gallon of consumed gasoline.[66] Accordingly, by definition, for vehicles that operate on gasoline only, the fuel economy score will equal the greenhouse gas score, and that combined score will be displayed on the label using one slider bar and one indicator for the combined score.[67] Because vehicles that operate on fuels other than gasoline will not necessarily have the same fuel economy and GHG scores, those vehicles will have their GHG rating determined by comparing their 5-cycle combined tailpipe CO_2 emission rate against the GHG ranges applicable for the model year to determine if their GHG score is different from their fuel economy score. If it is different, the GHG score must be indicated on the same slider bar as the fuel economy score; however, the GHG score will use a pointer below the slider bar and the fuel economy score will use a pointer above the slider bar. Using this approach, the GHG ratings for model year 2012, based on 2011 data with a break point adjustment reflecting model year 2012, would be assigned as shown in Table D–3.

TABLE D.3—MY2012 RATING SCALE FOR GREENHOUSE GASES

Greenhouse gas rating	Tailpipe GHG rating (combined city/highway 5-cycle CO_2 g/mile)
10	0–236
9	237–290
8	291–334
7	335–394
6	395–412
5	413–479

[64] For this purpose, the agencies used the projected fleet-wide achieved CAFE levels for the MY2012–2016 CAFE standards (Table I.B.2–2, 75 Federal Register 25331, May 7, 2010).

[65] French, R. Memorandum to Docket No. EPA–HQ–OAR–2009–0865, ''Adjusting Combined City/Highway CAFE Fleet Values to Determine Equivalent 5–Cycle Label Values.'' May 18, 2011.

[66] This reflects the direct relationship between CO, emissions and fuel consumption for gasoline, and the fact that the mpg values in the Table are derived from fuel consumption values which in turn are derived from CO, emissions values. Note that the GHG thresholds correspond to the MPG value that will round to the integer values shown in the table. For example, the GHG threshold corresponding to the fuel economy thresholds between a 1 and 2 is calculated as 8887 g CO_2/gallon divided by 12.5 miles/gallon, or 711 g/mile.

[67] For gasoline vehicles whose values are close to the threshold, the tables may occasionally reflect different scores on each of these factors. For purposes of the fuel economy and greenhouse gas rating for gasoline vehicles, the fuel economy thresholds will be controlling and only one rating will be displayed. Under this approach, vehicles with the same combined MPG value, which is prominently displayed on the label, will always have the same rating as other vehicle with the same value. Different ratings formed on the basis of rounding would not be helpful to consumer comprehension.

TABLE D.3—MY2012 RATING SCALE FOR GREENHOUSE GASES—Continued

Greenhouse gas rating	Tailpipe GHG rating (combined city/highway 5-cycle CO_2 g/mile)
4	480–538
3	539–612
2	613–710
1	711+

The methodology for determining the fuel economy and GHG rating scales defined above is based on a simple statistical approach that should be applicable to a changing fleet of vehicles over time. The agencies believe that this is a straightforward and robust methodology for rating vehicle fuel economy and tailpipe GHG emissions that will result in a flatter distribution of vehicle ratings across the entire fleet. We intend to update the scoring thresholds in the future to reflect the prevailing CAFE and GHG standards and the evolution of the vehicle fleet. Any updates to the rating scale will be included in the annual label manufacturer guidance document or in the regulations via rulemaking.

E. Upstream GHGs

In the proposal, the agencies recognized that upstream GHG emissions are associated with the production and distribution of all automotive fuels used by motor vehicles, that certain emerging automotive fuels might have very different upstream and tailpipe GHG characteristics depending on how those fuels are produced, that providing accurate upstream GHG emissions values for individual consumers can be a complex challenge, and that whether, and if so how, to account for these upstream GHG emissions was an important decision.

We proposed to limit the label to tailpipe-only GHG emissions, while providing more detailed information on upstream GHG emissions on a Web site. For details on the Web site content and accessibility, please refer to Section III.I. In addition, the agencies requested comment on alternative options for the label that, in addition to presenting tailpipe emissions, refer to or identify in some manner the upstream GHG emissions associated with fuel production and distribution. One such alternative would continue to base the label's GHG emissions value on tailpipe emissions values only but would supplement the numerical value with a symbol or asterisk and explanatory text such as ''the only CO_2 emissions are from electricity generation'' (for EVs), ''does not include CO_2 from electricity generation'' (for PHEVs), or ''the CO_2 emissions listed here are from gasoline combustion only and do not reflect the use of renewable biofuels'' (for ethanol flexible fuel vehicles).

A second alternative for the label would be to, provide a tailpipe-only GHG emissions value and also to provide a numerical value for upstream GHG emissions associated with production and distribution of the fuel(s) used by the vehicle. While recognizing the arguments for this approach, the agencies identified many challenges associated with developing a single numerical value for upstream GHG emissions. For electricity, for example, challenges include significant regional variability in electricity feedstocks and GHG emissions, potential changes in feedstocks and GHG emissions over time, and potential differences in GHG emissions between daytime and nighttime charging depending on the energy source used. The agencies asked for comments on how they could best address these complexities on a consumer label.

The agencies received a large number of comments on this topic, almost all of which focused primarily on the upstream GHG emissions issues associated with the electricity used in EVs and PHEVs.

Automotive associations, electric vehicle associations, electric utility companies, and nearly all automakers who commented on this topic supported the proposal to include only tailpipe GHG emissions on the label and provide more detailed information on upstream GHG emissions on a Web site. Automakers typically stated that labels have always reflected vehicle performance only and have not addressed upstream petroleum emissions, that they have no control over upstream emissions, and that including electricity upstream GHG emissions on the label could discourage future sales of EVs and PHEVs. EV and PHEV advocacy organizations generally supported the proposal as well, also citing that past label designs focused exclusively on vehicle performance and arguing that regional differences in electricity feedstocks make it impossible to provide a single upstream GHG emissions value for EVs and PHEVs that would be meaningful to consumers. One environmental group supported the proposal, but argued for a more prominent display of the text indicating that the values are tailpipe-only.

Nearly all environmental groups, academics, a Federal lab, and non-electricity fuel advocacy groups who commented on this topic opposed the proposal and endorsed the concept of including upstream GHG emissions on the label. The primary argument was that providing tailpipe-only GHG emissions would be confusing and/or misleading, as some consumers might infer that operating a vehicle on grid electricity has no greenhouse gas emissions impacts, and that this could lead to adverse consumer purchase decisions if ''zero emissions'' was an overriding selling point for a consumer.

A second argument from many of these commenters, as well as from one automaker, was that the primary purpose of the label should be to provide relevant consumer information, and that a label is not an appropriate way to promote an individual technology, which they argued this approach would do for electric vehicles if upstream emissions were not included on the label. California Air Resources Board (ARB) stated that upstream emissions would need to be reflected on the label in order to adopt the national label in California. ARB later indicated that, in the interest of a unified national label, this requirement could be met through a label statement about additional emissions and reference to a Web site where upstream values could be obtained.

However, only a few commenters endorsed a specific methodology for determining upstream GHG emissions values. One joint environmental group comment supported a universal upstream GHG emissions factor for all vehicle operation off of the electric grid, similar to the approach currently used by the ARB. Another environmental group suggested that the label CO_2 value for both EVs and PHEVs be an asterisk instead of a numerical value, and the asterisk would be coupled with label text directing the consumer to the Web site for customized, regional-based upstream GHG emissions values.

The agencies are requiring a label which, as was proposed, will be limited to tailpipe-only GHG emissions but will have more prominent text to better emphasize the tailpipe-only metric. EVs will include the clarifying statement, ''Does not include emissions from producing electricity.'' Vehicles fueled without grid electricity will include the statement, ''Producing and distributing fuel also create emissions; learn more at fueleconomy.gov.'' For PHEVs, the text ''& electricity'' will be added after the word ''fuel.'' Detailed information (including regional-specific values, when appropriate) regarding upstream emissions for fuels will be provided on a Web site. For details on the Web site

content and accessibility, please refer to Section III.I.

The agencies considered the merits of arguments both for and against inclusion of upstream emissions information on the label itself but ultimately concluded that retaining a tailpipe-only approach is more appropriate for this consumer-oriented label. While the agencies acknowledge, as discussed above, that substantial GHG emissions can be created during the upstream production and distribution of various automotive fuels, our reasoning for adopting a tailpipe-only approach starts with the fact that the label's fundamental purpose is to present information about the vehicle itself, rather than on a broader system. Emissions from the tailpipe fall under the automaker's control; they are a result of the product that the manufacturer produces.

The agencies agree that information on a vehicle's upstream emissions may be useful for consumers, even if it is not central to the purpose of the label. We also concluded that including upstream GHG emissions on a Web site instead of the label is a more appropriate way to communicate information regarding upstream emissions to consumers. Because of the substantial variation in emissions associated with electricity production from region to region, a label that presented a single national average of upstream emissions could be more likely to confuse consumers rather than help them, particularly if consumers are aware that their regional electricity generation mix is different from the national average, and could thereby detract from the label's purpose. Due to different electricity generation fuels and technologies, this level of variation is significant: from one region to another, the highest-to-lowest upstream average GHG emission ratios are roughly 3-to-1.[68] If examined from a utility-by-utility perspective, the ratio is even greater, at 75-to-1.[69] For a national label to present a single national average would be misleading and inaccurate given such a wide range. The agencies are aware of arguments that variation is also present in the gasoline prices used to calculate fuels costs and/or savings on the label, but the typical range in regional gasoline prices is much narrower (approximately 1.25-to-1)[70] than the range in upstream GHG emissions, and therefore adopting a single average value for national gasoline prices seems more appropriate.

Even if the agencies were to conclude that including upstream GHG emissions on the label were appropriate, given our concerns that a national-average upstream value might not be helpful, we do not believe that it would be practical for the label to present regional-specific upstream data for every vehicle sold. Under that scenario, automakers would not only need to reflect regional differences in power generation fuel mixes but would also need to consider how state regulations could affect emissions from electricity generation in the future; that is, a label that adequately reflects expected GHG emissions over the vehicle's useful life would need to project future changes in electric utility emission rates on a regional-specific basis, which would be challenging to accomplish in a meaningful way. Further, producing individualized labels would be difficult and would introduce additional complexity and costs for manufacturers, which the agencies did not account for in our proposal.

However, the agencies believe that it is important and beneficial to provide information on upstream GHG emissions to consumers for certain advanced technology vehicles and are in the process of developing a Web site in order to make such information available. We believe that providing such data on a Web site has advantages over presenting upstream information on the label. A Web site allows consumers to access regionally specific data on electricity upstream emissions and allows the agencies to present further information on methodologies as needed. The information can also be updated more quickly as new data becomes available. Further, presenting the information online, rather than on the label, allows the label to present more comprehensive information in a clearer, simpler manner, which we believe will benefit consumers.

The agencies recognize that biofuels, such as the E85 that FFVs use, will play an important role in reducing the nation's dependence on foreign oil, thereby increasing domestic energy security. While the majority of comments on upstream emissions pertained to emissions from electricity production, the agencies also recognize that biofuels have unique GHG emission characteristics. When considered on a lifecycle basis (including both tailpipe and upstream emissions), the net GHG emission impact of individual biofuels can vary significantly from both petroleum-based fuels and from one biofuel to another. EPA's Renewable Fuel Standard program, as modified by EISA, examined these differences in lifecycle emissions in detail.[71] For example, EPA found that with respect to aggregate lifecycle emissions including non-tailpipe GHG emissions (such as feedstock growth, transportation, fuel production, and land use), lifecycle GHG emissions in 2022 for ethanol from corn, using certain advanced production technologies, are about 20 percent less than gasoline from oil.

The agencies recognize that in the case of biofuels, ''upstream emissions'' include not only GHG emissions, but also any biological sequestration that takes place. For purposes of this discussion, the term ''upstream emissions,'' when considered in the case of biofuels, should be construed to encompass both GHG emissions and sequestration.

The agencies note that to the extent future policy decisions involve upstream emissions, the agencies will need to consider not only upstream emissions from electricity production, but also the unique emission characteristics associated with biofuels.

Finally, the agencies agree with one commenter's suggestion to indicate more clearly that the GHG emission values presented on the label represent tailpipe-only emissions. In response, the agencies are adopting a label with more prominent ''tailpipe only'' text as well as a statement that information on upstream emissions can be found at the Web site.

We have made this decision on the treatment of upstream emissions for the fuel economy label for the reasons explained in this preamble. This conclusion does not necessarily reflect any decisions that will be made regarding upstream emissions in future greenhouse gas and fuel economy rulemakings. In addition, the agencies will continue to consider this issue over time.

In summary, the agencies are requiring a label with a tailpipe-only GHG emissions rating as well as more clear and prominent text that the rating includes only tailpipe GHG emissions

[68] Pechan & Associates, Inc., ''The Emissions & Generation Resource Integrated Database for 2010 (eGRID2010 version 1.0) year 2007 Summary Tables,'' prepared for the U.S. Environmental Protection Agency, Washington, DC, March 2011.

[69] M. J. Bradley & Associates. (2010). Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States.

[70] . See EIA's Retail Gasoline Prices *http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_home_page.html* where, as of May 16, 2011, the highest city gasoline price, of the 10 cities represented, was $4.40 in Chicago, Illinois, and the lowest was $3.70 in Denver, Colorado. This represents a high-to-low range of 19%.

[71] *http://www.epa.gov/otaq/renewablefuels/420f10006.htm*

and that the consumer can go to the Web site for information on upstream GHG emissions.

F. Smog Rating

In addition to fuel economy and greenhouse gas information, EISA also requires that new vehicles be labeled with information reflecting a vehicle's performance in terms of ''other emissions,'' using a rating system that would make it easy for consumers to compare the other emissions of automobiles at the point of purchase.[72] The agencies proposed that ''other emissions'' include those tailpipe emissions, other than CO_2, for which vehicles are required to meet current emission standards. These emissions include criteria emissions regulated under EPA's National Ambient Air Quality Standards and air toxics and include the following smog-forming and other air pollutants:

- NMOG—non-methane organic gases;
- NO_X—oxides of nitrogen;
- PM—particulate matter;
- CO—carbon monoxide; and
- HCHO—formaldehyde.

The agencies proposed and requested comment on a one-to-ten rating for ''other emissions'' in which each rating is associated with a bin from the Federal Tier 2 emissions standards,[73] or the comparable California emissions standard,[74] based on the fact that it was impossible to provide a single aggregated rating reflecting an absolute scale, and that separate absolute rating scales would have been unduly cumbersome to present on the label.

The majority of comments received were supportive of the proposed option, indicating that it was a reasonable approach to distilling complex information and was consistent with the approach used on the EPA Green Vehicle Guide Web site and the California Environmental Performance Label. Several commenters advocated changing the name on the label from ''other air pollutants'' to the term ''smog,'' which they felt was more meaningful for the general public and would be even more directly consistent with the California Environmental Performance Label. Finally, a few comments suggested that ''other air pollutants'' should be disaggregated and displayed separately for each air pollutant.

The agencies are requiring, as proposed and as supported by most comments, a label that displays a relative one-to-ten rating based on Federal vehicle emission standards or comparable California emissions standards. We are also requiring the suggested name change, as consumers are already familiar with the connection between vehicle emissions and smog, whereas ''other air pollutants'' is not currently as meaningful. This will have the added benefit of promoting label harmonization by better aligning with the California Environmental Performance Label ''Smog Score'' that has been in existence for many years.

Despite the fact that the EPCA and EISA language could be interpreted to allow multiple ''other emissions'' rating scales on the label, the agencies were not persuaded that having disaggregated pollutant information on the label would benefit consumers. Based on our consumer research,[75] it appears that consumers do not currently want more specificity when it comes to these air pollutants and, in fact, could not make meaningful distinctions among these pollutants. In addition, we do not believe that there is sufficient space on the label to incorporate emissions information on the five pollutants addressed through this rating scale without cluttering the label and risking information overload. However, to address some consumers' interest in more information, consumers will be able to access more detailed information on the specific smog-forming pollutants that are covered collectively on the label on *fueleconomy.gov*.

The agencies acknowledge that this rating will multiply the number of distinct labels relative to current labeling because of the interaction between model types and test groups. Current labels are based only on model types and present only fuel economy information. However, emissions are based on test groups, and there may be multiple test groups within a given model type. For example, a manufacturer with two otherwise identical vehicles within a model type, where one is certified to EPA emission standards and the other to more stringent California standards, would only need one label today for all the vehicles in that model type. This final rule would require that—despite identical fuel economy results—the different vehicles have different smog ratings and thus different label information. Any incremental costs associated with this increase in distinct labels have been addressed; as discussed in Section VI.A., the agencies received comment from auto makers on the startup costs of the new labels, including estimates of the IT needs to address new label requirements, and incorporated their comments into the cost estimates.

The Smog Rating System for model year 2013 vehicles is shown in Table F–1. The proposal discussed ratings based on current emission standards; however, if those standards were to change in the future, the ratings would no longer have a basis on which to be assigned. Therefore, we clarify here that we intend to update the scoring thresholds in the future to reflect the prevailing Federal and California emissions standards. Any updates to the Smog Rating will be included in the annual label manufacturer guidance document or in the regulations via rulemaking.

TABLE F–1—RATING SYSTEM FOR ''OTHER EMISSIONS''

Smog rating	EPA Tier 2 emissions standard	California Air Resources Board LEV II emissions standard
10	Bin 1	ZEV
9	N/A	PZEV
8	Bin 2	SULEV II
7	Bin 3	N/A
6	Bin 4	ULEV II
5	Bin 5	LEV II
4	Bin 6	LEV II opt 1
3	Bin 7	N/A
2	Bin 8	SULEV II large trucks
1	N/A	ULEV & LEV II large trucks

G. Fuel Costs and Savings

As described in Section II.A, EPCA requires that labels shall contain ''the estimated annual fuel cost of operating the automobile.'' In addition EPCA states that the labels shall contain other information required or authorized by the EPA Administrator that is related to the required information,[76] such as the annual fuel cost. EPA proposed to include annual fuel cost on all labels, and proposed a five year fuel cost or savings compared to the average vehicle value on label 1, but indicated that any label required could include the five year cost or savings value.

1. Annual Fuel Cost

Focus groups conducted prior to the proposal provided mixed feedback on the value of annual fuel cost. When asked, participants were skeptical of the

[72] 49 U.S.C. 32908(g)(1)(A).

[73] 40 CFR part 86, subpart S.

[74] The California Low-Emission Vehicle Regulations for Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, Title 13, California Code of Regulations (last amended March 29, 2010).

[75] Environmental Protection Agency Fuel Economy Label: Phase 1 Focus Groups, EPA420–R–10–903, August 2010, p. 28.

[76] 49 U.S.C. 32908(b).

use of estimated annual fuel cost, even when asked to consider whether it could be a useful comparative metric across other vehicles of the same model year. This skepticism arose from the recognition that the value was based on assumptions of fuel prices and annual miles driven, which many felt would not be personally applicable to their own driving patterns. Nevertheless, participants consistently employed the annual fuel cost (along with MPG) when asked to compare the efficiency of conventional vehicles with that of advanced technology vehicles, like PHEVs and EVs, with their less familiar set of energy metrics.[77] Focus group participants involved in the previous update to the fuel economy label were clearly interested in the annual fuel cost figure.[78] Recognizing the EPCA statutory requirement to display the estimated annual fuel cost, EPA requested comment on whether it is a useful comparative tool across technologies and, if so, how to best communicate on the label that it is valid for this purpose. EPA also sought comment on whether there might be an additional or alternative way to display fuel cost information that might be more useful or have a greater impact on consumers.

Comments on annual fuel cost generally acknowledged the statutory requirement under EPCA and agreed that it provides a useful comparison metric. Several commenters indicated that it was the most important metric on the current fuel economy label, after MPG. The majority of those who commented on it agreed that annual fuel cost should be retained. Several commenters suggested that the $2.80 per gallon cost figure shown on the example labels be made more realistic. Comments on electric operation indicated that 15,000 miles per year is not attainable for an EV unless it were to recharge more than once a day, and suggested cents per mile as a useful metric; they did acknowledge, however, that the annual cost could be used as a comparative tool. One comment regarding PHEVs noted that annual fuel cost will vary significantly depending on the relative use of gasoline and electricity.

EPA is requiring the retention of annual fuel cost and its underlying assumptions on the label. This satisfies the EPCA requirement and provides continuity with the historical approach to annual fuel cost, which is used by some consumers as a comparative tool. EPA agrees that, as vehicle technologies diverge and it becomes increasingly challenging to find comparative metrics, fuel cost is a useful point of comparison. Consumers may compare the annual fuel cost of various vehicles and consider that cost to be part of the ''price'' of the vehicle. Because of the importance of annual fuel cost, the required label will make that cost quite prominent and conspicuous. EPA will continue its practice of issuing annual guidance updating the mileage and fuel cost assumptions, in consultation with the U.S. Department of Energy's Energy Information Administration.[79]

2. Five Year Fuel Savings or Sending Compared to the Average Vehicle

EPA also proposed and requested comment on another approach to presenting fuel cost information: Focusing on the savings attainable by purchasing a vehicle that is relatively more fuel efficient or the spending incurred when purchasing a vehicle that is relatively less fuel efficient. This approach was specifically recommended by the expert panel discussed in Section I.D, which noted that savings is a more powerful message than annual cost.[80] Although savings and spending calculations would necessarily also rely on assumptions, EPA believes that the value of the information to consumers is significant enough to overcome these drawbacks.

In the proposal, EPA explored a number of methods for calculating savings and spending, and proposed a method that calculated the difference in fuel costs of a vehicle over five years compared to the projected median new vehicle for that model year. EPA proposed that some vehicles would show a savings, while others would show consumers spending more for fuel over five years compared to the reference vehicle; these values would increase in magnitude the further the vehicle is from the average vehicle in terms of fuel consumption. The proposed approach appropriately reflects the fact that fuel cost savings become larger as the fuel efficiency of a vehicle improves, and conversely that fuel costs increase as fuel efficiency decreases compared to the reference vehicle.

As with the fuel economy and greenhouse gas rating system and comparable class information, EPA proposed to provide annual guidance indicating the reference against which the fuel cost savings would be measured, as well as the prices for all fuels.[81] EPA proposed to compare each labeled vehicle to a median vehicle, but to use ''average'' on the label as a more accessible term than ''median.'' EPA anticipated updating the reference vehicle MPG value as the fleet fuel efficiency changes in response to regulations and market forces. Finally, EPA proposed to round the relative fuel cost or savings values used on the label to the nearest one hundred dollars, to avoid implying more precision than is warranted and for ease of recall. Vehicles that are within fifty dollars of the reference vehicle fuel cost would be designated as saving zero dollars.

EPA sought comment on this and alternative approaches to conveying fuel cost and savings information. EPA also sought comment on whether there is a potential for consumer confusion caused by two different dollar figures: the estimated annual fuel cost of operating the vehicle and the five-year relative fuel savings/spending value compared to a reference vehicle.

Many individual consumers, consumer advocacy groups, and environmental advocacy groups expressed strong support for a five year save or spend value compared to the average vehicle. These commenters stated that clearly communicated operating costs or savings based on fuel efficiency would be a useful comparison metric, and that the five year save or spend value is a more powerful metric than annual fuel cost. They suggested that, for those consumers considering advanced technology vehicles with a higher sticker price but also a higher fuel economy than conventional vehicles, the five year save or spend value would be a valuable piece of information that would allow them to weigh the impact of fuel savings over time against the up-front vehicle purchase price.

Several industry organizations commented that a fuel cost or savings value should be limited to a within class comparison. Automotive manufacturers were primarily opposed to including the five year save or spend value on the label, suggesting that the statutorily-

[77] Environmental Protection Agency Fuel Economy Label: Phase 3 Focus Groups, EPA420–R–10–905, August 2010, p.37.

[78] 71 FR 5466, February 1, 2006.

[79] Sample labels in the package use projections for the second and third quarter of 2012, based on the EIA Short Term Energy Outlook, May 2011.

[80] Environmental Protection Agency Fuel Economy Label: Expert Panel Report, EPA420–R–10–908, August 2010.

[81] We proposed that the reference five-year fuel cost be calculated by applying the gasoline fuel price to the average miles driven over the first five years of the reference vehicle's life, assuming a particular fuel economy. The fuel economy value for the reference vehicle would be based on the projected fuel economy value of the median vehicle model type for sale the previous model year, not sales-weighted, and adjusted based on projections regarding the upcoming model year. The appropriate values would be provided in guidance.

required annual cost is sufficient and the additional five year information would be confusing. Many of these commenters noted that the reference vehicle could be ambiguous or confusing, and some raised a concern that the median vehicle and the average vehicle are not the same. Some commenters said that five year save or spend value was incomplete because it does not account for the time value of money nor include up-front vehicle costs. A few commenters suggested that the agencies use five-year fuel costs (annual fuel cost multiplied by five years) rather than a comparison to the average vehicle costs; other commenters suggested that a relative five year save or spend value should be calculated based on a reference vehicle in the same class. Several commenters noted that the value of a dollar and the cost of fuel will undoubtedly vary during the five year period.

EPA believes that the utility of the five year save or spend value compared to the average vehicle outweighs the concerns expressed by commenters. Although the literature is mixed, many studies have indicated that consumers may significantly undervalue (or overvalue) potential fuel savings when deciding which vehicle to purchase.[82] One reason may be that consumers have difficulty accurately estimating fuel costs and savings over time.[83] Another reason may be that unless relevant information is provided, those costs or savings, even if significant, may not be sufficiently salient to consumers at the time of purchase. The five-year fuel savings or spending value clearly demonstrates the total comparative fuel costs and savings over a timeframe that many vehicles are owned. Including it on the label will help consumers to more easily weigh the long-term payback benefits of purchasing a more fuel efficient vehicle or a vehicle that operates on a less expensive fuel.

In response to a concern that the median vehicle and the average vehicle are not the same, EPA is requiring a simple change to the proposed algorithm for estimating the reference vehicle for fuel costs over five years. For consistency, EPA will use the same reference point that is used to define the break between a rating of 5 and a rating of 6 on the fuel economy and greenhouse gas scale (see Section III.D). This addresses the concerns expressed in comment, as the term ''average'' now is represented by the label MPG value that corresponds with the projected achieved CAFE level for the fleet on a sales-weighted basis for that same model year. That is, the vehicles indicated on the label as ''you save'' in fuel costs over five years will have a fuel economy that is better than the projected average level for the fleet for that model year, while those indicating ''you spend'' will be below the projected average. The five-year average cost will be calculated for this average vehicle, using the same annual mileage and gasoline fuel cost assumptions used for the annual cost estimate, multiplied by five years. As proposed, this reference five-year cost value representing the average vehicle will be published in EPA guidance, along with the upcoming projected fuel costs and annual mileage assumptions.

While EPA agrees that some consumers may not fully understand the reference point for the five year save or spend value, EPA nevertheless believes that showing relative costs or savings has significant value in helping consumers understand that fuel efficiency can substantially affect the relative operating costs among vehicles. In particular, EPA believes that communicating to consumers a vehicle's fuel costs relative to the costs of the average new model offered for sale, and over a timeframe commensurate with vehicle ownership, will highlight the importance of future fuel costs and allow them to be more readily factored into the buying decision. To clarify the average vehicle reference point, the ''Compared to the average vehicle'' text is being increased in prominence. In addition, explanatory text is being added to the label which says ''The average new vehicle gets X MPG and costs $Y to fuel over 5 years.'' The agencies believe that this additional text should aid consumer understanding about the reference point.

EPA considered using five-year fuel cost (annual fuel cost multiplied by five-years) instead of the comparative five year save or spend value. However, as discussed above, EPA concluded that showing the relative costs or savings has additional merit that is not immediately gleaned from a five-year cost value. EPA and the Department of Energy provide similar information online for appliances as part of their Energy Star program.[84] In addition, since annual fuel cost is also on the label, consumers can easily use the information on the label to calculate their own five-year fuel costs, if desired.

EPA also considered using economic projections of future dollar values and fuel costs to calculate the five year save or spend value, but concluded that doing so would make the calculations unnecessarily confusing to the consumer while providing limited additional value. Many people in the public think in terms of simple calculations or payback periods when considering long-term costs or savings. As EPA learned from the focus groups, consumers are skeptical of any calculations involving fuel costs, because the price of fuel fluctuates greatly, and personal driving habits also vary. Adding additional complexities to the calculation would probably further confuse consumers and thus contribute to their skepticism. Our hope is that consumers will recognize that this value is most useful for comparison purposes, and not as an exact measure of actual fuel costs.

EPA does not agree with comments suggesting that the five year save or spend value should be based on a within class comparison, because EPA's research demonstrated that most shoppers search for vehicles that fall into more than one class. In addition, having multiple reference vehicles—one for each class—would create unnecessary confusion for the consumer. Therefore, the relative five year save or spend value will be compared to one reference vehicle, as described above.

EPA acknowledges that there is some potential for confusion created by having both annual fuel costs and the relative five year save or spend values on the label. It believes, however, that for many consumers, the two figures may prove complementary: Consumers are able both to see absolute cost on an annual basis and to learn how much they will save or spend compared to the average vehicle over a relevant period. To reduce the risk of confusion, the label will display the five year save or spend value and the annual fuel cost in distinct locations on the label, with

[82] Greene, David L. ''How Consumers Value Fuel Economy: A Literature Review,'' EPA Report EPA–420–R–10–008, March 2010, p.vi–ix.

[83] For evidence that consumers may make mistakes estimating the fuel savings associated with higher fuel economy, see: Turrentine, Thomas S. and Kurani, Kenneth S. ''Car buyers and fuel economy?'' Energy Policy 35:1213–1223 (2007) and Larrick, R.P. and J.B. Soll, ''The MPG illusion,'' Science 320:1593–1594 (2008). For a more complete discussion of reasons consumers may undervalue future fuel savings, see 75 F.R. 25510–25513; and Helfand, Gloria, and Wolverton, Ann, ''Evaluating the Consumer Response to Fuel Economy: A Review of the Literature, '' U.S. Environmental Protection Agency, National Center for Environmental Economics Working Paper 09–04 (2009), p.23–30, available at *http://yosemite.epa.gov/EE/epa/eed.nsf/WPNumber/2009–04?OpenDocument* (last accessed 3/18/11).

[84] For example see ''Savings Calculator'' at: *http://www.energystar.gov/index.cfm?fuseaction=find_a_product.showProductGroup&pgw_code=CW* (last accessed 3/17/11). This spreadsheet allows users to estimate the potential savings from using Energy Star-qualified clothes washers instead of conventional clothes washers.

prominent differentiating text (see Figure I–1).

H. Range and Charge Time

1. Range

Vehicle cruising range—the calculated distance that a vehicle can travel given its fuel economy and fuel tank capacity—has not historically been provided on the fuel economy label. However, in the focus groups conducted for this rulemaking, it became clear that many people were interested in this piece of information, but only for advanced technology vehicles, with which there is little familiarity. Accordingly, EPA proposed that vehicle range be included on the label for vehicles that use electricity, proposed that it not be included on labels for vehicles that operate on liquid fuels, and sought comment on whether range should be included on labels for vehicles that operate on non-petroleum fuels other than electricity.

EPA did not receive a large number of comments on range. Of the comments that were received, nearly all supported including range for some or all alternative fuel vehicles. Several commenters supported the inclusion of range for all alternative fuel vehicles, with the goal of harmonizing with the Federal Trade Commission [85] so that its separate label would no longer be necessary. One commenter opposed the inclusion of range on an already ''crowded'' label, but did state that if range were included on EV and PHEV labels, then it should also be included on CNG labels.

EPA is requiring the inclusion of range on all non-petroleum and advanced technology vehicle labels, *e.g.,* for CNG, EV, PHEV, and hydrogen FCV vehicles. As supported by commenters, EPA continues to believe that range is an important piece of information for potential purchasers of these vehicles, since they typically cannot travel as far on a refueling as can a conventional gasoline vehicle, and the refueling infrastructure for non-liquid fuels is currently limited. EPA also agrees with several commenters that including range on the new fuel economy and environment label may set the stage for possible future action by the Federal Trade Commission to withdraw its separate cruising range label for alternative fuel vehicles. In response to some commenters' concern about the ability to generate meaningful range estimates for PHEV labels, EPA recognizes that the real-world variability in PHEV range values, particularly in the all-electric or battery assist mode, will be much higher than with conventional vehicles. Nevertheless, a laboratory-based repeatable test gives a basis for comparison, despite real-world variability, and the final label requires an all electric range value for all PHEVs. EPA's market research suggests that many consumers want an objective comparative metric for range that they can use to determine whether an advanced technology vehicle might be right for them.[86]

EPA is also finalizing an option for vehicle manufacturers to voluntarily include E85 range information on the labels for ethanol flexible fuel vehicles. The potential benefit to a manufacturer is that, should it take advantage of this option, the Federal Trade Commission might decide that a separate driving range label is no longer required. The final regulations provide templates that illustrate how labels with this optional information should appear, and any company choosing to provide driving range information must display that information according to the regulations. EPA encourages manufacturers to provide this optional E85 driving range information, particularly in cases where refueling opportunities may be limited and/or the driving range is substantially less than what consumers are used to experiencing with typical conventional fuel vehicles.

2. Battery Charging Information

Battery charging information was included on two of the three EV and PHEV label designs in the proposed rule. As noted in the proposal, EPA believes that the amount of time it takes to charge an EV or PHEV battery is important to consumers. This was widely supported by the focus groups, where participants often expressed a strong interest in seeing battery charging information on the EV and PHEV labels. EPA proposed that the label include battery charging time using a standard wall outlet supplying 120 volts, with an option for the manufacturer to alternatively specify a 240 volt charge time if the higher voltage is recommended or required by the manufacturer.

A majority of commenters on the subject, including automotive manufacturers and consumer groups, supported including charge time information on the label. Some of these commenters suggested that charge time should be based on 240V, as this would be consistent with the recommendation in the owner's manual and would reflect the manner in which EVs and PHEVs are likely to be typically charged. Several comments suggested that a range of charge times should be provided, given the possible use of different voltage levels. A minority of commenters, largely comprised of electric vehicle manufactures and advocacy organizations, suggested that charging information should not be on the label, largely because of concerns of oversimplification of the range of possible charge times given charging conditions, as well as label overcrowding. These commenters suggested that the charging information could be provided on EPA's Web site instead.

EPA is requiring charging time information on the label of EVs and PHEVs, with one key difference from the proposal. The final regulations require that manufacturers display charging time based on the use of a dedicated 240 volt charging system, with the option of displaying charging time based on the use of a standard 120 volt wall outlet. It is our belief that the owners of these vehicles will, in a significant majority of cases, install dedicated 240 volt outlets to use for charging their vehicles.[87] Doing so will dramatically decrease the amount of time it takes to charge the battery, thus minimizing one of the perceived limitations of vehicles that use electricity and maximizing the utility and availability of the vehicle. However, to address the possibility that not all EV/PHEV owners will install dedicated 240 volt outlets, a manufacturer may instead report the 120 volt charging time on the label if, for example, their vehicle is not capable of receiving 240 volts, or if the manufacturer believes that their buyers will typically use 120 volt and will prefer that information instead.

I. Web Site and QR Code

EPA proposed and requested comment on adding a new, prominent URL on the label that would direct consumers to a detailed, interactive consumer Web site. EPA also proposed including a QR Code® that could be scanned by a device such as a smartphone and reach the same Web site.

[85] The Federal Trade Commission requires a label that displays cruising range for all alternative fuel vehicles and vehicles capable of utilizing alternative fuels. See 16 CFR part 309, Subpart C.

[86] Environmental Protection Agency Fuel Economy Label: Phase 2 Focus Groups, EPA420–R–10–904, August 2010.

[87] U.S. Environmental Protection Agency, U.S. Department of Transportation, California Air Resources Board Interim Joint Technical Assessment Report: Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards for Model Years 2017–2025. Chapter 4. September 2010.

All those who commented on the topic supported the development of a comprehensive Web site, indicating that it is crucial to achieving a simpler label while also providing consumers with access to detailed information. Commenters also liked the idea of having a Web site that can more accurately reflect their likely personal experience with a vehicle. The majority of comments received also supported the inclusion of the QR Code® on the label. EPA evaluated other two-dimensional bar codes suggested by commenters and found that the advantages of the QR Code® significantly outweighed the potential advantages of other options. The QR Code® is free to use, in the public domain, does not require entering into a business relationship with private industry, and perhaps most significantly, is described in an ISO standard which is incorporated by reference in the final regulations. The ISO standard allows the agencies to clearly and completely describe in regulatory language the process for generating a QR Code®, a necessity of the structure of our program.

EPA is moving forward with developing new Web site content on the existing fueleconomy.gov site. New content will be available prior to the date that labels are required to appear on vehicles (MY 2013), and will further explain the label's content, metrics, and methodologies. In addition to the label-specific information, consumers can use fueleconomy.gov's tools to compare and personalize fuel economy and environmental values across vehicles. New content on this Web site will include an enhanced emissions calculator that will allow consumers to determine an EV's or PHEV's potential upstream greenhouse gas emissions, based on the vehicle's efficiency and regional electricity emissions rates. This functionality will give consumers more accurate, regional-specific upstream emissions information than is possible on a static, national label. The Web calculator may also allow consumers to estimate the upstream GHG emissions associated with the operation of gasoline, diesel, and CNG vehicles using national averages.

In order to address consumers' growing interest in having information accessible via smartphones, EPA is including a QR Code® on the new label.[88] When a smartphone user scans the QR Code® on the label, information on that particular vehicle from the EPA Web site will be displayed on the handheld device. Though several commenters suggested linking to the auto manufacturers' vehicle-specific Web sites from the QR Code®, EPA determined that linking to a government Web site was the best way to provide consumers with ''just the facts.'' The content will be similar to what will be available on the label Web site, but geared to a smartphone platform. The user can then take advantage of many of the Web site's tools and vehicle comparisons from his/her phone while shopping at a dealership.

J. Color

All of the proposed labels utilized color to draw attention and highlight information for consumers. However, each of the two proposed label options used color in different ways. The color on Label 1 was assigned based on the letter grade rating of the vehicle, using color as a comparison tool, whereas the color on Label 2 was determined by the vehicle technology and fuel type, using color as a vehicle identifier.

NHTSA and EPA received comments from a wide variety of organizations supporting the use of color on the label. These commenters noted that color draws attention and results in a more influential label than black and white, and that the incremental cost of achieving color would be worthwhile. These comments especially supported using colors to differentiate important information for the consumer, such as vehicle ratings or five-year fuel costs. On the other hand, automobile manufacturers were concerned about the use of color on the label, especially any label design that would require color printing at the point of vehicle assembly or port of entry. In addition, they expressed concern that colors in the labels might fade, that they might be difficult to see through tinted windows, that the increased complexity of these labels would lead to compliance concerns, and that some colors might deter consumers from considering some vehicles. The manufactures were specifically concerned with the ''warning'' connotation that the colors red, orange, and yellow convey.

Currently, several manufacturers use color on their Monroney labels; however, most of those manufactures utilize a standard, preprinted color background (for example, a company logo in color) for all vehicles and then print with black ink on top of the preprinted background. The proposed labels would require either printing the entire label in color, or managing several preprinted color backgrounds and printing with black ink on top of the preprinted and collated backgrounds. Either of these methods would increase the amount of lead time required by manufacturers and would add cost and complexity to the printing process. These concerns ultimately led the agencies to simplify the color scheme on the final label.

The final label will use one color, blue, for all vehicles to highlight important aspects of the label. The agencies chose not to use red as the primary color on the label due to the perceived ''warning'' message that it can convey. Conversely, we decided not to use green on all of the labels because we did not want to imply that all vehicles are green (*i.e.* clean) vehicles. The agencies were also advised that the color blue does not fade to a different color (green for example, can fade into yellow). The label has been designed to facilitate printing with black ink on a preprinted background. In addition, the color on the label satisfies the requirements of California to have ''at least one color ink * * * in addition to black.''[89] As discussed in Section III.L.2, this allows for harmonization of labels, which was a key request the agencies received from the automakers.

K. Lead Time

The agencies proposed that the new label take effect for the 2012 model year, in anticipation of advanced technology vehicles entering the market that would require labels which addressed their particular attributes. For those advanced technology vehicles expected to enter the market in model year 2011, EPA indicated that we would work with individual manufacturers to develop interim labels that would be consistent with the proposal on a case by case basis, using our current authority. The proposed timing would also coincide with the recent joint rulemaking by EPA and NHTSA that established harmonized Federal GHG emissions and CAFE standards for new cars, sport utility vehicles, minivans, and pickup trucks for model years 2012 through 2016.[90] We also proposed to provide 30 days of lead-time for automobile manufacturers and importers to update the label template and upgrade printing

[88] QR (or ''quick response'') Codes are simply two-dimensional bar codes used to store information. In this case the information is a Web site URL. The term QR Code® is a registered trademark of Denso Wave Incorporated, which owns the patent rights to the QR Code. However, the patent right is not exercised, allowing the specification of the QR Code® to be disclosed and open for widespread use. For more information, see *http://www.denso-wave.com/en/adcd/index.html.*

[89] California Air Pollution Control Laws, Health and Safety Code, Division 26, Part 5, Chapter 2, Section 43200.1 (b)(2)(D).

[90] See 75 FR 25324, May 7, 2010.

capabilities in order to implement these new requirements in the 2012 model year. This timing, given rule finalization in December 2010, was projected to capture the majority of the 2012 model year.

Automakers commented that they would need significantly more lead-time to adopt a revised label, explaining that the implementation process was much more complex than buying off-the shelf colors printers. Specifically, these commenters referenced (1) a detailed process of integrating multiple Information Technology systems in order to properly assign the new label elements to the correct vehicle, (2) redesign of the vehicle Monroney label if the footprint for the fuel economy and environment label changed from that of the current fuel economy label, and (3) the need to print new label stock or acquire and integrate new printers in order to launch a new label. Automakers typically expected that implementing these procedures would take on the order of six to ten months, although comments suggested lead-times from a low end of 19 weeks to a high end of the model year following the one year anniversary of the final rule. Several automotive commenters suggested making the new label requirements effective with the 2013 model year, assuming that sufficient lead-time was also allotted.

Some commenters supported the proposal to implement the new label at the start of a model year, noting that this would dovetail with the changeover in manufacturing processes. Implementing the label at the beginning of the model year would thus allow for a change in the labeling procedure when the production line was idle, minimizing costs and the chances of mislabeling. Doing so would also minimize public confusion that could arise from two different label designs appearing on two vehicles of the same model and model year. However, not all those who commented on lead-time felt that a change at the start of a model year was important, given their particular manufacturing procedures, and requested the flexibility for voluntary early adoption, which could prevent having duplicate systems in place.

The detailed description of the required procedural steps persuaded EPA and NHTSA that additional lead-time is necessary for automakers to properly implement the revised label without undue burden and error. NHTSA and EPA also agree that, for many manufacturers, switching at the start of the model year would be the least burdensome and most logical approach. Finally, the rulemaking is being completed several months beyond when originally planned, which would capture only a portion of the 2012 model year. An EPA analysis of the timeframe of vehicle certifications over the past several years, using confidential information submitted by automotive manufacturers, revealed that fewer than 20% of the total labels for the model year are typically issued by the end of May, 40% by the end of June, and 60–70% by mid-August. We do not think it would enhance public understanding for a new label to be required on less than half of the vehicle models in that model year.

Thus, the agencies are requiring that the revised label be applied to all model year 2013 and later vehicles. The rule will be effective 30 days after publication, and manufacturers may optionally adopt the label for the remaining portion of the 2012 model year after that date. This approach provides the manufacturers with the most flexibility and several extra months of lead-time prior to the start of the 2013 model year, while providing consistency across the entire 2013 model year to minimize public confusion. We acknowledge that this lead-time, while significantly longer than that proposed, is less than that requested by certain commenters. However, the final label designs address many of the considerations that manufacturers raised as necessitating additional lead-time. Specifically, the minimum footprint of the current fuel economy label has been retained, thus eliminating the need for redesign of the Monroney label layout. In addition, the labels have been designed to eliminate the need for color printers on the line and, for the most part, to use a single pre-printed card stock, thus removing the lead-time steps that would have been needed to integrate either color printers or multiple card stocks in continuous use. We therefore believe that it will be possible for manufacturers to make the necessary changes in their labeling processes in the lead-time allotted.

L. Harmonization With Other Labels

As noted previously, Executive Order 13563, section 3, specifically draws attention to the importance of avoiding redundant, inconsistent, or overlapping requirements, and directs agencies to take steps to reduce ''costs by simplifying and harmonizing rules.''

1. Federal Trade Commission

The Federal Trade Commission (FTC) currently requires that alternative fuel vehicles display a label that reports the driving range of the vehicle.[91] The dedicated alternative fuel vehicle label displays the estimated city and highway driving ranges on the alternative fuel, and the label for dual fuel vehicles (*e.g.,* flexible fuel vehicles, or FFVs) displays the estimated city and highway driving ranges on both fuels.[92] Alternative fuels (especially non-petroleum alternative fuels) may have lower energy densities, thus resulting in potentially reduced driving ranges relative to conventional fuels, and it is important for consumers to be able to understand this when considering the purchase of an alternative fuel vehicle. Among the vehicles currently labeled by EPA, the FTC label applies to vehicles that operate on electricity, ethanol, compressed natural gas, hydrogen, or on combinations of these fuels and conventional gasoline or diesel fuel (*e.g.*, FFVs and PHEVs).

EPA did not specifically propose to harmonize with the FTC regulations such that a single label would satisfy the multiple and sometimes overlapping EPA, DOT, and FTC requirements. However, EPA did recognize in the proposal that there could be an opportunity for such harmonization that would depend on whether or not the FTC ultimately could conclude that the EPA/DOT label could satisfy their statutory requirements.[93] The relevant FTC statute specifically allows for the information to appear on labels placed on vehicles as the result of other Federal requirements.[94] Labels that were proposed to include range information and that are required to include this information (*e.g.,* EVs, PHEVs, hydrogen FCV, and CNG-fueled vehicles) may in fact meet the FTC's statutory requirements, although the FTC will ultimately need to make a formal decision as to whether vehicles with these labels meet the FTC label requirements.

The agencies are requiring a label for ethanol flexible fuel vehicles that is consistent with the principles of the current policy: all label metrics are based on gasoline operation, a statement is provided so that the consumer knows that the values are based on gasoline

[91] 16 CFR Part 309.

[92] Note that while EPA does not currently require any comparative fuel information on FFV labels, EPA regulations have allowed manufacturers to optionally include the ethanol MPG and annual cost values since 2007. See 40 CFR 600.307–08.

[93] 75 FR 58112 (Sept. 23, 2010).

[94] 42 U.S.C. 13232(a) states that the FTC labels ''shall be simple and, where appropriate, consolidated with other labels providing information to the consumer.''

operation,[95] and manufacturers may voluntarily include fuel economy estimates on E85 (which would be based on miles per gallon of E85, given that E85 is a liquid fuel). In addition, manufactures may optionally include the driving range on gasoline and on E85. As with the required range information on non-petroleum and advanced technology vehicles, the FTC will need to make a formal decision as to whether vehicles with these labels meet the FTC label requirements.

The FTC has indicated that they will evaluate the labels in this final rule and ultimately make a determination as to whether or not the labels for alternative fuel vehicles that include range information are sufficient to meet the FTC statutory requirements.

2. California Air Resources Board

To provide vehicle emissions information to consumers, the California Air Resources Board (ARB) has required new vehicles to have a Smog Index label since the 1998 model year, and an Environmental Performance Label (EPL), with both the Smog Index and a Global Warming Index, for all vehicles produced since Jan 1, 2009.[96] These labels, which must be displayed in all new vehicles sold and registered in the state of California,[97] depict relative emissions of smog-forming pollutants and, separately gases that contribute to global warming. In the proposal, the agencies acknowledged that the EPL required similar information to the proposed labels, but did not suggest harmonizing with the EPL.

Nevertheless, many auto manufacturers and their associations commented about the desirability of a single, unified national label. These comments stated that it would be a cost-saving measure, increase clear space on the window, and reduce the potential for consumer confusion that could occur with two different labels presenting vehicle emissions information. Notably, the California Air Resources Board (ARB) commented that it believed that two labels with environmental information would be confusing and that its goal is to accept a national fuel economy and environment label that would meet its statutory obligations under the California Assembly Bill 1229 of 2005.[98]

In discussing the possibility of harmonization, the California Air Resources Board commented specifically that it is obligated to address upstream emissions of greenhouse gases, stating that, ''One suggested solution, should EPA and NHTSA decide not to include upstream emissions on the label nationally, would be to set aside a blank space for automakers to include upstream emissions for California. This may be a workable compromise that would allow us to adopt the National Label.'' [99] ARB also commented that its statute requires that the label include a statement that motor vehicles are a primary contributor to global warming and smog, either in conjunction with any upstream language or in the border of the label, and that ARB adopt either an ''index that provides quantitative information in a continuous, easy-to read scale'' [100] or an alternative graphical representation if input from a public workshop indicates that it will be a more effective way to convey the information. ARB also stated that its label must also represent emissions relative to all new vehicles, and explained that after a public workshop, ARB had adopted a one-to-ten scale for both the smog and global warming indexes. Finally, according to their comments, under ARB's controlling statute,[101] the label must include at least one ink color other than black.

In order to try to facilitate label harmonization to reduce OEM costs associated with labeling and potential consumer confusion at the possibility of two environment-related labels on new vehicles, NHTSA and EPA are adopting label provisions that the agencies believe will address California's requirements. Specifically, the label includes both ''smog'' (''other emissions,'' as discussed above) and greenhouse gas ratings relative to all new vehicles, using a one-to-ten format that is consistent with ARB's historical approach. In response to ARB's request to address upstream emissions, the label will include language pointing the public to a Web site that will provide upstream emissions values, including regional-specific values for electricity generation. EVs will include the statement, ''Does not include emissions from producing electricity.'' Vehicles fueled without grid electricity will include the statement, ''Producing and distributing fuel also create emissions; learn more at fueleconomy.gov.'' For PHEVs, the text ''& electricity'' will be added after the word ''fuel.'' The label will also address California's requirement for additional consumer language by including this statement, ''Vehicle emissions are a significant cause of climate change and smog.''

The agencies have worked closely with ARB in developing a label that will meet their needs. We believe that ARB will evaluate the labels in this final rule with the intention of making a positive determination that the labels can serve to meet their statutory requirements as an alternative to the California Environmental Performance Label.

M. Electric and Plug-In Hybrid Electric Vehicle Test Procedures

1. Electric Vehicles

In the NPRM, EPA proposed that, for fuel economy and emissions certification testing of electric vehicles, manufacturers continue to use the Society of Automotive Engineers recommended practice SAE J1634, Electric Vehicle Energy Consumption and Range Test Procedure, as published in October 2002. EPA also proposed that the reissued SAE J1634 may be referenced by the EPA after the reissued SAE J1634 is published.

Comments in regard to the continued use of the procedures in SAE J1634 and EPA's continued involvement with SAE, ARB, and industry were generally positive. Some commenters were concerned with the potential length of test time required to follow SAE J1634, as EV range is expected to increase throughout the industry. Other commenters were concerned over the complexity associated with new test procedures and recommended that EPA and NHTSA consider a flexible regulatory mechanism to address any technical or procedural issues in the future.

In the final rule EPA will continue to require the same procedures as described in SAE J1634 as published in October 2002. The EPA will review SAE J1634 after revision. Manufacturers may use alternate methods of testing to the procedures described in SAE J1634 with prior Administrator approval. In addition, EPA will no longer reference the ARB document entitled ''California Exhaust Emission Standards and Test Procedures for 2003 and Subsequent Model Zero-Emission Vehicles and 2001

[95] The slightly revised statement is ''Values are based on gasoline and do not reflect performance and ratings based on E85.''

[96] State of California Air Resources Board, ''California Environmental Performance Label Specifications for 2009 and Subsequent Model Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Passenger Vehicles.'' Adopted May 2, 2008.

[97] And those Clean Air Act Section 177 states that have chosen to adopt the California Environmental Performance Label.

[98] California Air Pollution Control Laws, Health and Safety Code, Division 26 Air Resources, Part 5 Vehicular Air Pollution Control, Chapter 2 New Motor Vehicles, Sections 43200 and 43200.1.

[99] Docket number EPA–HQ–OAR–2009–0865–7527.1.

[100] Id.

[101] California Air Pollution Control Laws, Health and Safety Code, Division 26, Part 5, Chapter 2, Section 43200.1 (b)(2)(D).

and Subsequent Model Hybrid Electric Vehicles, in the Passenger Car, Light Duty Truck, and Medium-Duty Vehicle Classes'' as currently referenced in 40 CFR 86.1811–04(n). This reference change is in response to some commenters' concern over all electric vehicles not necessarily meeting the ARB definition of a Zero-Emission Vehicle and the inability to locate the exact document as referenced.

EPA may add additional allowable test procedures in the future. As electric vehicle testing experience develops, technical or procedural changes may also be addressed in the future.

Fuel economy and electric range estimates are measured during ''city'' and ''highway'' operation. Electric vehicles are tested to fulfill several requirements including Corporate Average Fuel Economy, fuel economy label values, and other compliance programs. Beginning in the 2008 model year,[102] all vehicles tested for fuel economy labeling purposes had to use the new ''5-cycle'' fuel economy methodology which either required testing all vehicles over five test cycles or applying an equivalent 5-cycle correction, referred to as the derived MPG-based approach, to 2-cycle testing. This 5-cycle method was meant to correct test laboratory values to ''real world'' estimates. For alternative fueled vehicles, including electric vehicles, manufacturers will continue to have the option of fuel economy testing over all five test cycles or applying a derived MPG-based approach to 2-cycle testing.

The 2-cycle testing includes the Federal test procedure (FTP) and the highway fuel economy dynamometer procedure. The FTP, or ''city'', and HFED, or ''highway'', procedures are used for calculating CAFE and can be used to calculate appropriate fuel economy label values and other compliance requirements.

The 5-cycle testing methodology for electric vehicles is still under development at the time of this final rule. This final rule will address 2-cycle and the derived adjustments to the 2-cycle testing, for electric vehicles. As 5-cycle testing methodology develops, EPA may address alternate test procedures. EPA regulations allow test methods alternate to the 2-cycle and derived 5-cycle to be used with Administrator approval.

(a) FTP or ''City'' Test

The proposed procedure for testing and measuring fuel economy and vehicle driving range for electric vehicles was similar to the process used by the average consumer to calculate the fuel economy of their personal vehicle, using the distance the vehicle can operate until the battery would be discharged to the point where it could no longer provide sufficient propulsive energy. For range testing, the distance used to calculate electrical consumption is defined as the point at which an electric vehicle cannot maintain the speed tolerances as expressed in 40 CFR 86.115–78. This distance would be measured and divided by the total amount of electrical energy necessary to fully recharge the battery. The resulting electrical consumption and range would be the raw test values used in calculating CAFE city and calculating fuel economy label city values.

Several commenters voiced concern over the test procedures associated with electric vehicles and the ongoing efforts in industry, specifically in SAE taskgroup SAE J1634, to address electric vehicle testing issues. SAE J1634 efforts include not only abbreviating the repetitive nature of the currently referenced version of SAE J1634 but also addressing the ''cold, fully charged start'' portion of EV testing and how this portion affects the range and fuel consumption. EPA may allow future SAE practices. Manufacturers may use test procedures other than the procedures described with prior Administrator approval.

The final stage of the electric vehicle FTP test procedure is the measurement of the electrical energy used to operate the vehicle. The end of test recharging procedure is intended to return the rechargeable energy storage system (RESS) to the full charge equivalent of the pre-test conditions. The recharging procedure must start within three hours after completing the EV testing. The vehicle will remain on charge for a minimum of 12 hours to a maximum of 36 hours. After reaching full charge and the minimum soak time of 12 hours, the manufacturer may physically disconnect the RESS from the grid. The alternating current (AC) watt-hours must be recorded throughout the charge time. It is important that the vehicle soak conditions must not be violated. The measured AC watt-hours must include the efficiency of the charging system. The measured AC watt hours are intended to reflect all applicable electricity consumption including charger losses, battery and vehicle conditioning during the recharge and soak, and the electricity consumption during the drive cycles. The AC integrated amp-hours are to be measured between the outlet and the Electric Vehicle Service Equipment. If there is no EVSE, for example in 120V charging, the amperage is to be measured between the outlet and the charger. Manufacturers may use voltage stabilizing equipment with prior Administrator approval.

The raw electricity consumption rate is calculated by dividing the above recharge AC watt-hours by the distance traveled before the end of the test criteria is reached. For electric vehicles that are not low powered, the end of test criteria is the point at which the vehicle can no longer maintain the speed tolerances as expressed in 40 CFR 86.115–78. Both the city consumption and city range procedures are as proposed in the NPRM with the above additions.

(b) Highway Fuel Economy Dynamometer Procedure or ''Highway'' Test

The Highway Fuel Economy Dynamometer Procedure or ''Highway'' Test actually consists of 2 cycles of the Highway Fuel Economy Driving Schedule (HFEDS). Similar to the FTP test procedure, the ''highway'' test will require procedures as described in SAE J1634 as published October 2002. The dynamometer procedures will be conducted pursuant to 40 CFR 600.111 with the exceptions that electric vehicles will run consecutive cycles of the HFEDS until the end of test criteria is reached. Subsequent HFEDS pairs may require up to 30 minutes of soak time between HFEDS pairs due to facility limitations. Between cycle pairs, the vehicle hood is to be closed and the cooling fans shut off. Between starts, the RESS is not to be charged.

Comments, specific to electric vehicle highway testing, included concern over the ''cold'' highway test. Conventional vehicles have no equivalent requirement to highway test from a ''cold start''. As with the FTP or ''city'' test, alternate ''highway'' test method procedures as described in SAE J1634 may be used with prior Administrator approval. The Administrator may approve alternative methods or test procedures to account for ''cold'' highway losses.

Both the highway consumption and highway range procedures are as proposed in the NPRM with the above additions. The recharging procedures following the highway testing are as proposed in the NPRM with the above additions from the recharging event following the ''city'' testing.

(c) Other EV Test Procedures

Commenters expressed concern over possible testing and measurement issues that may be of issue with emergent EV technologies. Due to the unforeseeable nature of possible issues of yet-to-be-

[102] 71 FR 77872, December 27, 2006.

developed EV technologies, the Agency requires a method of addressing possible future concerns in a timely manner. To address the rapidly evolving nature of some EV technologies, the Administrator may approve additional EV test procedures including SAE J1634 published after this notice.

(d) Charge Time

Several commenters voiced concern over the need for a procedure for measuring charge time. Charge time is meant to estimate the required time needed to bring the EV from ''empty'' or minimum usable battery energy to ''full'' or maximum usable battery energy. The ''empty'' or minimum usable battery energy would be the battery state of charge at the end of the range test. A vehicle that has completed the range and consumption test would be considered ''empty'' until it was recharged, provided no regenerative braking or other charging was allowed before the actual recharge procedure.

Defining the ''full'' or maximum usable battery energy state is required for charge time measurement. The ''full'' charge is the energy battery state of charge required to achieve the range as measured during the range tests above. Since vehicles may have electrical parasitic losses after the ''full'' charge is met, end of charge for the purposes of charge time may be less than the recharge and soak time associated with range and consumption testing. EPA may define charge time procedures as experience allows.

2. Plug-in Hybrid Electric Vehicles

(a) PHEV Test Procedure Rationale

Test procedures for plug-in hybrid electric vehicles (PHEV) are required to quantify some operation unique to plug-in hybrids. The PHEV test procedures in this rule use existing test cycles and test procedures where applicable. PHEV operation can be generally classified into two modes of operation, charge-depleting and charge-sustaining operation. Charge-depleting operation can be described as vehicle operation where the rechargeable energy storage system (RESS), commonly batteries, is being depleted of its ''wall'' charge. Charge-sustaining operation can best be described as conventional hybrid operation, where the energy from consumption of fuel by the internal combustion engine is directly or indirectly the source of charge or recharging of the RESS.

EPA has largely referenced SAE recommended practice SAE J1711, Recommended Practice for Measuring the Exhaust Emissions and Fuel Economy of Hybrid-Electric Vehicles, Including Plug-in Hybrid Vehicles, as published June 2010. EPA worked with stakeholders in developing SAE J1711 including manufacturers, Department of Energy, and the California Air Resources Board. EPA involvement in SAE J1711 was to help develop testing procedures that could be used as ''building blocks'' from which regulatory requirements could be determined.

Several commenters requested EPA expand the SAE J1711 references beyond just sections 3 and 4. EPA will reference additional sections for SAE J1711 but will refrain from referencing SAE J1711 in total. EPA has referenced SAE J1711 test procedures as required to fulfill regulatory requirements. For conditions not specifically addressed in this rule, where conflicts exist between SAE J1711 and 40 CFR Part 86, Part 86 shall apply.

As described above, charge-sustaining operation can best be described as conventional hybrid operation. Commenters to the proposed rule expressed concern in having different procedures for plug-in hybrid charge-sustaining testing than for conventional hybrid electric vehicles (HEV). The intent of the proposed rule was to test PHEVs in charge-sustaining mode the same as equivalent HEVs. Major differences in proposed PHEV charge-sustaining testing and HEV testing included RESS state of charge tolerances and RESS state of charge correction. This rule establishes the same exhaust test procedures for both HEVs and PHEVs while in charge-sustaining operation. This includes referencing Appendix C of SAE J1711 for net energy change correction. Manufacturers intending to use net energy correction methods will need prior Administrator approval. EPA may adopt state of charge (SOC) tolerances and net energy change (NEC) correction methods as testing experience develops.

For the purposes of fuel economy label values, PHEVs may continue to use the derived 5-cycle adjustment while in charge-depleting mode. Commenters voiced concern and asked for clarification over the method of applying the derived 5-cycle correction to charge-depleting label values. As clarification, the derived 5-cycle adjustment will be applied to the total city and total highway fuel economies, separately. The total fuel economies in charge-depleting mode include all of the fuels consumed, typically gas and electricity, as expressed in a miles per gallon of gasoline equivalent unit. Applying the derived 5-cycle correction to the gasoline and electricity consumption, in charge depleting mode, separately could lead to a larger adjustment than other single fueled vehicles since the 5-cycle correction is not linear with respect to fuel economy.

While in charge-sustaining mode, PHEV label value testing is subject to the same test procedures as conventional hybrid electric vehicles. This includes all the 5-cycle implications.

PHEVs must meet all applicable emissions standards regardless of RESS state of charge. Some commenters wanted EPA to average criteria pollutants over multiple modes of operation based upon projected fractions of driving in each respective mode. While this may be acceptable for CO_2 and fuel economy, averaging criteria pollutants over all modes of operation is not consistent with current emissions regulations. EPA will continue to consider the state of charge of a RESS as an adjustable parameter for the sake of emissions testing. EPA typically allows good engineering judgment in applying worse case emission testing criteria. This worse case testing insures all modes of vehicle operation are emissions compliant. It is the manufacturer's responsibility to insure vehicles are emissions compliant in all modes of operation. EPA may confirmatory test or request the manufacturer to provide test data for any required test cycle at any state of charge. For the purposes of emissions testing, EPA will start with the general assumption that charge-sustaining operation is worse case. Evaluation of fuel economy testing emissions may be used to change worse case emissions assumptions, including the assumption that worse case for emissions testing is charge-sustaining operation.

The Alliance of Automobile Manufactures, along with several of its members, expressed concern over the possibility of a ''double cold'' penalty while transitioning from charge-depleting to charge-sustaining operation during FTP testing. The concern was that the ''cold penalty'' could be the result of two circumstances.

One ''cold penalty'' could be shifting the cold engine start to the hot restart portion of the FTP. Currently, for the FTP, the hot start portion is weighted 57% and the cold start is weighted 43% of calculating the final emissions result. By shifting the cold start or multiple cold starts to the hot start phase, the Alliance argues that PHEVs are potentially held to a higher standard than conventional vehicles or conventional hybrids. EPA does not agree with this line of reasoning. The cold and hot start phases of the FTP are not only engine but also vehicle

conditions. By virtue of how PHEVs may operate, an engine cold start could indeed be moved to the hot start portion of the FTP or to any portion of any test cycle during mode transition. It is the manufacturer's responsibility to ensure the vehicle can pass the FTP emissions tests. One method manufacturers could employ would be to monitor the RESS SOC and idle the engine in order to light off the catalysts before any load is applied to the engine. A blended mode PHEV could potentially cycle the engine so little that the exhaust system could cool. Multiple cold starts, within one phase, and starts at vehicle speed represent real world concerns. Furthermore, an engine cold start in the hot start portion of the test would mean that the cold start portion of the test had no emissions. Zero emissions in the cold start phase would mitigate the cold start/hot start weighting of the FTP results.

The second ''cold penalty'' could be cold starting the engine at the very end of the stabilized portion of the cold start phase and then starting the engine again in the hot start phase with a nearly cold engine. Commenters had the similar concerns that a ''double cold'' start would hold PHEVs to a higher standard than other vehicles. Commenters argued that current conventional vehicle ''drive through'' their cold starts whereas a PHEV that starts late in the cold start phase would be similar to a conventional or conventional hybrid vehicle that was driven a very short distance and turned off, only to be restarted soon afterward. These commenters believed PHEVs would only undergo one cold start per trip, much like conventional vehicles, just that the test procedure technicalities may force a ''double cold'' that will likely not exist in the real world anymore than conventional vehicle ''double cold'' starts. EPA agrees that PHEVs would normally have only one cold start during typical continuous driving of 12 miles, which the FTP represents. To remedy this concern of PHEVs being held to driving cycle than results in more than the one typical cold start, this rule will allow manufacturers to substitute the charge-sustaining data for the second Urban Dynamometer Driving Schedule (UDDS), or the hot start test, for the second UDDS of charge-depleting ftp for emissions other than CO_2. Holding PHEVs to a ''double cold'' start may be increasing the stringency of the current emissions standard just as requiring conventional vehicles to pass current standards without an idle period or inserting a cold restart in the ftp to represent driveway or valet maneuvers would increase the stringency of the current emissions standard.

(b) PHEV Test Procedure and Calculations

(1) Charge-Depleting Operation—FTP or ''City'' Test and HFET or ''Highway'' Test

The EPA has incorporated by reference SAE J1711, as published in June 2010, chapters 3 and 4 for definitions and test procedures, where appropriate. For conditions not specifically addressed in this rule, where conflicts exist between SAE J1711 and 40 CFR Part 86, Part 86 shall apply. In this rule, where SAE J1711 is referenced, the June 2010 revision is assumed to be the referenced version. Commenters were concerned over an increased void rate of charge-depleting tests due to the length of repetitive cycles needed to finish the charge-depleting testing. To address this concern, this rule will adopt the speed tolerance violation section, 3.6.2, in SAEJ1711. Additional speed tolerance violations may be approved by the Administrator. The Administrator may also approve deviations outside of currently allowed ambient vehicle soak conditions to reduce the likelihood of voiding extended testing.

For the purposes of charge-depleting CO_2 and fuel economy testing, manufacturers may elect to report one measurement per phase (one bag per UDDS). Exhaust emissions need not be reported or measured in phases where the engine does not operate. Requiring exhaust emissions sampling during test cycles where the engine does not operate would increase void rate and possibly slow testing.

End of test recharging procedure is intended to return the rechargeable energy storage system (RESS) to a full charge equivalent to pre test conditions. The recharge AC watt-hours must be recorded throughout the charge time. The measured AC watt-hours are intended to reflect all applicable electricity consumption including charger losses, battery and vehicle conditioning during the recharge and soak, and the electricity consumption during the drive cycles. To capture all the losses, the AC amp-hours and voltage would be measured between the ''wall'' and the Electric Vehicle Service Equipment. Alternate recharge measurements may be approved by the Administrator.

Net Energy Change (NEC) tolerance is to be applied to the RESS to confirm charge-sustaining operation. The EPA is adopting the 1% of fuel energy NEC state of charge criteria as expressed in SAE J1711. The Administrator may approve alternate NEC tolerances and or state of charge correction factors.

Preconditioning special procedures are optional for traditional ''warm'' test cycles that are now required to test starting at full RESS charge due to charge-depleting range testing. If the vehicle is equipped with a charge-sustaining switch, the preconditioning cycle may be conducted per 600.111 provided that the RESS is not charged. Exhaust emission measurements are not required in preconditioning drives. Alternate vehicle warm up strategies may be approved by the Administrator. This will allow a method for starting ''warm'' test cycles with a fully charged battery.

(2) Hybrid Charge-Sustaining Operation—FTP or ''City'' Test and HFET or ''Highway'' Test

The EPA has incorporated by reference SAE J1711 Chapters 3 and 4 for definitions and test procedures, where appropriate. For conditions not specifically addressed in this rule, where conflicts exist between SAE J1711 and 40 CFR Part 86, Part 86 shall apply.

Commenters expressed the need for aligning test procedures between hybrids and PHEVs, while in charge-sustaining operation. The intent of this rule is to test hybrid and plug-in hybrids, while in charge-sustaining operation, in the same manner. This will in effect negate the requirement in 40 CFR 86.1811–04(n) that manufacturers must use ARB procedures in the document entitled California Exhaust Emission Standards and Test Procedures and Subsequent Model Zero-Emission Vehicles and 2001 and Subsequent Hybrid Electric Vehicles, in the Passenger Car, Light Duty Truck, and Medium-Duty Vehicle Classes. Therefore, this requirement will be deleted from the regulation.

NECtolerance, is to be applied to the RESS to confirm charge-sustaining operation. The EPA is adopting the 1% of fuel energy NEC state of charge criteria as expressed in SAE J1711. The Administrator may approve alternate NEC tolerances and or state of charge correction factors.

(3) Charge-Depleting Range Determination

Commenters were concerned that the charge-depleting range determination as proposed was not specific enough and could be prone to variation from ''false trigger'' electrical noise. To address commenter concern and due to recent testing experience, this rule references sections 6.1.3.1 and 6.1.3.2 of SAE J1711

for Actual Charge-Depleting Range (R_{CDA}) calculation.

Calculation of R_{CDA} using the referenced methods implies that there is no charge-depleting range for vehicles that cannot complete one test cycle in charge-depleting mode. This is consistent throughout this rule. There is no requirement or need, by EPA, to calculate charge-depleting ranges below one UDDS or one HFET for either blended mode or all-electric capable PHEVs.

3. Other Test Cycles

Several commenters voiced concern over applying SAE J1711 to test cycles other than the FTP and HFED. PHEV and electric vehicle testing over the SC03, US06, or Cold CO test cycles follow the same general procedure as the FTP and HFED. Applying possible 5-cycle calculations to produce charge-depleting fuel economy and CO_2 emissions is not required as the derived 5-cycle is allowed during charge-depleting mode. Methods to apply the 5-cycle calculation to PHEV charge-depleting testing require Administrator approval.

4. Test Tolerances

Commenters supported the flexibility of allowing increased state of charge tolerances and correction factors. As proposed, state of charge tolerance correction factors may be approved by the Administrator. RESS state of charge tolerances beyond the 1% of fuel energy as specified in SAE J1711 may be approved by the Administrator.

5. Mileage and Service Accumulation

Several commenters expressed concern over the minimum and maximum allowable test vehicle accumulated mileage for both EVs and PHEVs. Manufacturers claimed that, due to the nature of PHEV and EV operation, testing may require many more vehicle miles than conventional vehicles. Furthermore, electric motors may not receive the same benefit of vehicle mileage to fuel consumption. This rule will allow manufacturers to subtract non-engine operating miles from the vehicle mileage, with prior Administrator approval. The EV maximum accumulated mileage may also be extended with prior Administrator approval. The Administrator may approve additional or alternate maximum mileage and fuel economy correction.

6. Test Fuels

As proposed, electric vehicles and PHEVs are to be recharged using the supplied manufacturer method provided that the methods are available to consumers. This method could include the electricity service requirements such as service amperage, voltage, and phase. Commenters were supportive of the allowance for manufacturers to employ voltage regulators in order to reduce test to test variability with prior Administrator approval. Therefore, this rule will allow voltage regulators with prior Administrator approval, as proposed.

7. Charge Time

Plug-in hybrid electric vehicle and electric vehicles share many of the same requirements and concerns. This rule will use the same general charge time procedure for PHEVs as expressed above for electric vehicles.

N. Utility Factors

1. Utility Factor Background

Current PHEV designs use two types of energy sources: (1) An onboard battery, charged by plugging the vehicle into the electrical grid, that powers an electric motor, as well as (2) a conventional engine. Depending on how these vehicles are operated, they could, in any particular mode of operation, use ''wall'' or grid electricity exclusively, operate like a conventional hybrid, or operate in some combination of these two modes. For those metrics where a single, overall value is desired, a method is required to combine metrics from multiple modes of operation into a single value. The agencies proposed to use a utility factor (UF) approach for calculating these overall metrics. Most commenters agreed with the general approach of using UFs.

The new labels require overall metrics for 5-year fuel savings, annual fuel cost, CO_2 emissions, and the fuel economy and greenhouse gas rating. EPA has chosen to use the UF approach to calculate the overall values for these metrics.

EPA has worked closely with stakeholders including vehicle manufacturers, the Society of Automotive Engineers (SAE), the State of California, the Department of Energy (DOE), and others to develop an approach for calculating and applying UFs. UFs were developed using data from the 2001 Department of Transportation ''National Household Travel Survey.'' A detailed method of UF development can be found in the Society of Automotive Engineers (SAE) J2841 ''Utility Factor Definitions for Plug-In Hybrid Electric Vehicles Using Travel Survey Data,'' as published in September 2010. Where SAEJ2841 is referenced in this rule, the 2010 revision is assumed to be the referenced version. SAE documents can be obtained at *http://www.SAE.org.* By using a UF, it is possible to determine a weighted average of the multiple modes. For example, a vehicle that had a charge-depleting range that corresponded to a UF of 0.8 would indicate that an all-electric capable PHEV operates in an all electric mode 80% of the time and operates in hybrid mode using an engine the other 20% of the time. In this example, the weighted average fuel economy value and cost would be influenced more by the electricity use than the engine operation.

For the purposes of PHEVs, UF development makes several assumptions. Assumptions include: The first mode of operation is always electric assist or all electric drive, vehicles will be charged once per day, and future PHEV drivers will follow drive patterns exhibited by the drivers in the surveys used in SAE J2841. EPA acknowledges that current understanding of the above assumptions and the data upon which UFs were developed may change. Some commenters believed that these assumptions may change quickly; therefore, EPA may change the application of UFs in the light of new data.

2. General Application of Utility Factors

Utility factors can be applied cycle-specific (urban/highway) and with respect to fleet miles or to an individual's expected driving behavior.

Cycle-specific UFs portray the different driving behaviors of highway versus urban driving. This is to say that typical highway driving is generally at greater speeds and for greater distances than urban driving.

Fleet UFs weight driving behavior based upon miles traveled over a fleet of vehicles. The data used to develop fleet UFs are distance weighted. Distance weighting allows for a truer reflection in CO_2 inventories and corporate average fuel economies than an individual UF.

The data used in developing individual UFs equally weight driver behavior data regardless of distance travelled over several days. Individual UFs would be used to project an ''average consumer's'' fuel economy or vehicle CO_2 emissions, whereas the fleet UF would project the fuel economy or vehicle CO_2 emissions of the average mile travelled. In summary, fleet utility UFs are better for estimating fleet fuel economy and CO_2 inventories, and individual UFs are better for estimating an individual's expectation of fuel economy.

Since cycle-specific fleet UFs best predict fleet CO_2 emission inventories, cycle-specific fleet UFs will be used in calculating PHEV CO_2 emissions for compliance and non-dual fueled PHEVs CAFE calculations. CAFE dual fueled calculations and definitions are described in Title 49 United States Code, chapter 329. In chapter 329, a dual fueled vehicle fuel economy is the 50/50 harmonic average of the fuel economy from each mode of operation.

Since individual UFs best predict an individual's experience, individual UFs, specifically multi-day individual UFs, will be used in calculating the combined MPGe label value reflected in the fuel economy and greenhouse gas rating on the label. Some commenters preferred the use of cycle-specific individual multi-day UFs for this purpose. However, EPA could not mathematically justify applying the multi-day data to both the cycle-specific approach and the 55/45 city/highway average used in calculating combined label MPGe values; individual UFs do not lend themselves to the 55/45 city/highway split. In addition, the multi-day individual utility factors (MDIUFs) are listed in SAEJ2841, whereas only a calculation method for the cycle-specific MDIUF is listed in SAEJ2841. The fact that only combined MPGe values will be reflected on the label also limits the differences between MDIUFs and cycle-specific MDIUFs. This assessment was shared by some commenters. Therefore, MDIUFs will be used for all FE label applications that require the use of UFs.

3. Using Cycle-Specific Utility Factors

Commenters requested that UFs and examples of their use be in the final rule. This rule contains the calculated UFs for each application. As proposed, cycle distance is used in calculating UFs rather than distance driven. In the case of derived 5-cycle adjusted values, UFs are adjusted appropriately to reflect the increased fuel consumption and decreased charge-depleting range. Detailed calculation examples and work sheets for each required value may follow this rule in guidance.

4. Low-Powered Vehicles

Since PHEVs shall use UFs assigned by test cycle length, a provision is needed for low-powered vehicles that cannot drive the entire test cycle distance. Using assigned UFs for low powered vehicles could over-estimate UFs. Due to the possible significant difference in cycle versus driven distances, PHEVs using the low-powered vehicle provision in 40 CFR 86.115–78(b)(4) shall use the provisions for low-powered vehicles as written in this rule.

IV. Final Label Designs and Format

This section addresses the agencies' final decisions on the fuel economy and environment label designs, describing the relative placement of the elements on the label and discussing how the agencies have chosen to incorporate the decisions described in Section III. We show designs for gasoline, diesel, and flexible-fuel vehicles and for CNG, electric, plug-in electric hybrid, and fuel cell vehicles. We note that, if vehicle technologies come onto the market that are not addressed by any of these final labels, the agencies will use their existing authority to develop labels as needed and, to the extent possible, will make those labels consistent with those being finalized today.

All descriptions in this section are meant to reflect the label designs as illustrated; if in question, please refer to the illustrated labels for clarification. All label designs are specific as shown; that is, labels in use on actual vehicles are to reflect the label elements, colors, shape, size, wording, and graphics, as shown and without change, unless otherwise noted. It is important to note that although all of the label designs shown in this section make use of color, this **Federal Register** notice is capable of only displaying gray-scale versions. Full color versions can be viewed and/or downloaded from the docket (search for docket number EPA–HQ–OAR–2009–0865141 or docket number NHTSA–2010–0087 at *http://www.regulations.gov*) or from the agencies' Web sites where all information related to this action will be posted (*http://www.epa.gov/fueleconomy/regulations.htm and http://www.nhtsa.gov/fuel-economy*). To the extent possible this section will describe the use of color on the labels, but interested parties should view the color versions to understand the full effect of the label designs. In addition, the labels published below may be smaller than the minimum size required by the final regulations.

A. Label Size and Border

Each label will have a minimum size requirement of 4.5 inches tall by 7 inches wide, identical to the minimum size requirements for the current fuel economy label. Labels will have a black border that is consistent in relative size across all labels. This content includes, in the upper border, elements that identify the label and the vehicle type: from left to right, the acronyms ''EPA'' and ''DOT'', stacked as shown; the label title, ''Fuel Economy and Environment'' and a descriptor of the vehicle fuel type, using both an icon and specific wording—*e.g.,* a fuel pump icon and the words ''Gasoline Vehicle.'' This latter element—the vehicle fuel type icon and descriptor—will have a blue rather than black background, to draw attention to this variable element for the viewer.

The lower border includes, starting at the left, the statement, ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle,'' thus continuing a tradition of having a statement on the label informing the buyer that the values on the label are not guaranteed, and reasons why they might vary. This is followed by a statement about the mileage and fuel price assumptions used to make the cost estimates on the label; the fuel price assumptions will be specific to the fuel type(s) and to the model year.[103] The next sentence gives the mileage and 5-year fuel cost for the average vehicle, which is important context for the 5-year savings or cost value shown in the right-hand corner of the label. For those vehicles that are classified as dual-fuel vehicles for the purposes of CAFE, the fact that they are dual-fuel will also be stated in this portion of the label. The next sentence defines MPGe. The final sentence states, ''Vehicle emissions are a significant source of climate change and smog.''

Beneath this text, the label border prominently displays ''fueleconomy.gov,'' the government Web site that consumers can visit to obtain more information about the values on the label and to compare those values among vehicles, and a brief statement describing the function of the Web site, ''Calculate personalized estimates and compare vehicles.'' This Web site name and statement takes the place of and serves the same purpose as the former statement on the label, which informed the public where they could obtain copies of the Fuel Economy Guide to compare vehicles.[104] The right end of the lower border includes the vehicle-specific QR code for use with smartphones, which, when scanned, will reach the same Web site. Finally,

[103] As with the current fuel economy label, EPA will obtain the projected prices for all fuels from the Energy Information Administration's Short-Term Energy Outlook prior to the start of the model year, and will issue the values to be used on the label via manufacturer guidance. Values on the sample labels in this document are for illustrative purposes only.

[104] 49 U.S.C. 32908(b)(1)(D) requires that the label have ''a statement that a booklet is available from the dealer to assist in making a comparison of fuel economy * * *'' This booklet is now made available primarily through online access, where it can be used directly or downloaded and printed.

the lower border includes the seals of the agencies involved in providing this information to the public: EPA, DOT, and DOE.

B. Upper Box

The upper box of the label contains the information the agencies have determined have the most meaning to and importance for the public. Key elements from the current label are grouped together on the left, and new elements are primarily on the right.

Specifically, the upper left position displays fuel economy [105]; based on our consumer research, the agencies believe that this statutorily required metric is the most sought after and used by the public and, thus, have chosen to place it in the most prominent position on the label. In a departure from the current fuel economy label—which emphasizes separate city and highway fuel economy values—this label emphasizes the combined city/highway value, in recognition of the additional information on the label which is competing for both physical and cognitive space. The label retains the city and highway fuel economy values in smaller font near the larger combined value, to provide continuity with the current label and in recognition of consumer feedback that separate city and highway fuel economy values may be useful if the consumer believes their driving is more weighted toward one or the other. Text shows the range of fuel economy values of the vehicle's comparable fuel economy class, in accordance with the EPCA requirement, as well as the highest fuel economy value among all vehicles.[106] Labels for FFVs will include the clarifying statement, ''Values are based on gasoline and do not reflect performance and ratings based on E85.'' The upper left corner also provides a new but related metric, the fuel consumption value. We chose to situate fuel consumption near fuel economy to emphasize the relationship between these two values and help consumers begin to understand this new fuel consumption metric. Those vehicles that are subject to the gas guzzler tax [107] will include the dollar value of that tax and the words ''gas guzzler tax'' next to fuel consumption value.

This portion of the label has a different format for vehicles that have two modes of consuming energy, such as plug-in hybrid electric vehicles. For these vehicles, the energy use of the first (charge-depleting) mode is conveyed separately from the energy use of the second (charge-sustaining) mode. These values are coupled with the likely cruising range of the first mode on a full charge, displayed on the driving range bar just below these values. Each mode contains the combined city/highway MPG or MPGe value, the fuel consumption value(s), and a title describing the fuel type (*e.g.,* ''Electricity,'' ''Electricity + Gasoline,'' ''Gasoline Only'') and the appropriate fuel type icons. We believe that this combination of information conveys in the most succinct and accurate way both the energy use that the consumer can expect, the fuels needed to achieve those values, and comparative MPG and MPGe metrics. Finally, the time needed for a full charge will be displayed near the MPGe for the first (charge-depleting) mode, since charging is linked directly to the energy consumption in the first mode.

For those labels displaying driving range, the range bar graphics will be placed directly below the fuel economy and fuel consumption values. This placement was chosen because of the correlation between range and energy use and in recognition of the significant public interest in range for advanced technology vehicles. All PHEV labels show an all electric range value. For those PHEVs with no blended operation (*i.e.,* electricity plus gasoline operation), the phrase all electric range is on the driving range bar and the all electric range numerical value is just below the appropriate point on the driving range bar. For those PHEVs with blended operation, the phrase ''All electric range = ____ miles'' is just below the driving range bar, and the total range for electricity plus gasoline operation is shown on the driving range bar. For vehicles that utilize electricity, charge time is also placed in the left portion of the upper box.

The right side of the upper box contains the five-year fuel cost saving value, in a relatively large size, to introduce this new metric in a way that will maximize the opportunity for it to be recognized and used.

C. Lower Box

The lower left portion of the label provides the annual fuel cost estimate, which, like fuel economy, is contained on the current label as required by EPCA.

The lower right portion of the label contains the slider bars that consumers can use to determine the relative fuel economy and environmental ratings of a vehicle. The fuel economy and greenhouse gas rating slider bar, discussed above in Section III.C., is placed on the left.. This slider bar conveys the estimated fuel economy and tailpipe greenhouse gas emissions of the vehicle relative to all new vehicles, in accordance with the EISA requirement.[108] The fuel economy and greenhouse gas ratings are grouped on a single slider bar because they are closely related to each other and the agencies believe that fewer slider bars reduce the risk of confusion and information overload.

For most vehicles, including all gasoline vehicles, the fuel economy and greenhouse gas ratings will be the same and will share a single marker on the slider bar. Some non-gasoline vehicles may have slightly different fuel economy and greenhouse gas ratings, and in these cases two different markers will be used. Immediately below the fuel economy and greenhouse gas rating will be text giving the grams CO_2 per mile tailpipe value for the vehicle, the lowest tailpipe CO2 gram per mile value among all vehicles. EVs will also include the statement, ''Does not include emissions from producing electricity.'' Vehicles fueled without grid electricity will include the statement, ''Producing and distributing fuel also create emissions; learn more at fueleconomy.gov.'' For PHEVs, the text ''& electricity'' will be added after the word ''fuel.''. This statement was added in response to comments that consumers may be interested in learning more about vehicle upstream emissions impacts, and in order to facilitate potential harmonization with the California Air Resources Board's Environmental Performance Label.

The right portion of the lower part of the label contains the relative one-to-ten slider bar for tailpipe emissions of smog-forming ''other emissions'' pollutants.

D. Example Labels

Note: Example labels do not represent real vehicles or the numerical values to be included on any specific label.

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[105] Fuel economy is displayed as MPG for liquid fuels and MPGe for non-liquid fuels.

[106] 49 U.S.C. 32908(b)(1)(C).

[107] 40 CFR 600.314.

[108] 49 U.S.C. 32908(g)(1)(A)(ii).

Figure IV-1. Gasoline Vehicle

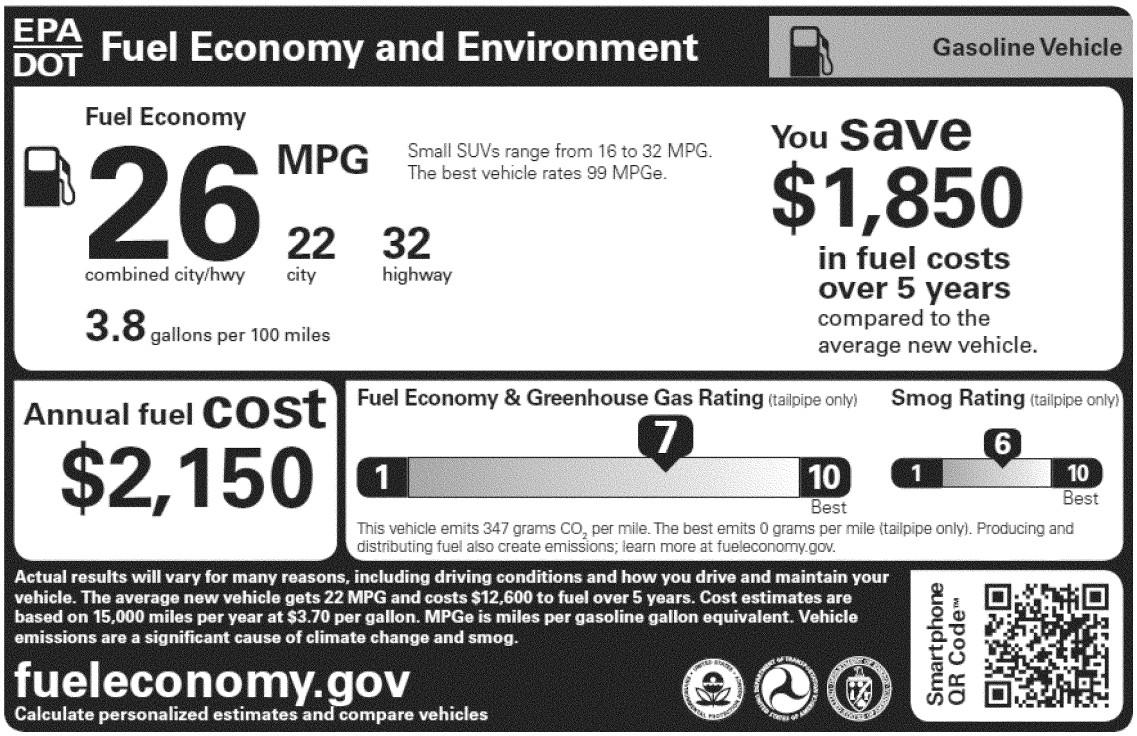


Figure IV-2. Flexible Fuel Vehicle: Gasoline-Ethanol (E85) Without Driving Range

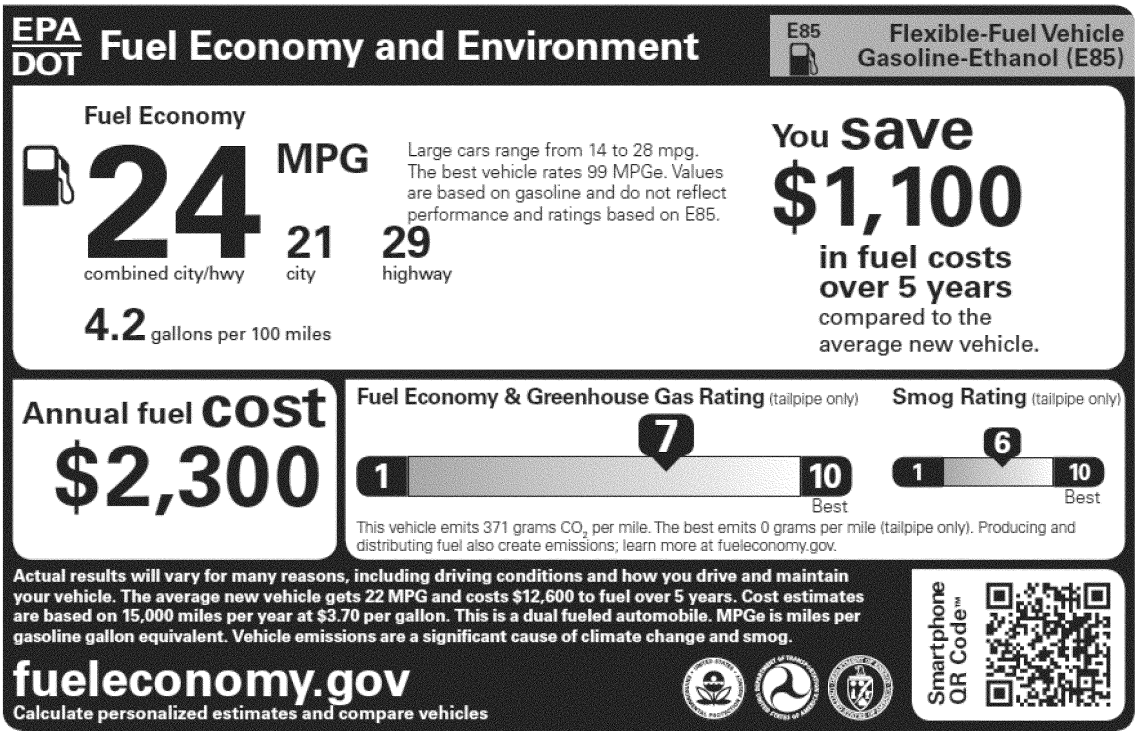


Figure IV-3. Flexible Fuel Vehicle: Gasoline-Ethanol (E85) with Optional Driving Range

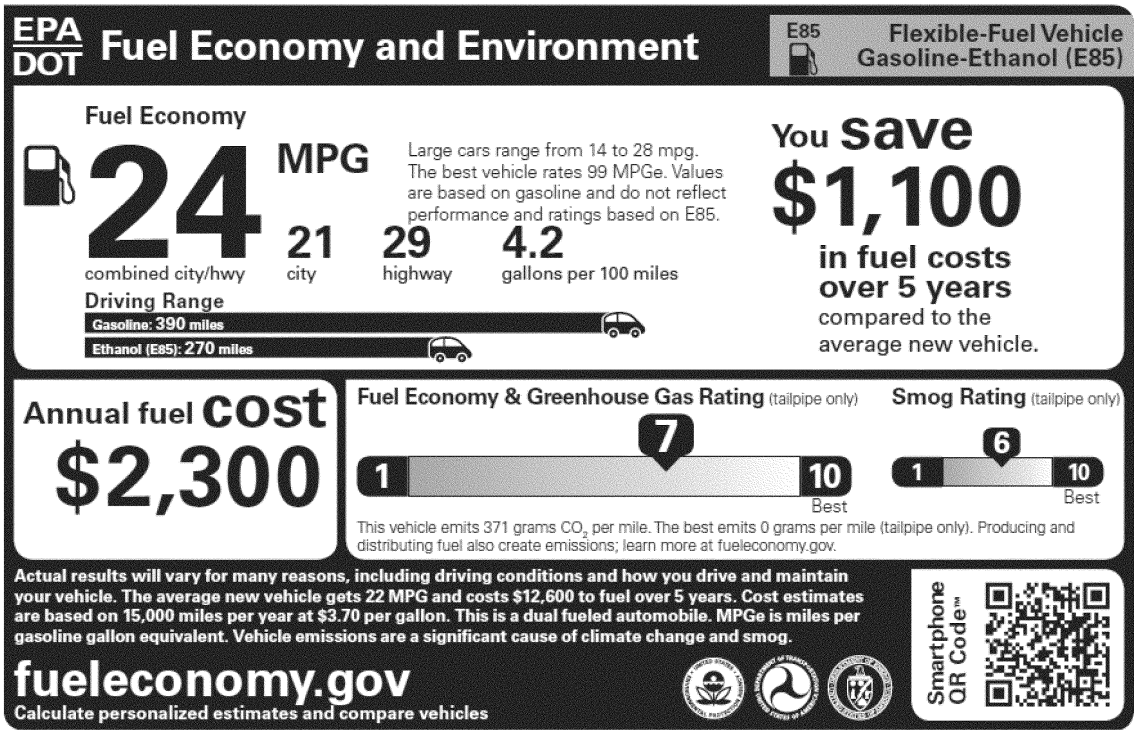


Figure IV-4. Diesel Vehicle

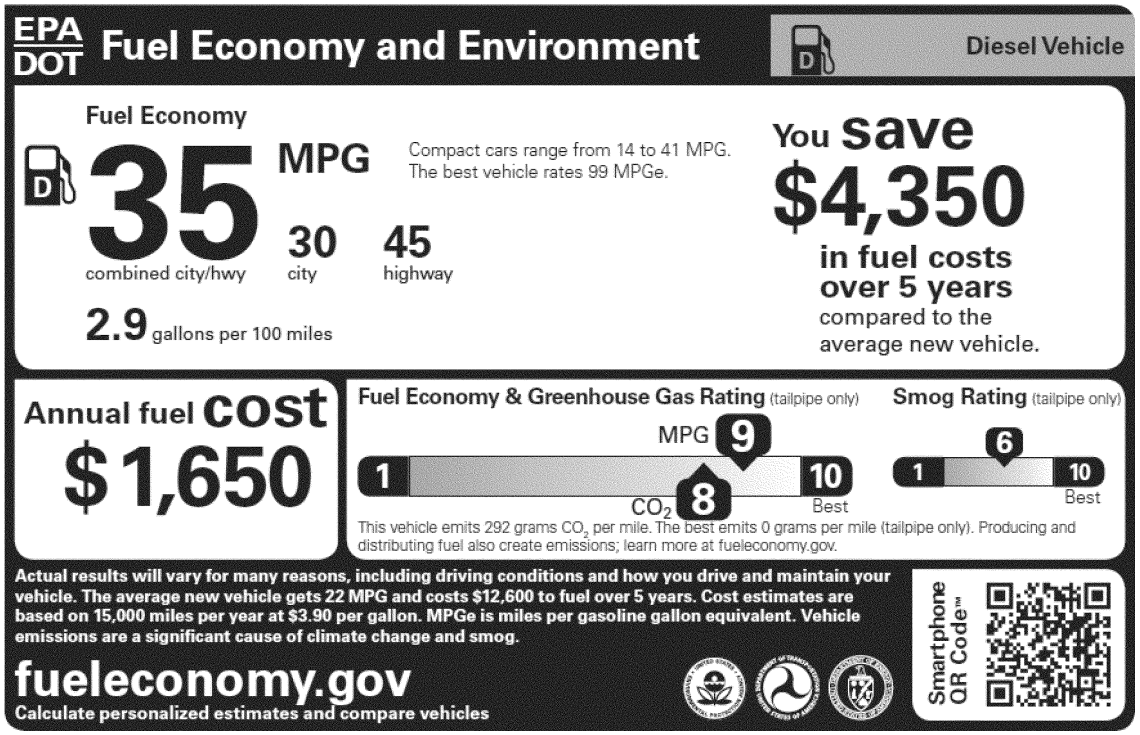


Figure IV-5. Compressed Natural Gas Vehicle

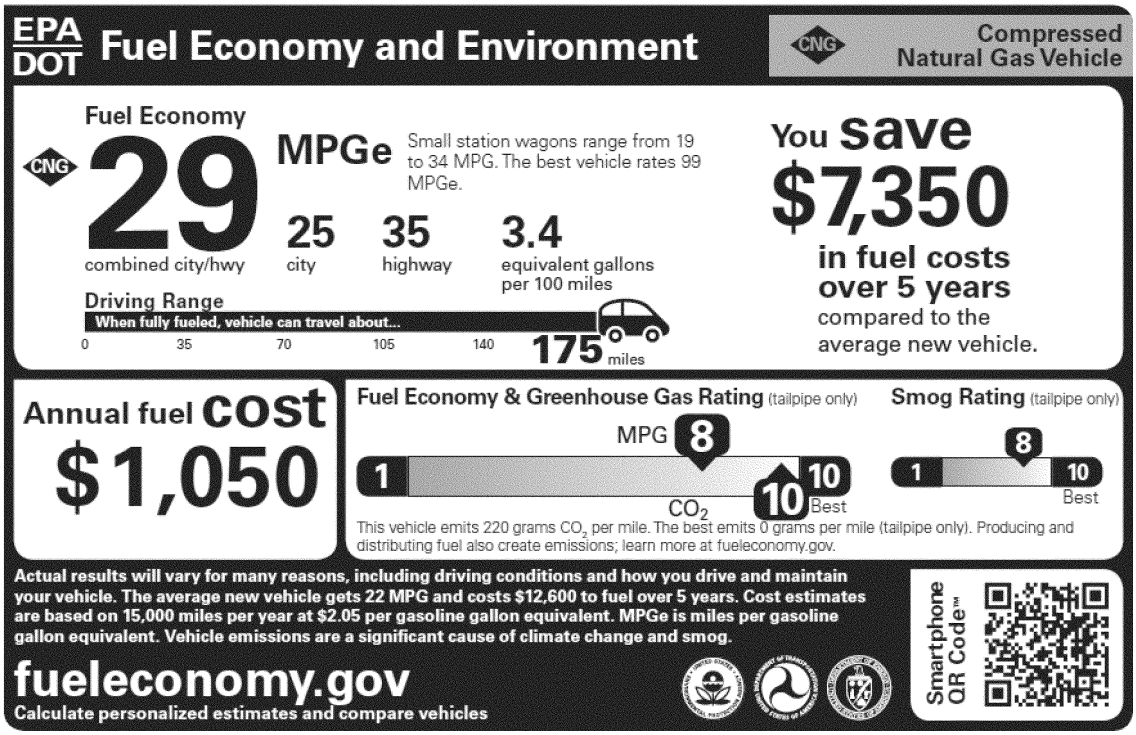


Figure IV-6. Plug-In Hybrid Vehicle: Electricity Gasoline (Series PHEV)

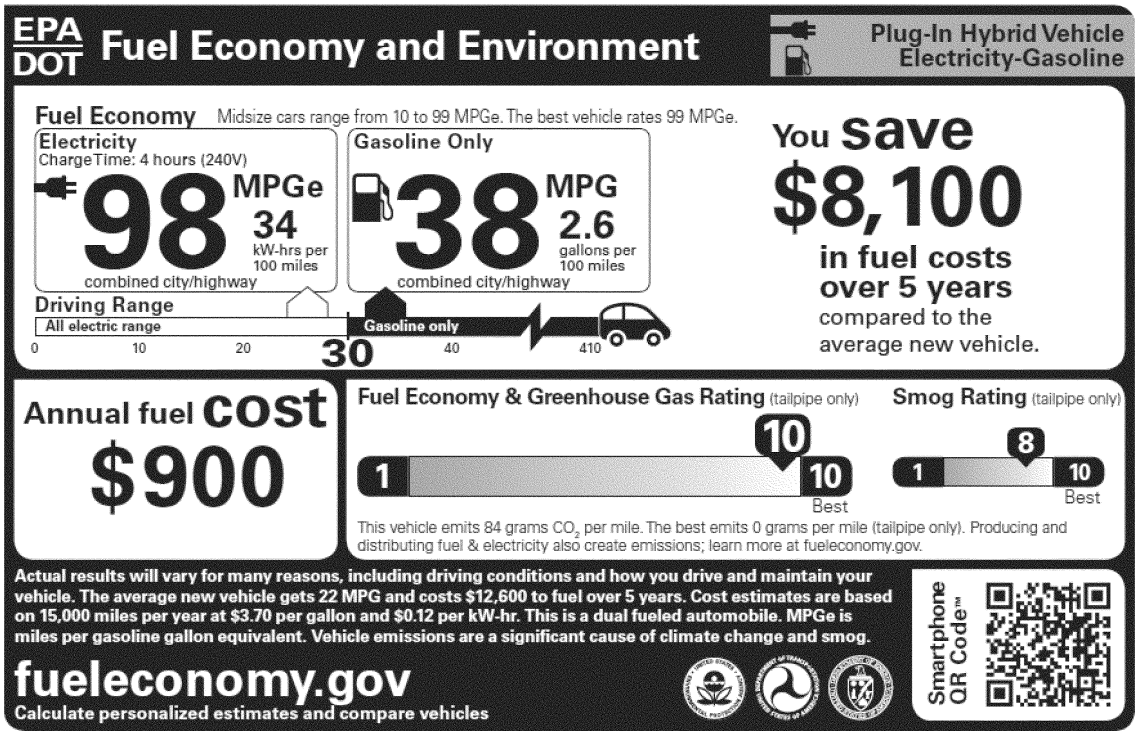


Figure IV-7. Plug-In Hybrid Vehicle: Electricity Gasoline (Blended PHEV)

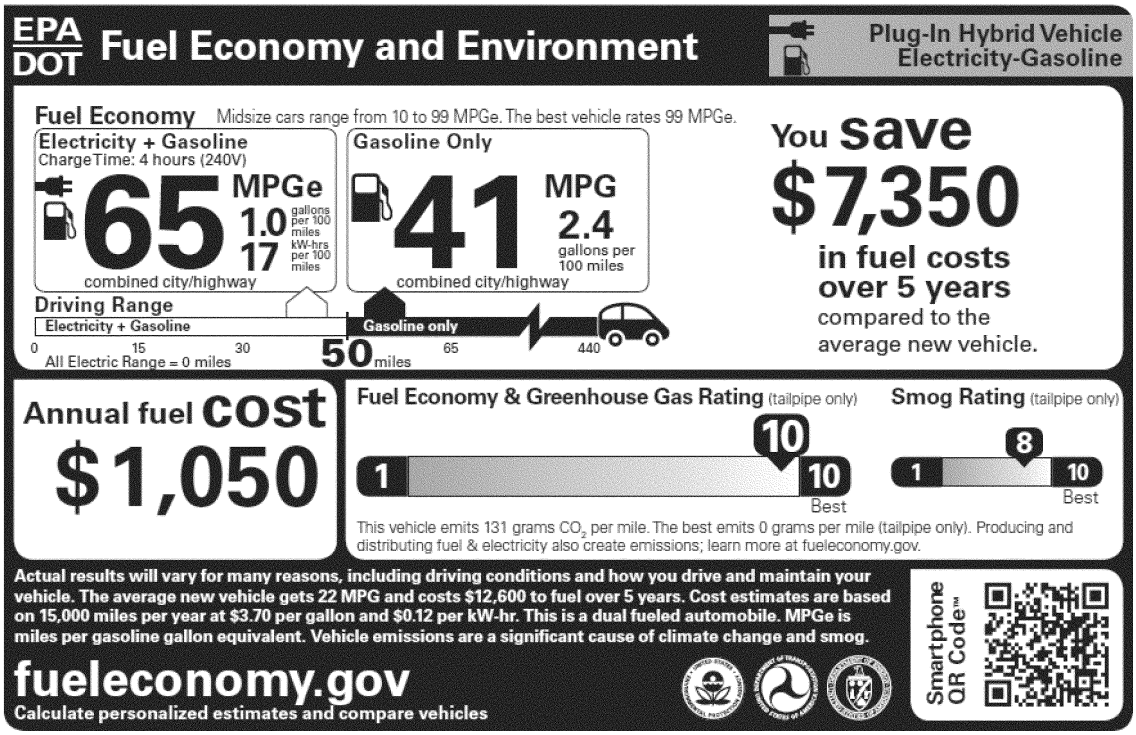


Figure IV-8. Electric Vehicle

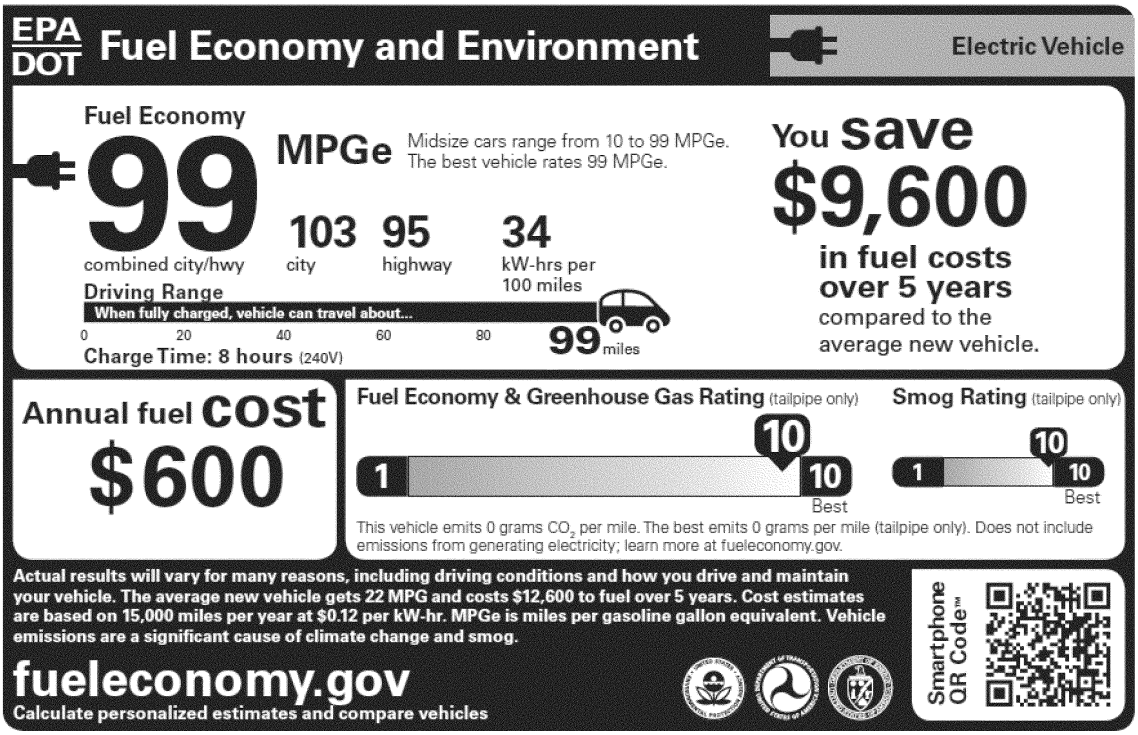


Figure IV-9. Hydrogen Fuel Cell Vehicle

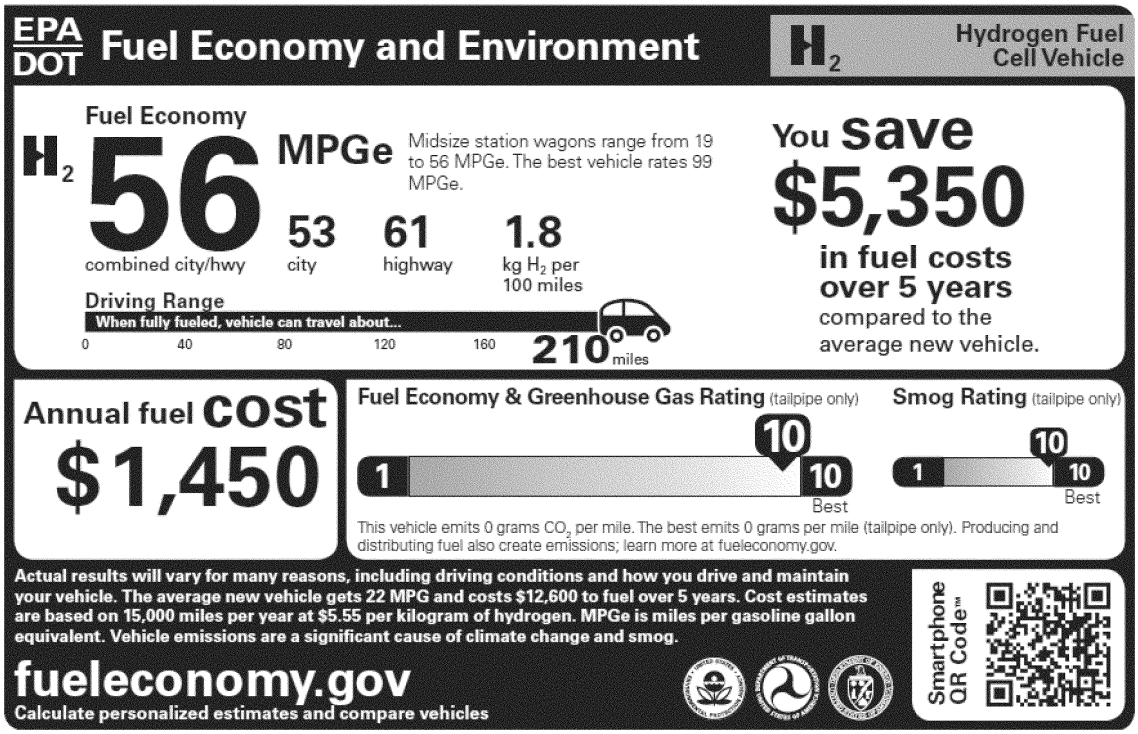
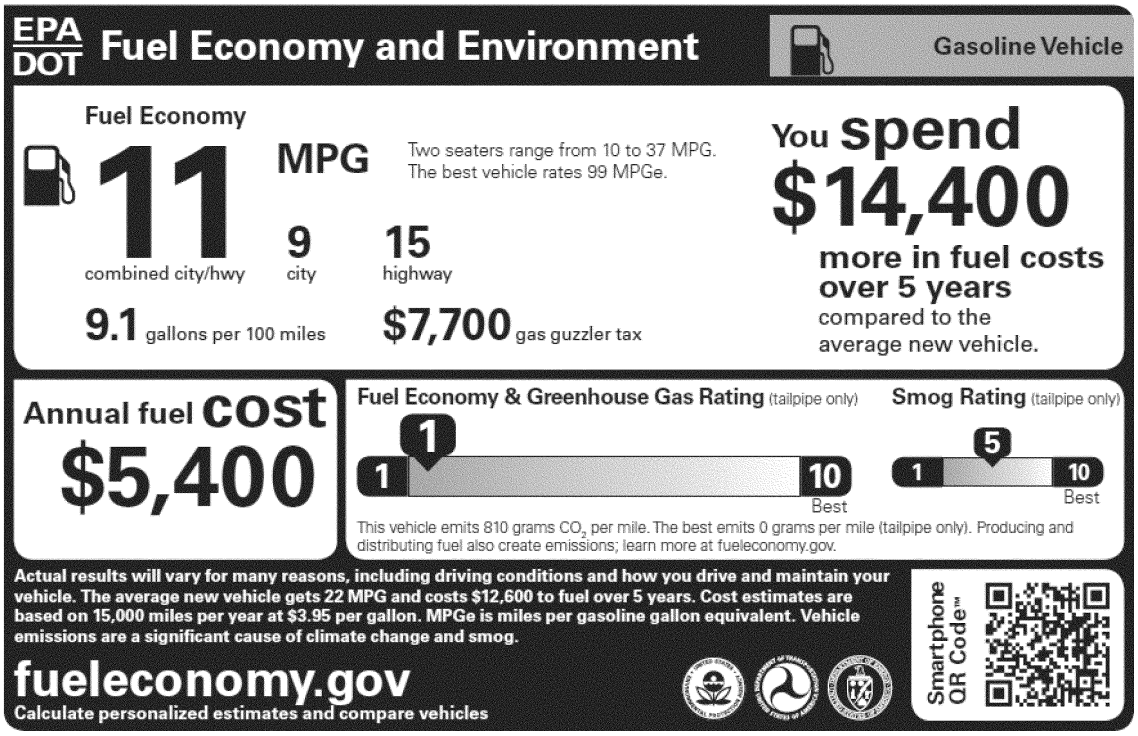


Figure IV-10. Gasoline Vehicle with Gas Guzzler Tax



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V. Additional Related EPA Actions

A. Comparable Class Categories

EPCA requires that the label include the range of fuel economy of comparable vehicles of all manufacturers.[109] EPA's comparable class structure provides a basis for comparing a vehicle's fuel

[109] 49 U.S.C. 32908(b)(1)(C).

economy to that of other vehicles in its class.[110] The definitions of vehicle classes were last revised by EPA's 2006 labeling final rule. That action required two specific changes to the vehicle class structure. Separate new classes were added for sport utility vehicles (SUVs) and minivans (these were previously included in the Special Purpose Vehicle category), and the weight limit for Small Pickup Trucks was increased from 4,500 pounds gross vehicle weight rating (GVWR) to 6,000 pounds GVWR. These were non-controversial changes that were generally seen as a move to keep the class structure as current as possible given the changing vehicle market. The resulting structure is one that contains nine car categories, five truck categories, and a ''special purpose vehicle'' category. It should also be noted that the EPA-defined vehicle classes are used only to provide consumer information about fuel economy and serve no other regulatory purpose.

Consistent with the distinction currently made between small and large pickup trucks, EPA proposed to divide the SUV class into small and large SUVs. We do not believe that it is appropriate, for example, to include a Toyota RAV4 in the same class as a Toyota Sequoia, or a Ford Escape in the same class as a Ford Expedition. Starting with the 2013 model year the single SUV category currently described in the regulations is replaced by the two following proposed categories:

- Small sport utility vehicles: Sport utility vehicles with a gross vehicle weight rating less than 6,000 pounds.
- Standard sport utility vehicles: Sport utility vehicles with a gross vehicle weight rating of 6,000 pounds up to 10,000 pounds.

Although the standard pickup truck class only goes up to 8,500 pounds GVWR, SUVs between 8,500 and 10,000 pounds GVWR are defined as medium-duty passenger vehicles, and they are subject to fuel economy labeling starting with the 2011 model year.

EPA received generally favorable comments regarding this proposed change to the class structure and is finalizing these provisions as proposed.

B. Miscellaneous Amendments and Corrections

EPA proposed a number of non-controversial amendments and corrections to the existing regulations. These received essentially no attention in the public comments. EPA is thus finalizing these provisions essentially as proposed.

First, we are making a number of corrections to the recently required regulations for controlling automobile greenhouse gas emissions.[111] These changes include correcting typographical errors, correcting some regulatory references, and adding some simple clarifications. Some of these changes are made to regulatory sections in 40 CFR Part 86, which does not include provisions related to labeling. For convenience we have included the table below identifying those changes made in 40 CFR Part 86. Similar corrections were also made throughout sections in 40 CFR Part 600, but many of these sections are integrated with the labeling calculations and provisions and less amenable to calling out in a table. For example, errors in the 5-cycle carbon-related exhaust emissions (CREE) calculations were corrected in 600.114, but at the same time, for labeling purposes, this section of the regulations was revised to enable the calculation of 5-cycle CO_2 values. Similarly, a rounding error is corrected in 600.207 while that section is also revised to include requirements for 5-cycle CO_2 calculations. The calculations in 40 CFR Part 600 have increased dramatically in complexity recently, and for that reason manufacturers should carefully evaluate the equations and calculations and ensure that they are using the appropriate and corrected versions. In addition to calculating model type MPG values for CAFE (two cycle) and labeling (five cycle), the same must now be done for CREE (two cycle) and label CO_2 (five cycle).

TABLE V–1—TABLE OF NON-SUBSTANTIVE AMENDMENTS TO 40 CFR PART 86 GREENHOUSE GAS PROGRAM

Regulatory Reference	What was changed	Reason for change
Part 85:		
85.1902(b)(2)	Inserted the words ''greenhouse gas''	To clarify the applicability of the provisions of the paragraph.
Part 86:		
86.165–12(d)(4)	Inserted a sentence allowing the use of a constant velocity sampling system to measure CO_2.	This is a recognized and viable option for CO_2 measurement that was not included in the GHG final rule.
86.1818–12(b)(3)	Inserted language aligning the EPA definition of ''manufacturer'' with the NHTSA definition.	To ensure that manufacturers are treated identically by EPA and NHTSA programs.
86.1818–12(c)(1)	Inserted the words ''full useful life'' in three locations.	To clarify that CO_2 fleet average standards are full useful life standards.
86.1818–12(d)	Changed ''600.113–08(g)(4)'' to ''600.113–12(g)(4)''.	Reference was incorrect.
86.1823–08(m)(2)(iii) and (m)(3)	Inserted the parenthetical ''(or derived from)'' in three locations.	Resolves a problem where the existing regulations require the use of potentially inappropriate DFs (*e.g.,* where an additive NO_2 DF might be greater in magnitude than the N_2O test result to which it is applied).
86.1841–01(a)(3)	Inserted the words ''full useful life''	To clarify that CO_2 certification standards are full useful life standards.
86.1848–10(c)(9)(i)	Changed reference ''86.1865–12(k)(7)'' to ''86.1865–12(k)(8)''.	Reference was incorrect.
86.1865–12(a)(1) and (d)	Changed ''86.1801–12(j)'' to ''86.1801–12(j) or (k)''	Reference was incomplete.
86.1865–12(k)(7)(i)	Changed ''(k)(4)'' to ''(k)(4) and (k)(5)''	Reference was incomplete.
86.1865–12(k)(8)(iii)	Changed references to paragraph (k)(7) to refer to paragraph (k)(8).	Reference was incorrect.

[110] 40 CFR 600.315–08.

[111] 75 FR 25324, May 7, 2010.

TABLE V–1—TABLE OF NON-SUBSTANTIVE AMENDMENTS TO 40 CFR PART 86 GREENHOUSE GAS PROGRAM—Continued

Regulatory Reference	What was changed	Reason for change
86.1867–12(a)(1)(iii)(A)	Removed and reserved the contents of this paragraph.	Requirement to use actual sales is not required under Pathway 1, and in all other cases the manufacturer should track vehicles produced and delivered for sale.
86.1867–12(a)(3)(iv)(A)	Inserted the words ''California and'' before the text ''the section 177 states''.	Statement should refer to California and the section 177 states, not just the section 177 states.
86.1867–12(a)(3)(iv)(F)	Deleted the sentence ''Section 600.510–12(j)(3) of this chapter shall not apply.''.	Statement was not valid and referenced a non-existent paragraph.
86.1867–12(a)(3)(vi)	In the definition for CO_2 Credit Threshold changed the reference to ''(a)(3)(vi)'' to ''(a)(3)(iv)''.	Reference was incorrect.
	In the definition of Manufacturers Sales Weighted Fleet Average CO_2 Emissions changed the reference to ''(a)(3)(vii)'' to ''(a)(3)(v)''.	Reference was incorrect.
	Inserted the words ''California and'' before the text ''the section 177 states * * *''.	Statement should refer to California and the section 177 states, not just the section 177 states.
86.1867–12(a)(4)	Inserted the words ''California and'' before the text ''the section 177 states * * *''.	Statement should refer to California and the section 177 states, not just the section 177 states.
86.1867–12(b)(2)	Struck existing text in paragraph (b)(2) and replaced with new text.	Corrected an error where the GHG final rule inadvertently finalized incorrect language that was inconsistent with the proposal and the intent stated in the preamble to the final rule.
86.1867–12(d)(1)	Changed ''Administratory'' to ''Administrator''	Misspelled word.

Second, we are correcting an oversight from the 2006 labeling rule regarding the applicability of testing requirements to independent commercial importers (ICIs). Currently several vehicle categories (dedicated alternative fuel, dual fuel while operating on alternative fuel, and MDPVs) are exempted from having to perform full 5-cycle fuel economy testing.[112] These categories are allowed to use the ''derived 5-cycle'' method, whereas other vehicles must use data from all five test cycles at certification to perform an evaluation that determines whether the test group can use the derived 5-cycle method or whether they must complete full 5-cycle testing. The reason for exempting these vehicles is that the evaluation required at emissions certification requires the use of all 5 cycles as run for emissions certification, but these categories are not subject to the SFTP requirements, and thus such vehicles do not perform two of the five test procedures (the US06 high speed/acceleration test and the SC03 air conditioning test). Thus when EPA required the 2006 label rule we recognized that these categories would not have the data required to perform the 5-cycle fuel economy evaluation, and we decided to exempt them from 5-cycle fuel economy testing. However, this same exemption should have been applied to ICIs. Like the vehicle categories noted above, vehicles imported by ICIs are not required to perform the SFTP emission tests and thus also will not have the necessary data to perform the 5-cycle fuel economy evaluation. Therefore, we are extending the allowance to use the derived 5-cycle method to ICIs.

Third, we are clarifying the altitude applicability of evaporative emission standards. This clarification is needed in part because of an error that was made in the rulemaking requiring greenhouse gas emission standards for light-duty vehicles and trucks, and in part because the original language was found to lack sufficient clarity. Revisions to the regulations in 86.1810–09 to accommodate greenhouse gas provisions unintentionally eliminated a phrase regarding the high altitude applicability of the ''Tier 2'' evaporative emission standards.[113] The omission of this phrase was pointed out by auto manufacturers after the greenhouse gas rulemaking was finalized. Upon further review of the issue, EPA concluded that simply re-inserting the omitted language did not sufficiently improve clarity, since the original structure of the regulatory language as required in the 2007 rulemaking was unclear as well.[114] Simply stated, the intent of the language finalized in the 2007 rulemaking (before clarity was further confounded by the 2010 greenhouse gas rulemaking) was to state that the evaporative standards in 86.2011–09(e) apply at low altitude only, and the ''Tier 2'' standards in 86.2011–04(e) continue to apply at high altitude for the 2009 and later model years. Unfortunately, because of the construction of the regulations and the way the model year applicability of section references work (see 40 CFR 600.004–77), it is unclear whether the reference in the deleted statement to 86.1811–04(e) is static or dynamic. In most cases, when a section has been superseded (as is the case for 86.1811–04) we expect that the more recent section (*i.e.,* 86.1811–09) is the one that should be used. However, in this case the intent was that the reference remain static, referring not to the evaporative emission standards that took effect in the 2009 model year, but to the standards that took effect in the 2004 model year. Basically the 2004 ''Tier 2'' standards were promulgated as ''all-altitude'' standards, but were superseded at low altitude by the 2009 standards, thus leaving the 2004 standards in place at high altitude. We believe we have appropriately clarified the regulations to reflect the original intent.

Fourth, we are taking steps to further clarify the regulatory language. This involves removing several sections that apply only for model years before 2008 and moving or combining several of the remaining sections to provide a clearer organization. We are also being more careful with regulatory references pointing to other sections within 40 CFR Part 600 and to sections in 40 CFR Part 86. This largely addresses the concern that regulatory sections numbered for

[112] See 40 CFR 600.115–08.

[113] The phrase, which reads''Tier 2 evaporative emission standards apply at high altitude conditions as specified in § 86.1810–01(f) and (j), and § 86.1811–04(e).'', can be found in the originally promulgated regulations at 72 FR 8562 (February 26, 2007). The language as modified by the light-duty greenhouse gas rulemaking can be found at 75 FR 25686 (May 7, 2010) and in the Code of Federal Regulations at 40 CFR 86.1810–09(f).

[114] 72 FR 8428 (February 26, 2007).

certain model years can cause references to be incorrect or misleading over time. We are relying on the rounding convention as specified for engine testing in 40 CFR Part 1065. Similarly, we are relying on the hearing procedures specified in 40 CFR Part 1068. These changes allow us to centralize provisions that have general applicability to support our effort to have a consistent approach across programs. The regulations also include a streamlined set of references to outside standards (such as SAE standards). We are also including the most recent updates for the ASTM standards we reference in 40 CFR Part 600. We are not intending to make any substantive changes to the regulatory provisions affected by these administrative changes and are not reopening the prior rules for any of those provisions.

VI. Impacts of Label Requirements

Vehicle manufacturers have been required to provide fuel economy labels on vehicles since 1977. The costs and benefits of label revisions would be those associated with changes to the current label, not the costs and benefits associated with production of the label itself. The change in cost from this proposed rule comes in the physical revisions to the label itself and the possible efficiencies achieved by meeting EPCA and EISA labeling requirements in one label, as well as proposed modified vehicle testing procedures. The benefits of the rule come from providing labels for mass-market advanced technology vehicles for the first time and from any improvements in the effectiveness of labels for conventional vehicles in providing accurate and useful consumer information on fuel consumption and environmental performance.

A. Costs Associated With This Rule

1. Testing Costs

Testing requirements for vehicles are not new. Advanced technology and alternative fuel vehicles have been required to undergo testing requirements in the past. For advanced technology vehicles, though, the test procedures have not previously been standardized; they have been handled on a case-by-case basis. Because the agencies expect more advanced technology vehicles to come to market, this rule codifies testing procedures, as discussed in sections III.M. and III.N. of this preamble. The testing costs described here therefore are not completely new costs for manufacturers, since they would have to test the vehicles even in the absence of this rule, but the procedures have not previously been established. The cost estimates are included here because they have previously not been presented. The agencies received no comments on the cost estimates for the vehicle testing to support the label program.

As discussed in the NPRM, the analysis of the projected costs of this rule follows conceptually the approach in the 2006 (''five-cycle'') fuel economy labeling rule. Increased on-going operations and maintenance (O&M) costs and labor hours result from increases in testing costs for electric vehicles (EVs) and plug-in hybrids (PHEVs) specified in this rule. We also allow for the costs of increased facility capacity to accommodate the increased testing time involved for these two categories of vehicles. Startup costs are treated as capital costs and are amortized over ten years at 3% and 7% interest. Startup costs for this rule include testing equipment for those manufacturers subject to new testing. As an aid to the analysis and to help articulate the range of uncertainty, we include both low and high cost estimates for each of these cost and labor hour elements. The cost estimates, excluding potential cost savings from harmonization of label requirements with California and the Federal Trade Commission, are $0.7 million per year for the low estimate and $5.5 million per year for the high estimate. For details of this analysis, see the ''Final Supporting Statement for Information Collection Request, Fuel Economy Labeling of Motor Vehicles'', in the docket.[115]

(a) Testing Requirements for Electric Vehicles

To date, EPA has performed some fuel economy testing connected with certification applications for electric vehicles using the procedures developed by the Society of Automotive Engineers (SAE), specifically SAE J1634, as published October 2002. The proposal spelled out EV testing requirements that are similar to SAE J1634. This rule finalizes the test procedures.

In estimating the costs of this action, there is no clear baseline cost that manufacturers of EVs would have incurred in satisfying Federal requirements, because fuel economy measurements were either optional[116] or not specific as to method (except to satisfy FTC requirements). For purposes of the analysis, we assume these EV costs are entirely new costs rather than increments to pre-existing costs. Here and in the facility costs section, this also means we assume no carry-over applications for EVs. Both these assumptions are more likely to lead to an overstatement of costs than an understatement.

The NPRM described the use of SAE J1634 as the basis for the costs of testing procedures for EVs, based on range testing requirements of the Federal Trade Commission for ''alternative fueled vehicles.'' Preparation costs were estimated to be $3,163 and 30 hours per vehicle, per Information Collection Request (ICR) 0783.54 (OMB 2060–0104), the certification ICR for conventional vehicles. The low and high EV test distances for Federal Test Procedure (FTP) and Highway Fuel Economy Test (HFET) tests are estimated as 50 to 250 miles. For purposes of this estimate, the cost of an FTP/HFET pair is $1,860, allocated 70% to the FTP and 30% to the HFET and incremented either by 50 or 250 divided by 7.45 (the distance of a normal FTP), or by 50 or 250 divided by 10.3 (the distance of the normal HFET). These increases are applied to an estimated five to eight EV families in the years through MY2013. Labor hours, estimated at 30 hours per FTP/HFET pair, are allocated and incremented in a similar manner. The bottom line is a cost between $75,300 and $486,784 and 1,073 to 7,625 hours, per year for the EV industry. With the cost of labor estimated to be $61.49 per hour, labor costs would add between $65,988 and $468,871 in annual costs. No comments were received on these estimates.

(b) Testing Requirements for Plug-In Hybrid Electric Vehicles

As explained in Section III.M., the proposed EPA test procedure for PHEVs is an extension of the existing test procedure for hybrid vehicles. Off-cycle tests are already required for test groups that do not meet the ''litmus test;'' others would use the derived five-cycle adjustment. Hybrid vehicles already do FTP and HFET tests for fuel economy determination. The new FTP procedure for PHEVs would essentially run repeated FTPs until the charge is

[115] U.S. Environmental Protection Agency, Office of Transportation and Air Quality. ''Final Supporting Statement for Information Collection Request, Fuel Economy Labeling of Motor Vehicles (Final Rule), EPA ICR 2392.02.'' Compliance and Innovative Strategies Division, Transportation and Climate Change Division, and Assessment and Standards Division, April 2011.

[116] Although fuel economy labels are statutorily required for all vehicles, the regulations have, prior to model year 2012, included a *de minimus* exemption for very small numbers of EVs (except those built by large manufacturers). See 40 CFR 600.001–08.

depleted. This is the ''charge-depleting'' operation, when the vehicle is mainly running on its battery. The battery would then be recharged, and a single additional four-phase FTP would be conducted in what is denominated as the ''charge-sustaining'' operation. Following this, the vehicle will be recharged, if necessary, by running any appropriate test cycle followed by HFET cycles in charge-depleting operation, followed by a cycle in charge-sustaining operation.

For purposes of this cost analysis, the charge-sustaining FTP and HFET cycles along with potential other cycles mandated by emissions and fuel economy testing requirements are considered to be continuations of existing requirements. The cost increment due to this proposal consequently derives entirely from the increased testing time in depleting mode. The duration of the depleting modes is estimated as 7.45 to 50 miles over the repeated 7.45-mile FTP or 10.3-mile HFET test cycles. These together, applied to 5 to 8 families with no carryovers, add an estimated $8,528 to $80,564 in operation and maintenance (O&M) costs and 138 to 923 labor hours to existing hybrid testing costs. With the cost of labor estimated to be $61.49 per hour, labor costs would add between $8,458 and $56,764 in annual costs.

The O&M costs and labor hours discussed above are summarized in Table VI.A.1–1:

2. Equipment and Facility Costs

TABLE VI.A.1–1—TESTING COSTS

[Labor and O&M costs for running the tests]

Vehicle type/test cycle	Increase in number of tests and hours			
	Min tests/hours	Min cost increase	Max tests/hours	Max cost increase
EV:				
Prep	5.0	$18,065	8.0	$28,904
FTP	5.0	43,691	8.0	349,530
HFET	5.0	13,544	8.0	108,350
Labor	218	65,988	1,748	468,871
EV Total	.....	141,288	.....	955,655
PHEV:				
FTP	5.0	6,510	8.0	50,563
HFET	5.0	2,018	8.0	30,001
Labor	33	8,458	218	56,764
PHEV Total	.....	16,986	.....	137,328
Total	.....	158,273	.....	1,092,983

As estimated in the proposal, each manufacturer who has not previously produced hybrid-electric vehicles is assumed to need new testing equipment costing $25,000 for an ammeter and $50,000 for voltage stabilizers; we estimate that 5–8 manufacturers will fall in this category. No comments were received on this estimate.

In addition to new equipment, establishing testing requirements for EVs and PHEVs will in theory require expanded testing facilities for those manufacturers choosing to produce and sell them in the U.S. Because the cost of new facility capacity is highly dependent on manufacturer-specific factors (the costs of capital, the availability of land, the structure of work shifts, the existing excess capacity, etc.), we use the approximation of unitizing increased test costs by assuming that a facility capable of performing 750 FTP/HFET pairs would cost $4 million. Here, the new tests are deemed to require these facilities in proportion to the increases in test time, and the costs are then annualized over ten years and amortized at 3% and 7% interest compounded monthly. This assumption is more likely to produce an overestimate of costs rather than an underestimate, since it does not attempt to account for the current excess capacity that exists in manufacturers' current test facilities. We assume that there is no excess capacity in our analysis. Note that other features of the EV and PHEV test cycles, such as recharging times, have been harmonized with existing test protocols. Furthermore, consistent with other information burden analyses for the emissions and fuel economy programs, we consider these as ongoing rather than startup costs (*i.e.,* as the facilities depreciate they are continually being replaced), another conservative assumption. Applying these costs to a low and high estimate of 5 to 8 EV families and 5 to 8 PHEV families per year yields an annualized facilities cost between $25,278 and $210,779 per year. No comments were received on these estimates.

Facility and equipment costs are summarized in Table VI.A.2–1:

TABLE VI.A.2–1—INCREASE IN TEST FACILITIES

Undepreciated capital costs	Minimum	Maximum
EV test distance increase	$154,210	$1,233,683
PHEV test distance increase	22,977	246,737
Updating Information systems	768,000	960,000
Ammeter/stabilizer	375,000	600,000
Total	1,320,188	3,040,420
Amortized, 10 yrs @ 3%	154,766	356,430

TABLE VI.A.2–1—INCREASE IN TEST FACILITIES—Continued

Undepreciated capital costs	Minimum	Maximum
Amortized, 10 yrs @ 7%	187,965	432,887

3. Costs Associated With New Labels

(a) Startup Costs

Startup costs are counted as one-time costs that are amortized or discounted at an interest rate of 3% or 7% over ten years. The proposal separated the costs for updating information systems and testing equipment from the costs of label redesign, and estimated total startup costs between $8.1 and 8.6 million. When annualized and subjected to 7% loan repayment/discounting, the startup costs total in the proposal was estimated at $1.16 to $1.22 million per year.

Written comments from GM did not break down costs in these categories. Instead, their ''initial estimate,'' which included designing, releasing, testing, and validating the system, would cost ''more than $800,000.'' Suzuki estimated its costs as $70,000 for software, $111,144 for printers, and $20,250 for IT costs, for a total of $201,394. Because color printers are no longer required, these costs are therefore estimated to be $90,250. Other cost estimates provided to the agencies for non-color printing included $174,000 from one manufacturer and $500,000 from another.

For this cost analysis, the agencies are using these two estimates as upper and lower bounds specifically of additional startup costs for the labels. These estimates are then applied to the universe of separate manufacturer entities subject to the rule. Many specific automotive brands are parts of marketing groups or are owned and managed by other, parent companies. Allowing for these relationships, the agencies estimate that the rule would apply to 24 manufacturers and 11 independent commercial importers (ICIs) importing nonconforming vehicles into the U.S. for sale. Applied to 35 companies, then, the label redesign cost is estimated to be between $3.2 million and $28 million. When annualized at 3% and 7% over ten years, these costs are estimated to be between $370,000 and $3,987,000 per year.

(b) Printing Costs for New Labels

The proposed labels in the NPRM included different colors, reflecting either different technologies or differences in fuel economy and greenhouse gas emissions. Auto companies commented that the use of multiple colors would add significantly to label costs and lead time, due to the need to purchase new printers and to increased maintenance costs. In addition, they expressed concern that colors in the labels might fade, that they might be difficult to see through tinted windows, that the increased complexity of these labels would lead to compliance concerns, and that some colors might deter consumers from considering some vehicles. As discussed in Section III.J. of this preamble, the agencies have decided for the final label to use one color (in addition to black) that can be pre-printed on the feedstock that will go into the printers used for the vehicle labels. The acceptance of this approach by many auto manufacturers suggests that the addition of color in a manner that allows it to be pre-printed on feedstock does not have a material effect on costs; indeed, some manufacturers already use a color besides black. Thus, printing costs associated with the final label are not expected to change from the baseline costs. Because of this change in label requirements from the proposal, the agencies believe that there will be no additional costs associated with label printing. Thus, the additional printing costs estimated in the proposal to be $294,690 to $1,274,634 per year are now estimated to be zero.

4. Cost Summary

Table VI.A.4–1 summarizes the costs presented here. The total costs of this rule, excluding labor, are estimated to be between $0.7 and $5.5 million per year.

TABLE VI.A.4–1—TOTAL ANNUAL COST INCREASE—7% DISCOUNT RATE

	Low estimate	High estimate
Testing: O&M, including labor costs	$158,274	$1,092,983
Testing: Equipment and Facilities	187,965	432,887
Label design startup	450,000	3,987,000
Total Annual Cost	796,239	5,512,870

TOTAL ANNUAL COST INCREASE—3% DISCOUNT RATE

	Low estimate	High estimate
Testing: O&M, including labor costs	$158,274	$1,092,983
Testing: Equipment and Facilities	154,766	356,430
Label design startup	370,000	3,282,000
Total Annual Cost	683,040	4,731,413

B. Impact of Requiring One Label To Meet EPCA/EISA

EPCA and EISA create similar but not necessarily identical requirements for labeling vehicles. EPA conducts a labeling program under EPCA, and NHTSA is required to conduct a labeling program under EISA, in consultation with EPA. While the agencies could require that manufacturers produce two separate labels to meet the requirements of the statutes, much of the information on the two labels would be duplicative. In addition, two different fuel economy

labels might confuse vehicle purchasers, frustrating the purpose of providing fuel economy information to purchasers. Requiring that auto manufacturers put two fuel economy labels on vehicles would also crowd the limited labeling space on vehicles. For these reasons, EPA and NHTSA are addressing both the EPCA and the EISA requirements in one label.

Because NHTSA's labeling under EISA is a new requirement that has not previously been implemented, there is no cost reduction associated with the proposal to use a joint label. The use of the joint label avoids a cost increase that would result from two separate labels. EPA and NHTSA are not including this cost saving in the cost analysis because we believe that the benefits of coordinating labeling requirements outweigh any possible disadvantages.

Section III.L. discusses harmonization of this label with labeling requirements for the Federal Trade Commission (FTC) and the State of California. To the extent that the new label can reduce the need for separate labels due to these requirements, there are additional cost reductions associated with this rule. The California Air Resources Board in 2007 estimated the annual cost of its label to be $245,000 per year for all companies operating in California.[117] No cost estimate is available for the FTC label. If the new label satisfies the requirements of these agencies, then the costs will be lower than those reported here, which do not take into account this harmonization, by the savings associated with producing those labels.

C. Benefits of Label Changes

The NPRM discussed the difficulties of quantitatively estimating benefits of this rulemaking. Measuring benefits would depend on predicting what vehicles consumers would purchase in the absence of the rule; predicting what vehicles consumers would purchase with implementation of the rule; and then measuring the benefits associated with the changed vehicle purchases. One commenter (the New York University Law School Institute for Policy Integrity) argued that the agencies should quantify these effects, on the ground that the effects of the rule on the economy are likely to be significant: if the revised labels lead even to small changes in behavior, the effects on fuel purchases alone would be large.

The agencies recognize that Executive Order 13563 directs agencies ''to use the best available techniques to quantify anticipated present and future benefits as accurately as possible.'' In this context, however, quantitative information is not available, and the agencies have therefore chosen instead to continue with a qualitative assessment of benefits. It is difficult to develop a good baseline for the fleet using the existing label, partly because the existing label is not designed to incorporate advanced technology vehicles. It is even more difficult to develop a comparison for the fleet with the new labels, because the effects of label designs on vehicle purchases are not known. Thus, any assessment of quantitative effects of label design on vehicle sales involves a great deal of speculation. The agencies believe that informed choice is an end in itself, even if it is hard to quantify; the agencies also believe that the new labels will provide significant benefits for consumers, including economic benefits, though these benefits cannot be quantified at this time.

The existing label is not suitable for providing information on advanced technologies, and it does not include new information required by EISA; it must be revised. Sections III and IV of this preamble discuss the rationales for the label that is being required. The benefits of this rule will come from the improved provision of information to vehicle buyers and from more informed consumer decisions resulting from the changes. To the extent that the new labels fulfill these functions, they will save consumers money, help them find the most satisfactory vehicles for their needs, and probably contribute to improvements in environmental quality. These effects will be difficult to measure even after rule implementation, because these labels are being introduced at the same time that new vehicle technologies and fuels are coming into the market and vehicles' fuel economy is improving. Nevertheless, the agencies' research suggests that a well-designed label will assist people in making informed decisions about their vehicles.

D. Summary of Costs and Benefits

The primary benefits associated with this rule are associated with improved consumer decision-making resulting from improved presentation of information. At this time, EPA and NHTSA do not have data to quantify these impacts.

The primary costs associated with this proposed rule come from revisions to the fuel economy label and additional testing procedures. These costs, not including any cost reductions from harmonizing label designs with California or the FTC, are estimated to be $0.7 to $5.5 million per year. The agencies have concluded, consistent with Executive Order 13563, that the likely benefits justify the costs.

VII. Agencies' Statutory Authority and Executive Order Reviews

A. Relationship of EPA's Requirements With Other Statutes and Regulations

1. Automobile Disclosure Act

The Automobile Information Disclosure Act (AIDA) requires the affixing of a retail price sticker to the windshield or side window of new automobiles indicating the Manufacturer's Suggested Retail Price, the ''sticker price.'' [118] Additional information, such as a list of any optional equipment offered or transportation charges, is also required. The Act prohibits the sticker from being removed or altered prior to sale to a consumer.

Under EPCA, EPA may allow manufacturers of new automobiles to comply with the EPCA labeling requirements by placing the fuel economy information on the label required by AIDA.[119] Normally, the price sticker label and EPA label are combined as one large label. Failure to maintain the EPA label on the vehicle is considered a violation of AIDA.[120]

2. Internal Revenue Code

EPCA requires that ''Gas Guzzler'' tax information under 26 U.S.C. 4064 be included on the fuel economy label. The new labels provide for this requirement. The Internal Revenue code contains the provisions governing the administration of the Gas Guzzler Tax. It contains the table of applicable taxes and defines which vehicles are subject to the taxes.[121] The IRS code specifies that the fuel economy to be used to assess the amount of tax will be the combined city and highway fuel economy as determined by using the procedures in place in 1975, or procedures that give comparable results [122] (similar to EPCA's requirements for determining CAFE for passenger automobiles). This rule does not impact these provisions.

[117] State of California, Air Resources Board. ''Staff Report: Initial Statement of Reasons for Rulemaking: Proposed Amendments to the Smog Index Vehicle Emissions Label,'' May 4, 2007, *http://www.climatechange.ca.gov/publications/arb/2007-06-21_isor.pdf,* (last accessed May 3, 2010).

[118] More commonly known as the Monroney Act (Senator Mike Monroney was the chief sponsor of the Act) or Price Sticker Act. See 15 U.S.C. 1231–1233.

[119] 49 U.S.C. 32908(b)(2).

[120] 49 U.S.C. 32908(e)(1)

[121] 26 U.S.C. 34064(a).

[122] 26 U.S.C. 4064(c).

3. Clean Air Act

EPCA states that fuel economy tests shall, to the extent practicable, be carried out with the emissions tests required under Section 206 of the Clean Air Act.[123] EPA did not propose and is not requiring additional emissions tests, thus the connection between emission and fuel economy tests is unchanged.

4. Federal Trade Commission Guide Concerning Fuel Economy Advertising for New Vehicles

In the mid-1970's when EPCA was passed, the Federal Trade Commission (FTC) ''took note of the dramatic increase in the number of fuel economy claims then being made and of the proliferation of test procedures then being used as the basis for such claims.'' [124] They responded by promulgating regulations in 16 CFR part 259 entitled ''Guide Concerning Fuel Economy Advertising for New Vehicles'' (''Fuel Guide''). The Fuel Guide, adopted in 1975 and subsequently revised twice, provides guidance to automobile manufacturers to prevent deceptive advertising and to facilitate the use of fuel economy information in advertising. The Fuel Guide advises vehicle manufacturers and dealers how to disclose the established fuel economy of a vehicle, as determined by the Environmental Protection Agency's rules pursuant to the Automobile Information Disclosure Act (15 U.S.C. 2996), in advertisements that make representations regarding the fuel economy of a new vehicle.[125] The disclosure is tied to the claim made in the advertisement. If both city and highway fuel economy claims are made, both city and highway EPA figures should be disclosed. A claim regarding either city or highway fuel economy should be accompanied by the corresponding EPA figure. A general fuel economy claim requires disclosure of the EPA city figure, although the advertiser would be free to state the highway figure as well. The authority for the Fuel Guide is tied to the Federal Trade Commission Act (15 U.S.C. 41–58) which, briefly stated, makes it illegal for one to engage in ''unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.''

[123] 49 U.S.C. 32904(c).

[124] 40 FR 42003, Sept. 10, 1975.

[125] 43 FR 55747, Nov. 29, 1978; and 60 FR 56230, Nov. 8, 1995.

B. Statutory and Executive Order Reviews

1. Executive Order 12866 and Executive Order 13563: Regulatory Planning and Review and DOT Regulatory Policies and Procedures

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

NHTSA is also subject to the Department of Transportation's Regulatory Policies and Procedures. This final rule is also significant within the meaning of the DOT Regulatory Policies and Procedures. Executive Order 12866 also requires NHTSA to submit this action to OMB for review and document any changes made in response to OMB recommendations.

In addition, EPA and NHTSA both prepared an analysis of the potential costs and benefits associated with this action. This analysis is available in Section VI of this document. In accordance with Executive Order 13563, section 1, the agencies have made ''a reasoned determination that'' the benefits of the rule ''justify its costs (recognizing that some benefits and costs are difficult to quantify.'' In accordance with Executive Order 13563, section 3, the agencies have reduced costs and promoted predictability and simplicity by coordinating and harmonizing regulatory requirements, both state and Federal.

Executive Order 13563, section 4, directs agencies to consider ''flexible approaches'' that maintain ''freedom of choice for the public.'' Such approaches include, under the Executive Order, ''disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.'' This rule is specifically designed to promote the goals of section 4 of Executive Order 13563 by providing clear and intelligible information and by promoting informed choices.

2. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2392.02. Since this is a joint final rule, the burden associated with these information collection requirements could be attributed to either agency. However, since a significant portion of the burden result from new EPA testing requirements, EPA has agreed to assume responsibility for the complete paperwork burden. Both agencies have considered the comments submitted regarding these potential costs as part of their decision in this final rule.

The information being collected is used by EPA to calculate the fuel economy estimates that appear on new automobile, light truck and medium-duty passenger vehicle sticker labels. EPA currently collects this information annually as part of its vehicle certification and fuel economy program, and will continue to do so. This final rule changes some of the content of the information submitted. Responses to this information collection are mandatory to obtain the benefit of vehicle certification under Title II of the Clean Air Act (42 U.S.C. 7521 *et seq.*) and as required under Title III of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2001 *et seq.*). Information submitted by manufacturers is held as confidential until the specific vehicle to which it pertains is available for purchase. After vehicles are available for purchase, most information associated with the manufacturer's application is available to the public. Under section 208 of the Clean Air Act (42 U.S.C. 7542(c)), all information, other than trade secret processes or methods, must be publicly available. Proprietary information is granted confidentiality in accordance with the Freedom of Information Act, EPA regulations at 40 CFR part 2, and class determinations issued by EPA's Office of General Counsel.

The projected yearly increased cost within the three-year horizon of the pending information collection request is $2,812,000 including $2,286,000 in operations and maintenance costs and $526,000 in labor costs. The estimated number of likely respondent manufacturers is 35. Responses are submitted annually by engine family, with the number of responses per respondent varying widely depending on the number of engine families being certified. Under the current fuel economy information authorization, an average of 12.2 responses a year are approved for each of 33 respondents requiring 451.2 hours per response and 80 hours of recordkeeping at a total cost of $10,012 per response for an industry total of 184,127 hours and $4,274,932 million annually, including capital and

operations and maintenance costs. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agencies certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, a small entity is defined as: (1) A small business as defined by the Small Business Administration (SBA) by category of business using North America Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Table VIII.B.3–1 provides an overview of the primary SBA small business categories included in the light-duty vehicle sector that are subject to the final rule:

TABLE VIII.B.3–1—PRIMARY SBA SMALL BUSINESS CATEGORIES IN THE LIGHT-DUTY VEHICLE SECTOR

Industry	Defined as small entity by SBA if less than or equal to:	NAICS codes [a]
Automobile Manufacturing	1,000 employees	336111
Light Truck and Utility Vehicle Manufacturing	1,000 employees	336112
Motor Vehicle Body Manufacturing	1,000 employees	336211
Automobile and Other Motor Vehicle Merchant Wholesalers	100 employees	423110
New Car Dealers	200 employees	441110

Notes: [a] North American Industrial Classification System.

After considering the economic impacts of today's final rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this final rule cover several types of small businesses including vehicle manufacturers, automobile dealers, limousine and hearse manufacturers, and independent commercial importers (ICIs). ICIs are companies that import used vehicles into the U.S. that must be certified for emissions compliance and labeled for fuel economy purposes. Small governmental jurisdictions and small organizations as described above will not be impacted. We have determined that the estimated effect of the final rule is to impact 5 small business vehicle manufacturers and 11 ICIs who currently certify vehicles with costs less than one percent of revenues. These 16 companies represent all of the small businesses impacted by the new regulations. The final regulations will have no new impacts on small business automobile dealers or small business limousine and hearse manufacturers. We requested comment on the impacts of the proposed regulations on small entities but received no feedback. An analysis of the impacts of the final rule on small businesses has been prepared and placed in the docket for this rulemaking.[126]

Although this final rule will not have a significant impact on a substantial number of small entities, we nonetheless have tried to reduce the impact of this rule on small entities. As discussed in section V.B, EPA is requiring a reduction in the testing burden on ICIs that will be needed for the fuel economy label. Under the final regulations, ICIs will be allowed to test over two driving cycles when determining the fuel economy estimate for the fuel economy label instead of testing over five driving cycles as required for vehicle manufacturers.

4. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million (adjusted for inflation) or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. This rule contains no Federal mandates for state, local, or tribal governments as defined by the provisions of Title II of the UMRA. The rule imposes no enforceable duties on any of these governmental entities. Nothing in the rule would significantly or uniquely affect small governments. The proposed rule only affects vehicle manufacturers and the agencies estimate annual costs of less than $100 million (adjusted for inflation). EPA and NHTSA believe that the rule represents the least costly, most cost-effective approach to achieve the statutory requirements of the rule. The agencies' estimated costs are provided in Section VI. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As noted above, the rule only affects vehicle manufacturers.

5. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule applies to manufacturers of motor vehicles and not to state or local governments. Thus, Executive Order 13132 does not apply to this action. Although section 6 of Executive Order 13132 does not apply to this action, EPA and NHTSA did consult with representatives of state governments in developing this action.

[126] ''Screening Analysis: Small Business Impacts from Revisions to Motor Vehicle Fuel Economy Label,'' EPA report, May 2, 2011.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule would be implemented at the Federal level and imposes compliance costs only on vehicle manufacturers. Tribal governments would be affected only to the extent they purchase and use regulated vehicles. Thus, Executive Order 13175 does not apply to this action.

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

EPA and NHTSA interpret E.O. 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the E.O. has the potential to influence the regulation. This action is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action does not require manufacturers to improve or otherwise change the fuel economy of their vehicles. The purpose of this action is to provide consumers with better information on which to base their vehicle purchasing decisions and that may have a positive effect on the energy supply. Therefore, we have concluded that this rule is not likely to have any adverse energy effects.

9. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113 (15 U.S.C. 272 note) directs the agencies to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the agencies to provide Congress, through OMB, explanations when the agencies decide not to use available and applicable voluntary consensus standards.

The EPA portion of this rulemaking involves technical standards. EPA has decided to use the following testing standards developed with the Society of Automotive Engineers (SAE) related to measurement procedures for electric vehicles and plug-in hybrid electric vehicles: SAEJ1711, SAE J2841, and SAE J1634. SAE reference documents can be obtained at *http://www.SAE.org.* The final rule incorporates these standards with only minor modifications needed to fit in the regulatory context. The incorporation by reference does not involve any substantial change or disagreement with the technical conclusions from the published standards.

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

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The agencies have determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The final regulations do not require manufacturers to improve or otherwise change the emissions control or fuel economy of their vehicles. The purpose of this final regulation is to provide consumers with better information on which to base their vehicle purchasing decisions.

11. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective September 6, 2011.

List of Subjects

40 CFR Part 85

Confidential business information, Imports, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements, Research, Warranties.

40 CFR Part 86

Administrative practice and procedure, Confidential business information, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

40 CFR Part 600

Administrative practice and procedure, Electric power, Fuel economy, Incorporation by reference, Labeling, Reporting and recordkeeping requirements.

49 CFR Part 575

Administrative practice and procedure, Consumer protection, Fuel economy, Motor vehicles, Motor vehicle safety, Reporting and recordkeeping requirements.

Environmental Protection Agency

40 CFR Chapter I

For the reasons set forth in the preamble, the Environmental Protection Agency amends parts 85, 86, and 600 of title 40, Chapter I of the Code of Federal Regulations as follows:

PART 85—CONTROL OF AIR POLLUTION FROM MOBILE SOURCES

■ 1. The authority citation for part 85 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart T—[Amended]

■ 2. Section 85.1902 is amended by revising paragraph (b)(2) to read as follows:

§ 85.1902 Definitions.

* * * * *

(b) * * *

(2) A defect in the design, materials, or workmanship in one or more emissions control or emission-related parts, components, systems, software or elements of design which must function properly to ensure continued

compliance with greenhouse gas emission standards.

* * * * *

PART 86—CONTROL OF EMISSIONS FROM NEW AND IN-USE HIGHWAY VEHICLES AND ENGINES

■ 3. The authority citation for part 86 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart B—[Amended]

■ 4. Section 86.165–12 is amended by revising paragraph (d)(4) to read as follows:

§ 86.165–12 Air conditioning idle test procedure.

* * * * *

(d) * * *

(4) Measure and record the continuous CO_2 concentration for 600 seconds. Measure the CO_2 concentration continuously using raw or dilute sampling procedures. Multiply this concentration by the continuous (raw or dilute) flow rate at the emission sampling location to determine the CO_2 flow rate. Calculate the CO_2 cumulative flow rate continuously over the test interval. This cumulative value is the total mass of the emitted CO_2. Alternatively, CO_2 may be measured and recorded using a constant velocity sampling system as described in §§ 86.106–96(a)(2) and 86.109.

* * * * *

Subpart S—[Amended]

■ 5. Section 86.1810–09 is amended by revising paragraph (f)(1) to read as follows:

§ 86.1810–09 General standards; increase in emissions; unsafe condition; waivers.

* * * * *

(f) * * *

(1) All emission standards apply at low altitude conditions and at high altitude conditions, with the following exceptions:

(i) The supplemental exhaust emission standards as described in § 86.1811–04(f) apply only at low altitude conditions;

(ii) The cold temperature NMHC emission standards as described in § 86.1811–10(g) apply only at low altitude conditions;

(iii) The evaporative emission standards specified in § 86.1811–09(e) apply at low altitude conditions. The evaporative emission standards specified in § 86.1811–04(e) continue to apply at high altitude conditions for 2009 and later model year vehicles.

* * * * *

■ 6. Section 86.1811–09 is amended by revising paragraph (e) introductory text to read as follows:

§ 86.1811–09 Emission standards for light-duty vehicles, light-duty trucks and medium-duty passenger vehicles.

* * * * *

(e) *Evaporative emission standards.* Evaporative emissions from gasoline-fueled, natural gas-fueled, liquefied petroleum gas-fueled, ethanol-fueled and methanol-fueled vehicles must not exceed the standards in this paragraph (e) at low altitude conditions. The evaporative emission standards specified in § 86.1811–04(e)(1) continue to apply at high altitude conditions. The standards apply equally to certification and in-use vehicles.

* * * * *

■ 7. Section 86.1818–12 is amended by adding paragraph (b)(3) and revising paragraphs (c)(1) and (d) to read as follows:

§ 86.1818–12 Greenhouse gas emission standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles.

* * * * *

(b) * * *

(3) Manufacturer has the meaning given by the Department of Transportation at 49 CFR 531.4.

(c) * * *

(1) For a given individual model year's production of passenger automobiles and light trucks, manufacturers must comply with a full useful life fleet average CO_2 standard calculated according to the provisions of this paragraph (c). Manufacturers must calculate separate full useful life fleet average CO_2 standards for their passenger automobile and light truck fleets, as those terms are defined in this section. Each manufacturer's fleet average CO_2 standards determined in this paragraph (c) shall be expressed in whole grams per mile, in the model year specified as applicable. Manufacturers eligible for and choosing to participate in the Temporary Leadtime Allowance Alternative Standards for qualifying manufacturers specified in paragraph (e) of this section shall not include vehicles subject to the Temporary Leadtime Allowance Alternative Standards in the calculations of their primary passenger automobile or light truck standards determined in this paragraph (c). Manufacturers shall demonstrate compliance with the applicable standards according to the provisions of § 86.1865.

* * * * *

(d) *In-use CO_2 exhaust emission standards.* The in-use CO_2 exhaust emission standard shall be the combined city/highway carbon-related exhaust emission value calculated for the appropriate vehicle carline/subconfiguration according to the provisions of § 600.113–12(g)(4) of this chapter multiplied by 1.1 and rounded to the nearest whole gram per mile. For in-use vehicle carlines/subconfigurations for which a combined city/highway carbon-related exhaust emission value was not determined under § 600.113–12(g)(4) of this chapter, the in-use CO_2 exhaust emission standard shall be the combined city/highway carbon-related exhaust emission value calculated according to the provisions of § 600.208 of this chapter for the vehicle model type (except that total model year production data shall be used instead of sales projections) multiplied by 1.1 and rounded to the nearest whole gram per mile. For vehicles that are capable of operating on multiple fuels, including but not limited to alcohol dual fuel, natural gas dual fuel and plug-in hybrid electric vehicles, a separate in-use standard shall be determined for each fuel that the vehicle is capable of operating on. These standards apply to in-use testing performed by the manufacturer pursuant to regulations at §§ 86.1845 and 86.1846 and to in-use testing performed by EPA.

* * * * *

■ 8. Section 86.1823–08 is amended by revising paragraphs (m)(2)(iii) and (m)(3) to read as follows:

§ 86.1823–08 Durability demonstration procedures for exhaust emissions.

* * * * *

(m) * * *

(2) * * *

(iii) For the 2012 through 2014 model years only, manufacturers may use alternative deterioration factors. For N_2O, the alternative deterioration factor to be used to adjust FTP and HFET emissions is the additive or multiplicative deterioration factor determined for (or derived from, using good engineering judgment) NO_X emissions according to the provisions of this section. For CH_4, the alternative deterioration factor to be used to adjust FTP and HFET emissions is the additive or multiplicative deterioration factor determined for (or derived from, using good engineering judgment) NMOG or NMHC emissions according to the provisions of this section.

(3) *Other carbon-related exhaust emissions.* Deterioration factors shall be determined according to the provisions of paragraphs (a) through (l) of this section. Optionally, in lieu of determining emission-specific FTP and

HFET deterioration factors for CH_3OH (methanol), HCHO (formaldehyde), C_2H_5OH (ethanol), and C_2H_4O (acetaldehyde), manufacturers may use the additive or multiplicative deterioration factor determined for (or derived from, using good engineering judgment) NMOG or NMHC emissions according to the provisions of this section.

* * * * *

■ 9. Section 86.1841–01 is amended by revising paragraph (a)(3) to read as follows:

§ 86.1841–01 Compliance with emission standards for the purpose of certification.

(a) * * *

(3) Compliance with full useful life CO_2 exhaust emission standards shall be demonstrated at certification by the certification levels on the FTP and HFET tests for carbon-related exhaust emissions determined according to § 600.113 of this chapter.

* * * * *

■ 10. Section 86.1848–10 is amended by revising the section heading and paragraph (c)(9)(i) to read as follows:

§ 86.1848–10 Compliance with emission standards for the purpose of certification.

* * * * *

(c) * * *

(9) * * *

(i) Failure to meet the fleet average CO_2 requirements will be considered a failure to satisfy the terms and conditions upon which the certificate(s) was (were) issued and the vehicles sold in violation of the fleet average CO_2 standard will not be covered by the certificate(s). The vehicles sold in violation will be determined according to § 86.1865–12(k)(8).

* * * * *

■ 11. Section 86.1865–12 is amended by revising paragraphs (a)(1) introductory text, (d), (j)(1), (k)(7)(i), (k)(8)(iii) through (v), (k)(9)(iv)(B), and (k)(9)(v) to read as follows:

§ 86.1865–12 How to comply with the fleet average CO_2 standards.

(a) * * *

(1) Unless otherwise exempted under the provisions of § 86.1801–12(j) or (k), CO_2 fleet average exhaust emission standards apply to:

* * * * *

(d) *Small volume manufacturer certification procedures.* Certification procedures for small volume manufacturers are provided in § 86.1838. Small businesses meeting certain criteria may be exempted from the greenhouse gas emission standards in § 86.1818 according to the provisions of § 86.1801–12(j) or (k).

* * * * *

(j) * * *

(1) Compliance and enforcement requirements are provided in this section and § 86.1848–10(c)(9).

* * * * *

(k) * * *

(7) * * *

(i) Credits generated and calculated according to the method in paragraphs (k)(4) and (5) of this section may not be used to offset deficits other than those deficits accrued with respect to the standard in § 86.1818. Credits may be banked and used in a future model year in which a manufacturer's average CO_2 level exceeds the applicable standard. Credits may be exchanged between the passenger automobile and light truck fleets of a given manufacturer. Credits may also be traded to another manufacturer according to the provisions in paragraph (k)(8) of this section. Before trading or carrying over credits to the next model year, a manufacturer must apply available credits to offset any deficit, where the deadline to offset that credit deficit has not yet passed.

* * * * *

(8) * * *

(iii) EPA will determine the vehicles not covered by a certificate because the condition on the certificate was not satisfied by designating vehicles in those test groups with the highest carbon-related exhaust emission values first and continuing until reaching a number of vehicles equal to the calculated number of non-complying vehicles as determined in this paragraph (k)(8). If this calculation determines that only a portion of vehicles in a test group contribute to the debit situation, then EPA will designate actual vehicles in that test group as not covered by the certificate, starting with the last vehicle produced and counting backwards.

(iv)(A) If a manufacturer ceases production of passenger cars and light trucks, the manufacturer continues to be responsible for offsetting any debits outstanding within the required time period. Any failure to offset the debits will be considered a violation of paragraph (k)(8)(i) of this section and may subject the manufacturer to an enforcement action for sale of vehicles not covered by a certificate, pursuant to paragraphs (k)(8)(ii) and (iii) of this section.

(B) If a manufacturer is purchased by, merges with, or otherwise combines with another manufacturer, the controlling entity is responsible for offsetting any debits outstanding within the required time period. Any failure to offset the debits will be considered a violation of paragraph (k)(8)(i) of this section and may subject the manufacturer to an enforcement action for sale of vehicles not covered by a certificate, pursuant to paragraphs (k)(8)(ii) and (iii) of this section.

(v) For purposes of calculating the statute of limitations, a violation of the requirements of paragraph (k)(8)(i) of this section, a failure to satisfy the conditions upon which a certificate(s) was issued and hence a sale of vehicles not covered by the certificate, all occur upon the expiration of the deadline for offsetting debits specified in paragraph (k)(8)(i) of this section.

(9) * * *

(iv) * * *

(B) Failure to offset the debits within the required time period will be considered a failure to satisfy the conditions upon which the certificate(s) was issued and will be addressed pursuant to paragraph (k)(8) of this section.

(v) A manufacturer may only trade credits that it has generated pursuant to paragraphs (k)(4) and (5) of this section or acquired from another party.

* * * * *

■ 12. Section 86.1866–12 is amended by revising paragraphs (b)(2), (c)(5)(iv), and (d)(1) introductory text to read as follows:

§ 86.1866–12 CO_2 fleet average credit programs.

* * * * *

(b) * * *

(2) The CO_2-equivalent gram per mile leakage reduction to be used to calculate the total credits generated by the air conditioning system shall be determined according to the following formulae, rounded to the nearest tenth of a gram per mile:

(i) Passenger automobiles:

$$\text{Leakage Credit} = \text{MaxCredit} \times \left[1 - \left(\frac{\text{Leakage}}{16.6}\right) \times \left(\frac{GWP_{REF}}{GWP_{HFC134a}}\right)\right]$$

Where:

MaxCredit is 12.6 (grams CO_2-equivalent/mile) for air conditioning systems using HFC–134a, and 13.8 (grams CO_2-equivalent/mile) for air conditioning systems using a refrigerant with a lower global warming potential.

Leakage means the annual refrigerant leakage rate determined according to the provisions of § 86.166–12(a), except if the calculated rate is less than 8.3 grams/year (4.1 grams/year for systems using only electric compressors), the rate for the purpose of this formula shall be 8.3 grams/year (4.1 grams/year for systems using only electric compressors).

The constant 16.6 is the average passenger car impact of air conditioning leakage in units of grams/year.

GWP_{REF} means the global warming potential of the refrigerant as indicated in paragraph (b)(5) of this section or as otherwise determined by the Administrator.

$GWP_{HFC134a}$ means the global warming potential of HFC–134a as indicated in paragraph (b)(5) of this section or as otherwise determined by the Administrator.

(ii) Light trucks:

$$\text{Leakage Credit} = \text{MaxCredit} \times \left[1 - \left(\frac{\text{Leakage}}{20.7}\right) \times \left(\frac{GWP_{REF}}{GWP_{HFC134a}}\right)\right]$$

Where:

MaxCredit is 15.6 (grams CO_2-equivalent/mile) for air conditioning systems using HFC–134a, and 17.2 (grams CO_2-equivalent/mile) for air conditioning systems using a refrigerant with a lower global warming potential.

Leakage means the annual refrigerant leakage rate determined according to the provisions of § 86.166–12(a), except if the calculated rate is less than 10.4 grams/year (5.2 grams/year for systems using only electric compressors), the rate for the purpose of this formula shall be 10.4 grams/year (5.2 grams/year for systems using only electric compressors).

The constant 20.7 is the average light truck impact of air conditioning leakage in units of grams/year.

GWP_{REF} means the global warming potential of the refrigerant as indicated in paragraph (b)(5) of this section or as otherwise determined by the Administrator.

GWP_{R134a} means the global warming potential of HFC–134a as indicated in paragraph (b)(5) of this section or as otherwise determined by the Administrator.

* * * * *

(c) * * *

(5) * * *

(iv) Air conditioning systems with compressors that are powered solely by electricity shall submit Air Conditioning Idle Test Procedure data to be eligible to generate credits in 2014 and later model years, but such systems are not required to meet a specific threshold to be eligible to generate such credits, as long as the engine is off for at least 2 cumulative minutes during the air conditioning-on portion of the Idle Test Procedure in § 86.165–12(d).

* * * * *

(d) * * *

(1) *Qualification criteria.* To qualify for this credit, the following criteria must be met as determined by the Administrator:

* * * * *

■ 13. Section 86.1867–12 is amended by removing and reserving paragraph (a)(1)(iii)(A), by revising paragraphs (a)(1)(i), (a)(1)(ii), removing and reserving paragraph (a)(3)(iv)(A), and revising paragraphs (a)(3)(iv)(F), (a)(3)(vi), (a)(4), (b)(2), and (e)(4)(ii) to read as follows:

§ 86.1867–12 Optional early CO_2 credit programs.

* * * * *

(a) * * *

(1) * * *

(i) An average carbon-related exhaust emission value calculation will be made for the combined LDV/LDT1 averaging set, where the terms LDV and LDT1 are as defined in § 86.1803.

(ii) An average carbon-related exhaust emission value calculation will be made for the combined LDT2/HLDT/MDPV averaging set, where the terms LDT2, HLDT, and MDPV are as defined in § 86.1803.

(iii) * * *

(A) [Reserved]

* * * * *

(3) * * *

(iv) * * *

(A) Vehicles sold in California and the section 177 states determined in paragraph (a)(2)(i) of this section shall not be included.

* * * * *

(F) Electric, fuel cell, and plug-in hybrid electric model type carbon-related exhaust emission values shall be included in the fleet average determined under paragraph (a)(1) of this section only to the extent that such vehicles are not being used to generate early advanced technology vehicle credits under paragraph (c) of this section.

* * * * *

(vi) Credits are earned on the last day of the model year. Manufacturers must calculate, for a given model year, the number of credits or debits it has generated according to the following equation, rounded to the nearest megagram:

CO_2 Credits or Debits (Mg) = [(CO_2 Credit Threshold − Manufacturer's Sales Weighted Fleet Average CO_2 Emissions) × (Total Number of Vehicles Sold) × (Vehicle Lifetime Miles)] ÷ 1,000,000

Where:

CO_2 Credit Threshold = the applicable credit threshold value for the model year and vehicle averaging set as determined by paragraph (a)(3)(v) of this section.

Manufacturer's Sales Weighted Fleet Average CO_2 Emissions = average calculated according to paragraph (a)(3)(iv) of this section.

Total Number of Vehicles Sold = The number of vehicles domestically sold as defined in § 600.511 of this chapter except that vehicles sold in California and the section 177 states determined in paragraph (a)(2)(i) of this section shall not be included.

Vehicle Lifetime Miles is 195,264 for the LDV/LDT1 averaging set and 225,865 for the LDT2/HLDT/MDPV averaging set.

* * * * *

(4) Pathway 4. Pathway 4 credits are those credits earned under Pathway 3 as described in paragraph (a)(3) of this section in the set of states that does not include California and the section 177 states determined in paragraph (a)(2)(i) of this section and calculated according to paragraph (a)(3) of this section. Credits may only be generated by vehicles sold in the set of states that does not include California and the section 177 states determined in paragraph (a)(2)(i) of this section.

(b) * * *

(2) Manufacturers must be participating in one of the early fleet average credit pathways described in paragraphs (a)(1), (2), or (3) of this section in order to generate early air conditioning credits for vehicles sold in California and the section 177 states as determined in paragraph (a)(2)(i) of this section. Manufacturers that select Pathway 4 as described in paragraph (a)(4) of this section may not generate early air conditioning credits for vehicles sold in California and the section 177 states as determined in paragraph (a)(2)(i) of this section. Manufacturers not participating in one of the early fleet average credit pathways described in this section may

generate early air conditioning credits only for vehicles sold in states other than in California and the section 177 states as determined in paragraph (a)(2)(i) of this section.

* * * * *

(e) * * *

(4) * * *

(ii) The leakage and efficiency credit values and all the information required to determine these values.

* * * * *

PART 600—FUEL ECONOMY AND GREENHOUSE GAS EXHAUST EMISSIONS OF MOTOR VEHICLES

■ 14. The authority citation for part 600 continues to read as follows:

Authority: 49 U.S.C. 32901–23919q, Pub. L. 109–58.

■ 15. The heading for part 600 is revised to read as set forth above.

Subpart A—General Provisions

■ 16. The heading for subpart A is revised as set forth above.

§§ 600.001–08, 600.001–86, 600.001–93, 600.002–85, 600.002–93, 600.004–77, 600.006–86, 600.006–87, 600.006–89, 600.007–80, 600.008–01, 600.008–77, and 600.010–86 [Removed]

■ 17. Subpart A is amended by removing the following sections:

§ 600.001–08.
§ 600.001–86.
§ 600.001–93.
§ 600.002–85.
§ 600.002–93.
§ 600.004–77.
§ 600.006–86.
§ 600.006–87.
§ 600.006–89.
§ 600.007–80.
§ 600.008–01.
§ 600.008–77.
§ 600.010–86.

§ 600.001–12 [Redesignated as § 600.001]

§ 600.002–08 [Redesignated as § 600.002]

§ 600.003–77 [Redesignated as § 600.003]

§ 600.005–81 [Redesignated as § 600.005]

§ 600.006–08 [Redesignated as § 600.006]

§ 600.007–08 [Redesignated as § 600.007]

§ 600.008–08 [Redesignated as § 600.008]

§ 600.009–85 [Redesignated as § 600.009]

§ 600.010–08 [Redesignated as § 600.010]

§ 600.011–93 [Redesignated as § 600.011]

■ 18. Redesignate §§ 600.001–12 through 600.011–93 as follows:

Old section	New section
§ 600.001–12	§ 600.001
§ 600.002–08	§ 600.002
§ 600.003–77	§ 600.003
§ 600.005–81	§ 600.005
§ 600.006–08	§ 600.006
§ 600.007–08	§ 600.007
§ 600.008–08	§ 600.008
§ 600.009–85	§ 600.009
§ 600.010–08	§ 600.010
§ 600.011–93	§ 600.011

■ 19. Newly redesignated § 600.001 is revised to read as follows:

§ 600.001 General applicability.

(a) The provisions of this part apply to 2008 and later model year automobiles that are not medium duty passenger vehicles, and to 2011 and later model year automobiles including medium-duty passenger vehicles.

(b) The provisions of subparts A, D, and F of this part are optional through the 2011 model year in the following cases:

(1) Manufacturers that produce only electric vehicles are exempt from the requirements of this subpart, except with regard to the requirements in those sections pertaining specifically to electric vehicles.

(2) Manufacturers with worldwide production (excluding electric vehicle production) of less than 10,000 gasoline-fueled and/or diesel powered passenger automobiles and light trucks may optionally comply with the electric vehicle requirements in this subpart.

(c) Unless stated otherwise, references to fuel economy or fuel economy data in this part shall also be interpreted to mean the related exhaust emissions of CO_2, HC, and CO, and where applicable for alternative fuel vehicles, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC and CH_4. References to average fuel economy shall be interpreted to also mean average carbon-related exhaust emissions and average CO_2 emissions. References to fuel economy data vehicles shall also be meant to refer to vehicles tested for carbon-related exhaust emissions for the purpose of demonstrating compliance with fleet average CO_2 standards in § 86.1818 of this chapter.

(d) The model year of initial applicability for sections in this part is indicated by the section number. The two digits following the hyphen designate the first model year for which a section is applicable. An individual section continues to apply for later model years until it is replaced by a different section that applies starting in a later model year. Sections that have no two-digit suffix apply for all 2008 and later model year vehicles, except as noted in those sections. If a section has a two-digit suffix but the regulation references that section without including the two-digit suffix, this refers to the section applicable for the appropriate model year. This also applies for references to part 86 of this chapter. As an example, § 600.113–08 applies to the 2008 and subsequent model years until § 600.113–12 is applicable beginning with the 2012 model year. Section 600.111–08 would then apply only for 2008 through 2011 model year vehicles.

■ 20. Newly redesignated § 600.002 is revised to read as follows:

§ 600.002 Definitions.

The following definitions apply throughout this part:

3-bag FTP means the Federal Test Procedure specified in part 86 of this chapter, with three sampling portions consisting of the cold-start transient (''Bag 1''), stabilized (''Bag 2''), and hot-start transient phases (''Bag 3'').

4-bag FTP means the 3-bag FTP, with the addition of a sampling portion for the hot-start stabilized phase (''Bag 4'').

5-cycle means the FTP, HFET, US06, SC03 and cold temperature FTP tests as described in subparts B and C of this part.

Administrator means the Administrator of the Environmental Protection Agency or his authorized representative.

Alcohol means a mixture containing 85 percent or more by volume methanol, ethanol, or other alcohols, in any combination.

Alcohol-fueled automobile means an automobile designed to operate exclusively on alcohol.

Alcohol dual fuel automobile means an automobile:

(1) Which is designed to operate on alcohol and on gasoline or diesel fuel; and

(2) Which provides equal or greater energy efficiency as calculated in accordance with § 600.510–08(g)(1) or § 600.510–12(g)(1) while operating on alcohol as it does while operating on gasoline or diesel fuel; and

(3) Which, in the case of passenger automobiles, meets or exceeds the minimum driving range established by the Department of Transportation in 49 CFR part 538.

Alternative fuel means any of the following:

(1) Methanol.

(2) Denatured ethanol.

(3) Other alcohols.

(4) A mixture containing at least 85 percent (or an alternative percentage as specified by the Secretary of Transportation under 49 U.S.C.

32901(b)) of methanol, denatured ethanol, and other alcohols by volume with gasoline or other fuels.

(5) Natural gas.

(6) Liquefied petroleum gas.

(7) Hydrogen.

(8) Coal derived liquid fuels.

(9) Fuels (except alcohol) derived from biological materials.

(10) Electricity (including electricity from solar energy).

(11) Any other fuel the Secretary of Transportation prescribes by regulation under 49 U.S.C. 32901(a)(1)(K).

Automobile has the meaning given by the Department of Transportation at 49 CFR 523.3. This includes ''passenger automobiles'' and ''non-passenger automobiles'' (or ''light trucks'').

Auxiliary emission control device (AECD) means an element of design as defined in § 86.1803 of this chapter.

Average fuel economy means the unique fuel economy value as computed under § 600.510 for a specific class of automobiles produced by a manufacturer that is subject to average fuel economy standards.

Axle ratio means the number of times the input shaft to the differential (or equivalent) turns for each turn of the drive wheels.

Base level means a unique combination of basic engine, inertia weight class and transmission class.

Base tire means the tire specified as standard equipment by the manufacturer.

Base vehicle means the lowest priced version of each body style that makes up a car line.

Basic engine means a unique combination of manufacturer, engine displacement, number of cylinders, fuel system (*e.g.,* type of fuel injection), catalyst usage, and other engine and emission control system characteristics specified by the Administrator. For electric vehicles, basic engine means a unique combination of manufacturer and electric traction motor, motor controller, battery configuration, electrical charging system, energy storage device, and other components as specified by the Administrator.

Battery configuration means the electrochemical type, voltage, capacity (in Watt-hours at the c/3 rate), and physical characteristics of the battery used as the tractive energy device.

Body style means a level of commonality in vehicle construction as defined by number of doors and roof treatment (*e.g.,* sedan, convertible, fastback, hatchback) and number of seats (*i.e.,* front, second, or third seat) requiring seat belts pursuant to National Highway Traffic Safety Administration safety regulations in 49 CFR part 571. Station wagons and light trucks are identified as car lines.

Calibration means the set of specifications, including tolerances, unique to a particular design, version of application of a component, or component assembly capable of functionally describing its operation over its working range.

Carbon-related exhaust emissions (CREE) means the summation of the carbon-containing constituents of the exhaust emissions, with each constituent adjusted by a coefficient representing the carbon weight fraction of each constituent relative to the CO_2 carbon weight fraction, as specified in § 600.113. For example, carbon-related exhaust emissions (weighted 55 percent city and 45 percent highway) are used to demonstrate compliance with fleet average CO_2 emission standards outlined in § 86.1818 of this chapter.

Car line means a name denoting a group of vehicles within a make or car division which has a degree of commonality in construction (*e.g.,* body, chassis). Car line does not consider any level of decor or opulence and is not generally distinguished by characteristics as roof line, number of doors, seats, or windows, except for station wagons or light-duty trucks. Station wagons and light-duty trucks are considered to be different car lines than passenger cars.

Certification vehicle means a vehicle which is selected under § 86.1828 of this chapter and used to determine compliance under § 86.1848 of this chapter for issuance of an original certificate of conformity.

City fuel economy means the city fuel economy determined by operating a vehicle (or vehicles) over the driving schedule in the Federal emission test procedure, or determined according to the vehicle-specific 5-cycle or derived 5-cycle procedures.

Cold temperature FTP means the test performed under the provisions of subpart C of part 86 of this chapter.

Combined fuel economy means:

(1) The fuel economy value determined for a vehicle (or vehicles) by harmonically averaging the city and highway fuel economy values, weighted 0.55 and 0.45, respectively.

(2) For electric vehicles, the term means the equivalent petroleum-based fuel economy value as determined by the calculation procedure promulgated by the Secretary of Energy.

Dealer means a person who resides or is located in the United States, any territory of the United States, or the District of Columbia and who is engaged in the sale or distribution of new automobiles to the ultimate purchaser.

Derived 5-cycle fuel economy means the 5-cycle fuel economy derived from the FTP-based city and HFET-based highway fuel economy by means of the equation provided in § 600.210.

Derived 5-cycle CO_2 means the 5-cycle CO_2 derived from the FTP-based city and HFET-based highway fuel economy by means of the equation provided in § 600.210.

Diesel gallon equivalent means an amount of electricity or fuel with the energy equivalence of one gallon of diesel fuel. For purposes of this part, one gallon of diesel fuel is equivalent to 36.7 kilowatt-hours of electricity.

Drive system is determined by the number and location of drive axles (*e.g.,* front wheel drive, rear wheel drive, four wheel drive) and any other feature of the drive system if the Administrator determines that such other features may result in a fuel economy difference.

Dual fueled automobile means an automobile:

(1) Which is designed to operate on an alternative fuel and on gasoline or diesel fuel; and

(2) Which provides equal or greater energy efficiency as calculated in accordance with § 600.510–08(g)(1) or § 600.510–12(g)(1) while operating on the alternative fuel as it does while operating on gasoline or diesel fuel; and

(3) Which, in the case of passenger automobiles, meets or exceeds the minimum driving range established by the Department of Transportation in 49 CFR part 538.

Electrical charging system means a device to convert 60 Hz alternating electric current, as commonly available in residential electric service in the United States, to a proper form for recharging the energy storage device.

Electric traction motor means an electrically powered motor which provides tractive energy to the wheels of a vehicle.

Electric vehicle has the meaning given in § 86.1803 of this chapter.

Energy storage device means a rechargeable means of storing tractive energy on board a vehicle such as storage batteries or a flywheel.

Engine code means a unique combination, within an engine-system combination (as defined in § 86.1803 of this chapter), of displacement, fuel injection (or carburetion or other fuel delivery system), calibration, distributor calibration, choke calibration, auxiliary emission control devices, and other engine and emission control system components specified by the Administrator. For electric vehicles, engine code means a unique combination of manufacturer, electric traction motor, motor configuration,

motor controller, and energy storage device.

Federal emission test procedure (FTP) refers to the dynamometer driving schedule, dynamometer procedure, and sampling and analytical procedures described in part 86 of this chapter for the respective model year, which are used to derive city fuel economy data.

Footprint has the meaning given in § 86.1803 of this chapter.

FTP-based city fuel economy means the fuel economy determined in § 600.113 of this part, on the basis of FTP testing.

Fuel means:

(1) Gasoline and diesel fuel for gasoline- or diesel-powered automobiles; or

(2) Electrical energy for electrically powered automobiles; or

(3) Alcohol for alcohol-powered automobiles; or

(4) Natural gas for natural gas-powered automobiles; or

(5) Liquid Petroleum Gas (LPG), commonly referred to as ''propane,'' for LPG-powered automobiles; or

(6) Hydrogen for hydrogen fuel cell automobiles and for automobiles equipped with hydrogen internal combustion engines.

Fuel cell has the meaning given in § 86.1803 of this chapter.

Fuel cell vehicle has the meaning given in § 86.1803 of this chapter.

Fuel economy means:

(1) The average number of miles traveled by an automobile or group of automobiles per volume of fuel consumed as calculated in this part; or

(2) For the purpose of calculating average fuel economy pursuant to the provisions of part 600, subpart F, fuel economy for electrically powered automobiles means the equivalent petroleum-based fuel economy as determined by the Secretary of Energy in accordance with the provisions of 10 CFR 474.

Fuel economy data vehicle means a vehicle used for the purpose of determining fuel economy which is not a certification vehicle.

Gasoline gallon equivalent means an amount of electricity or fuel with the energy equivalence of one gallon of gasoline. For purposes of this part, one gallon of gasoline is equivalent to 33.705 kilowatt-hours of electricity or 121.5 standard cubic feet of natural gas.

Good engineering judgment has the meaning given in § 1068.30 of this chapter. See § 1068.5 of this chapter for the administrative process we use to evaluate good engineering judgment.

Gross vehicle weight rating means the manufacturer's gross weight rating for the individual vehicle.

Hatchback means a passenger automobile where the conventional luggage compartment, *i.e.,* trunk, is replaced by a cargo area which is open to the passenger compartment and accessed vertically by a rear door which encompasses the rear window.

Highway fuel economy means the highway fuel economy determined either by operating a vehicle (or vehicles) over the driving schedule in the Federal highway fuel economy test procedure, or determined according to either the vehicle-specific 5-cycle equation or the derived 5-cycle equation for highway fuel economy.

Highway fuel economy test procedure (HFET) refers to the dynamometer driving schedule, dynamometer procedure, and sampling and analytical procedures described in subpart B of this part and which are used to derive highway fuel economy data.

HFET-based fuel economy means the highway fuel economy determined in § 600.113 of this part, on the basis of HFET testing.

Hybrid electric vehicle (HEV) has the meaning given in § 86.1803 of this chapter.

Independent Commercial Importer has the meaning given in § 85.1502 of this chapter.

Inertia weight class means the class, which is a group of test weights, into which a vehicle is grouped based on its loaded vehicle weight in accordance with the provisions of part 86 of this chapter.

Label means a sticker that contains fuel economy information and is affixed to new automobiles in accordance with subpart D of this part.

Light truck means an automobile that is not a passenger automobile, as defined by the Secretary of Transportation at 49 CFR 523.5. This term is interchangeable with ''non-passenger automobile.'' The term ''light truck'' includes medium-duty passenger vehicles which are manufactured during 2011 and later model years.

Medium-duty passenger vehicle means a vehicle which would satisfy the criteria for light trucks as defined by the Secretary of Transportation at 49 CFR 523.5 but for its gross vehicle weight rating or its curb weight, which is rated at more than 8,500 lbs GVWR or has a vehicle curb weight of more than 6,000 pounds or has a basic vehicle frontal area in excess of 45 square feet, and which is designed primarily to transport passengers, but does not include a vehicle that:

(1) Is an ''incomplete truck'' as defined in this subpart; or

(2) Has a seating capacity of more than 12 persons; or

(3) Is designed for more than 9 persons in seating rearward of the driver's seat; or

(4) Is equipped with an open cargo area (for example, a pick-up truck box or bed) of 72.0 inches in interior length or more. A covered box not readily accessible from the passenger compartment will be considered an open cargo area for purposes of this definition.

Minivan means a light truck which is designed primarily to carry no more than eight passengers, having an integral enclosure fully enclosing the driver, passenger, and load-carrying compartments, and rear seats readily removed, folded, stowed, or pivoted to facilitate cargo carrying. A minivan typically includes one or more sliding doors and a rear liftgate. Minivans typically have less total interior volume or overall height than full sized vans and are commonly advertised and marketed as ''minivans.''

Model type means a unique combination of car line, basic engine, and transmission class.

Model year means the manufacturer's annual production period (as determined by the Administrator) which includes January 1 of such calendar year. If a manufacturer has no annual production period, the term ''model year'' means the calendar year.

Motor controller means an electronic or electro-mechanical device to convert energy stored in an energy storage device into a form suitable to power the traction motor.

Natural gas-fueled automobile means an automobile designed to operate exclusively on natural gas.

Natural gas dual fuel automobile means an automobile:

(1) Which is designed to operate on natural gas and on gasoline or diesel fuel;

(2) Which provides equal or greater energy efficiency as calculated in § 600.510–08(g)(1) while operating on natural gas as it does while operating on gasoline or diesel fuel; and

(3) Which, in the case of passenger automobiles, meets or exceeds the minimum driving range established by the Department of Transportation in 49 CFR part 538.

Non-passenger automobile has the meaning given by the Department of Transportation at 49 CFR 523.5. This term is synonymous with ''light truck.''

Passenger automobile has the meaning given by the Department of Transportation at 49 CFR 523.4.

Pickup truck means a nonpassenger automobile which has a passenger compartment and an open cargo bed.

Plug-in hybrid electric vehicle (PHEV) has the meaning given in § 86.1803 of this chapter.

Production volume means, for a domestic manufacturer, the number of vehicle units domestically produced in a particular model year but not exported, and for a foreign manufacturer, means the number of vehicle units of a particular model imported into the United States.

QR Code means Quick Response Code, which is a registered trademark of Denso Wave, Incorporated.

Round has the meaning given in § 1065.1001 of this chapter, unless specified otherwise.

SC03 means the test procedure specified in § 86.160 of this chapter.

Secretary of Energy means the Secretary of Energy or his authorized representative.

Secretary of Transportation means the Secretary of Transportation or his authorized representative.

Sport utility vehicle (SUV) means a light truck with an extended roof line to increase cargo or passenger capacity, cargo compartment open to the passenger compartment, and one or more rear seats readily removed or folded to facilitate cargo carrying.

Station wagon means a passenger automobile with an extended roof line to increase cargo or passenger capacity, cargo compartment open to the passenger compartment, a tailgate, and one or more rear seats readily removed or folded to facilitate cargo carrying.

Subconfiguration means a unique combination within a vehicle configuration of equivalent test weight, road-load horsepower, and any other operational characteristics or parameters which the Administrator determines may significantly affect fuel economy within a vehicle configuration.

Test weight means the weight within an inertia weight class which is used in the dynamometer testing of a vehicle, and which is based on its loaded vehicle weight in accordance with the provisions of part 86 of this chapter.

Track width has the meaning given in § 86.1803 of this chapter.

Transmission class means a group of transmissions having the following common features: Basic transmission type (manual, automatic, or semi-automatic); number of forward gears used in fuel economy testing (*e.g.,* manual four-speed, three-speed automatic, two-speed semi-automatic); drive system (*e.g.,* front wheel drive, rear wheel drive; four wheel drive), type of overdrive, if applicable (*e.g.,* final gear ratio less than 1.00, separate overdrive unit); torque converter type, if applicable (*e.g.,* non-lockup, lockup, variable ratio); and other transmission characteristics that may be determined to be significant by the Administrator.

Transmission configuration means the Administrator may further subdivide within a transmission class if the Administrator determines that sufficient fuel economy differences exist. Features such as gear ratios, torque converter multiplication ratio, stall speed, shift calibration, or shift speed may be used to further distinguish characteristics within a transmission class.

Ultimate consumer means the first person who purchases an automobile for purposes other than resale or who leases an automobile.

US06 means the test procedure as described in § 86.159 of this chapter.

US06-City means the combined periods of the US06 test that occur before and after the US06-Highway period.

US06-Highway means the period of the US06 test that begins at the end of the deceleration which is scheduled to occur at 130 seconds of the driving schedule and terminates at the end of the deceleration which is scheduled to occur at 495 seconds of the driving schedule.

Usable fuel storage capacity means the amount of fuel that is available to a vehicle starting from a complete refueling event until the vehicle stops (or until driveability deteriorates to the point that further driving is unlikely or impractical). For liquid fuels, the usable fuel storage capacity represents the difference between the total fuel volume after a complete refueling event and the fuel volume that remains in the fuel tank after the vehicle runs out of fuel. For other fuels, use good engineering judgment to determine the full and empty conditions consistent with typical consumer behavior. For example, for natural gas vehicles, the full condition would be the point at which a typical operator would stop refueling based on the increasing system pressures, which are determined by temperature effects related to the refueling process; this does not necessarily represent the maximum amount of fuel the tank can hold under equilibrium conditions. The empty condition would be the point at which fuel pressure drops enough that the engine is unable to maintain stable air-fuel ratios for acceptable continued operation.

Van means any light truck having an integral enclosure fully enclosing the driver compartment and load carrying compartment. The distance from the leading edge of the windshield to the foremost body section of vans is typically shorter than that of pickup trucks and SUVs.

Vehicle configuration means a unique combination of basic engine, engine code, inertia weight class, transmission configuration, and axle ratio within a base level.

Vehicle-specific 5-cycle CO_2 means the CO_2 calculated according to the procedures in § 600.114.

Vehicle-specific 5-cycle fuel economy means the fuel economy calculated according to the procedures in § 600.114.

Wheelbase has the meaning given in § 86.1803 of this chapter.

■ 21. Newly redesignated § 600.003 is revised to read as follows:

§ 600.003 Abbreviations.

The abbreviations and acronyms used in this part have the same meaning as those in part 86 of this chapter, with the addition of the following:

(a) ''MPG'' or ''mpg'' means miles per gallon. This may be used to generally describe fuel economy as a quantity, or it may be used as the units associated with a particular value.

(b) MPGe means miles per gallon equivalent. This is generally used to quantify a fuel economy value for vehicles that use a fuel other than gasoline. The value represents miles the vehicle can drive with the energy equivalent of one gallon of gasoline.

(c) SCF means standard cubic feet.

(d) SUV means sport utility vehicle.

(e) CREE means carbon-related exhaust emissions.

■ 22. Newly redesignated § 600.005 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 600.005 Maintenance of records and rights of entry.

The provisions of this section are applicable to all fuel economy data vehicles. Certification vehicles are required to meet the provisions of § 86.1844 of this chapter.

(a) The manufacturer of any new motor vehicle subject to any of the standards or procedures prescribed in this part shall establish, maintain, and retain the following adequately organized and indexed records:

(1) *General records.* (i) Identification and description of all vehicles for which data are submitted to meet the requirements of this part.

(ii) A description of all procedures used to test each vehicle.

(iii) A copy of the information required to be submitted under § 600.006 fulfills the requirements of paragraph (a)(1)(i) of this section.

(2) *Individual records.* A brief history of each vehicle for which data are

submitted to meet the requirements of this part, in the form of a separate booklet or other document for each separate vehicle, in which must be recorded:

(i) The steps taken to ensure that the vehicle with respect to its engine, drive train, fuel system, emission control system components, exhaust after treatment device, vehicle weight, or any other device or component, as applicable, will be representative of production vehicles. In the case of electric vehicles, the manufacturer should describe the steps taken to ensure that the vehicle with respect to its electric traction motor, motor controller, battery configuration, or any other device or component, as applicable, will be representative of production vehicles.

(ii) A complete record of all emission tests performed under part 86 of this chapter, all fuel economy tests performed under this part 600 (except tests actually performed by EPA personnel), and all electric vehicle tests performed according to procedures promulgated by DOE, including all individual worksheets and other documentation relating to each such test or exact copies thereof; the date, time, purpose, and location of each test; the number of miles accumulated on the vehicle when the tests began and ended; and the names of supervisory personnel responsible for the conduct of the tests.

(iii) A description of mileage accumulated since selection of buildup of such vehicles including the date and time of each mileage accumulation listing both the mileage accumulated and the name of each driver, or each operator of the automatic mileage accumulation device, if applicable. Additionally, a description of mileage accumulated prior to selection or buildup of such vehicle must be maintained in such detail as is available.

(iv) If used, the record of any devices employed to record the speed or mileage, or both, of the test vehicle in relationship to time.

(v) A record and description of all maintenance and other servicing performed, within 2,000 miles prior to fuel economy testing under this part, giving the date and time of the maintenance or service, the reason for it, the person authorizing it, and the names of supervisory personnel responsible for the conduct of the maintenance or service. A copy of the maintenance information to be submitted under § 600.006 fulfills the requirements of this paragraph (a)(2)(v).

(vi) A brief description of any significant events affecting the vehicle during any of the period covered by the history not described in an entry under one of the previous headings including such extraordinary events as vehicle accidents or driver speeding citations or warnings.

(3) *Keeping records.* The manufacturer shall retain all records required under this part for five years after the end of the model year to which they relate. Records may be retained as hard copy or some alternative storage medium, provided that in every case all the information contained in hard copy shall be retained.

* * * * *

■ 23. Newly redesignated § 600.006 is amended by revising paragraphs (c), (e), and (g) to read as follows:

§ 600.006 Data and information requirements for fuel economy data vehicles.

* * * * *

(c) The manufacturer shall submit the following fuel economy data:

(1) For vehicles tested to meet the requirements of part 86 of this chapter (other than those chosen in accordance with the provisions related to durability demonstration in § 86.1829 of this chapter or in-use verification testing in § 86.1845 of this chapter), the FTP, highway, US06, SC03 and cold temperature FTP fuel economy results, as applicable, from all tests on that vehicle, and the test results adjusted in accordance with paragraph (g) of this section.

(2) For each fuel economy data vehicle, all individual test results (excluding results of invalid and zero mile tests) and these test results adjusted in accordance with paragraph (g) of this section.

(3) For diesel vehicles tested to meet the requirements of part 86 of this chapter, data from a cold temperature FTP, performed in accordance with § 600.111–08(e), using the fuel specified in § 600.107–08(c).

(4) For all vehicles tested in paragraph (c)(1) through (3) of this section, the individual fuel economy results measured on a per-phase basis, that is, the individual phase results for all sample phases of the FTP, cold temperature FTP and US06 tests.

(5) Starting with the 2012 model year, the data submitted according to paragraphs (c)(1) through (4) of this section shall include total HC, CO, CO_2, and, where applicable for alternative fuel vehicles, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC and CH_4. Manufacturers incorporating N_2O and CH_4 emissions in their fleet average carbon-related exhaust emissions as allowed under § 86.1818 of this chapter shall also submit N_2O and CH_4 emission data where applicable. The fuel economy, carbon-related exhaust emissions, and CO_2 emission test results shall be adjusted in accordance with paragraph (g) of this section.

* * * * *

(e) In lieu of submitting actual data from a test vehicle, a manufacturer may provide fuel economy, CO_2 emissions, and carbon-related exhaust emission values derived from a previously tested vehicle, where the fuel economy, CO_2 emissions, and carbon-related exhaust emissions are expected to be equivalent (or less fuel-efficient and with higher CO_2 emissions and carbon-related exhaust emissions). Additionally, in lieu of submitting actual data from a test vehicle, a manufacturer may provide fuel economy, CO_2 emissions, and carbon-related exhaust emission values derived from an analytical expression, *e.g.,* regression analysis. In order for fuel economy, CO_2 emissions, and carbon-related exhaust emission values derived from analytical methods to be accepted, the expression (form and coefficients) must have been approved by the Administrator.

* * * * *

(g)(1) The manufacturer shall adjust all test data used for fuel economy label calculations in subpart D and average fuel economy calculations in subpart F for the classes of automobiles within the categories identified in paragraphs of § 600.510(a)(1) through (4). The test data shall be adjusted in accordance with paragraph (g)(3) or (4) of this section as applicable.

(2) [Reserved]

(3)(i) The manufacturer shall adjust all fuel economy test data generated by vehicles with engine-drive system combinations with more than 6,200 miles by using the following equation:

$$FE_{4,000mi} = FE_T[0.979 + 5.25 \times 10^{-6}(mi)]^{-1}$$

Where:

$FE_{4,000mi}$ = Fuel economy data adjusted to 4,000-mile test point rounded to the nearest 0.1 mpg.

FE_T = Tested fuel economy value rounded to the nearest 0.1 mpg.

mi = System miles accumulated at the start of the test rounded to the nearest whole mile.

(ii)(A) The manufacturer shall adjust all carbon-related exhaust emission (CREE) and all CO_2 test data generated by vehicles with engine-drive system combinations with more than 6,200 miles by using the following equation:

$$ADJ_{4,000mi} = TEST[0.979 + 5.25 \cdot 10^{-6} \cdot (mi)]$$

$ADJ_{4,000mi}$ = CREE or CO_2 emission data adjusted to 4,000-mile test point.

TEST = Tested emissions value of CREE or CO_2 in grams per mile.
mi = System miles accumulated at the start of the test rounded to the nearest whole mile.

(B) Emissions test values and results used and determined in the calculations in this paragraph (g)(3)(ii) shall be rounded in accordance with § 86.1837 of this chapter as applicable. CO_2 and CREE values shall be rounded to the nearest gram per mile.

(C) Note that the CREE test results are determined using the unadjusted CO_2 value; *i.e.,* CO_2 is not adjusted twice when determining the 4,000 mile CREE value.

(4) For vehicles with 6,200 miles or less accumulated, the manufacturer is not required to adjust the data.

(5) The Administrator may specify a different adjustment calculation for electric vehicles, plug-in hybrid electric vehicles, and fuel cell vehicles to allow for properly characterizing the fuel economy and emissions of these vehicles.

■ 24. Newly redesignated § 600.007 is amended by revising paragraphs (a), (b), and (e) to read as follows:

§ 600.007 Vehicle acceptability.

(a) All certification vehicles and other vehicles tested to meet the requirements of part 86 of this chapter (other than those chosen under the durability-demonstration provisions in § 86.1829 of this chapter), are considered to have met the requirements of this section.

(b) Any vehicle not meeting the provisions of paragraph (a) of this section must be judged acceptable by the Administrator under this section in order for the test results to be reviewed for use in subpart C or F of this part. The Administrator will judge the acceptability of a fuel economy data vehicle on the basis of the information supplied by the manufacturer under § 600.006(b). The criteria to be met are:

(1) A fuel economy data vehicle may have accumulated not more than 10,000 miles. A vehicle will be considered to have met this requirement if the engine and drivetrain have accumulated 10,000 or fewer miles. The Administrator may specify a different maximum value for electric vehicles, plug-in hybrid electric vehicles, and fuel cell vehicles that allows for the necessary operation for properly evaluating and characterizing those vehicles under this part. The components installed for a fuel economy test are not required to be the ones with which the mileage was accumulated, *e.g.,* axles, transmission types, and tire sizes may be changed. The Administrator will determine if vehicle/engine component changes are acceptable.

(2) A vehicle may be tested in different vehicle configurations by change of vehicle components, as specified in paragraph (b)(1) of this section, or by testing in different inertia weight classes. Also, a single vehicle may be tested under different test conditions, *i.e.,* test weight and/or road load horsepower, to generate fuel economy data representing various situations within a vehicle configuration. For purposes of this part, data generated by a single vehicle tested in various test conditions will be treated as if the data were generated by the testing of multiple vehicles.

(3) The mileage on a fuel economy data vehicle must be, to the extent possible, accumulated according to § 86.1831 of this chapter.

(4) Each fuel economy data vehicle must meet the same exhaust emission standards as certification vehicles of the respective engine-system combination during the test in which the city fuel economy test results are generated. This may be demonstrated using one of the following methods:

(i) The deterioration factors established for the respective engine-system combination per § 86.1841 of this chapter as applicable will be used; or

(ii) The fuel economy data vehicle will be equipped with aged emission control components according to the provisions of § 86.1823 of this chapter.

(5) The calibration information submitted under § 600.006(b) must be representative of the vehicle configuration for which the fuel economy, CO_2 emissions, and carbon-related exhaust emissions data were submitted.

(6) Any vehicle tested for fuel economy, CO_2 emissions, or carbon-related exhaust emissions purposes must be representative of a vehicle which the manufacturer intends to produce under the provisions of a certificate of conformity.

(7) For vehicles imported under § 85.1509 or § 85.1511(b)(2), (b)(4), (c)(1), (c)(2) or (d) of this chapter (when applicable), only the following requirements must be met:

(i) For vehicles imported under § 85.1509 of this chapter, a highway fuel economy value must be generated contemporaneously with the emission tests used for purposes of demonstrating compliance with § 85.1509 of this chapter. No modifications or adjustments should be made to the vehicles between the highway fuel economy, FTP, US06, SC03 and Cold temperature FTP tests.

(ii) For vehicles imported under § 85.1509 or § 85.1511(b)(2), (b)(4), (c)(1), or (c)(2) of this chapter (when applicable) with over 10,000 miles, the equation in § 600.006(g)(3) shall be used as though only 10,000 miles had been accumulated.

(iii) Any required fuel economy testing must take place after any safety modifications are completed for each vehicle as required by regulations of the Department of Transportation.

(iv) Every vehicle imported under § 85.1509 or § 85.1511(b)(2), (b)(4), (c)(1), or (c)(2) of this chapter (when applicable) must be considered a separate type for the purposes of calculating a fuel economy label for a manufacturer's average fuel economy.

* * * * *

(e) If, based on a review of the emission data for a fuel economy data vehicle, submitted under § 600.006(b), or emission data generated by a vehicle tested under § 600.008(e), the Administrator finds an indication of non-compliance with section 202 of the Clean Air Act, 42 U.S.C. 1857 et seq. of the regulation thereunder, he may take such investigative actions as are appropriate to determine to what extent emission non-compliance actually exists.

(1) The Administrator may, under the provisions of § 86.1830 of this chapter, request the manufacturer to submit production vehicles of the configuration(s) specified by the Administrator for testing to determine to what extent emission noncompliance of a production vehicle configuration or of a group of production vehicle configurations may actually exist.

(2) If the Administrator determines, as a result of his investigation, that substantial emission non-compliance is exhibited by a production vehicle configuration or group of production vehicle configurations, he may proceed with respect to the vehicle configuration(s) as provided under section 206 or 207, as applicable, of the Clean Air Act, 42 U.S.C. 1857 *et seq.*

* * * * *

■ 25. Newly redesignated § 600.008 is amended by revising the section heading and paragraphs (a)(1) and (a)(2)(i) to read as follows:

§ 600.008 Review of fuel economy, CO_2 emissions, and carbon-related exhaust emission data, testing by the Administrator.

(a) * * *

(1)(i) The Administrator may require that any one or more of the test vehicles be submitted to the Agency, at such place or places as the Agency may designate, for the purposes of

conducting fuel economy tests. The Administrator may specify that such testing be conducted at the manufacturer's facility, in which case instrumentation and equipment specified by the Administrator shall be made available by the manufacturer for test operations. The tests to be performed may comprise the FTP, highway fuel economy test, US06, SC03, or Cold temperature FTP or any combination of those tests. Any testing conducted at a manufacturer's facility pursuant to this paragraph shall be scheduled by the manufacturer as promptly as possible.

(ii) Starting with the 2012 model year for carbon-related exhaust emissions and with the 2013 model year for CO_2 emissions, the evaluations, testing, and test data described in this section pertaining to fuel economy shall also be performed for CO_2 emissions and carbon-related exhaust emissions, except that CO_2 emissions and carbon-related exhaust emissions shall be arithmetically averaged instead of harmonically averaged, and in cases where the manufacturer selects the lowest of several fuel economy results to represent the vehicle, the manufacturer shall select the CO_2 emissions and carbon-related exhaust emissions value from the test results associated with the lowest selected fuel economy results.

(2) * * *

(i) The manufacturer's fuel economy data (or harmonically averaged data if more than one test was conducted) will be compared with the results of the Administrator's test.

* * * * *

■ 26. Newly redesignated § 600.009 is revised to read as follows:

§ 600.009 Hearing on acceptance of test data.

(a) The manufacturer may request a hearing on the Administrator's decision if the Administrator rejects any of the following:

(1) The use of a manufacturer's fuel economy data vehicle, in accordance with § 600.008(e) or (g), or

(2) The use of fuel economy data, in accordance with § 600.008(c), or (f), or

(3) The determination of a vehicle configuration, in accordance with § 600.206(a), or

(4) The identification of a car line, in accordance with § 600.002, or

(5) The fuel economy label values determined by the manufacturer under § 600.312–08(a), then:

(b) The request for a hearing must be filed in writing within 30 days after being notified of the Administrator's decision. The request must be signed by an authorized representative of the manufacturer and include a statement specifying the manufacturer's objections to the Administrator's determinations, with data in support of such objection.

(c) If, after the review of the request and supporting data, the Administrator finds that the request raises one or more substantial factual issues, the Administrator shall provide the manufacturer with a hearing in accordance with the provisions of 40 CFR part 1068, subpart G.

(d) A manufacturer's use of any fuel economy data which the manufacturer challenges pursuant to this section shall not constitute final acceptance by the manufacturer nor prejudice the manufacturer in the exercise of any appeal pursuant to this section challenging such fuel economy data.

■ 27. Newly redesignated § 600.010 is amended by revising paragraphs (a) introductory text, (c), and (d) to read as follows:

§ 600.010 Vehicle test requirements and minimum data requirements.

(a) Unless otherwise exempted from specific emission compliance requirements, for each certification vehicle defined in this part, and for each vehicle tested according to the emission test procedures in part 86 of this chapter for addition of a model after certification or approval of a running change (§ 86.1842 of this chapter, as applicable):

* * * * *

(c) *Minimum data requirements for labeling.* (1) In order to establish fuel economy label values under § 600.301, the manufacturer shall use only test data accepted in accordance with § 600.008 meeting the minimum coverage of:

(i) Data required for emission certification under §§ 86.1828 and 86.1842 of this chapter.

(ii)(A) FTP and HFET data from the highest projected model year sales subconfiguration within the highest projected model year sales configuration for each base level, and

(B) If required under § 600.115, for 2011 and later model year vehicles, US06, SC03 and cold temperature FTP data from the highest projected model year sales subconfiguration within the highest projected model year sales configuration for each base level. Manufacturers may optionally generate this data for any 2008 through 2010 model years, and, 2011 and later model year vehicles, if not otherwise required.

(iii) For additional model types established under § 600.208–08(a)(2), § 600.208–12(a)(2) § 600.209–08(a)(2), or § 600.209–12(a)(2) FTP and HFET data, and if required under § 600.115, US06, SC03 and Cold temperature FTP data from each subconfiguration included within the model type.

(2) For the purpose of recalculating fuel economy label values as required under § 600.314–08(b), the manufacturer shall submit data required under § 600.507.

(d) *Minimum data requirements for the manufacturer's average fuel economy and average carbon-related exhaust emissions.* For the purpose of calculating the manufacturer's average fuel economy and average carbon-related exhaust emissions under § 600.510, the manufacturer shall submit FTP (city) and HFET (highway) test data representing at least 90 percent of the manufacturer's actual model year production, by configuration, for each category identified for calculation under § 600.510–08(a) or § 600.510–12(a)(1).

■ 28. Newly redesignated § 600.011 is revised to read as follows:

§ 600.011 Incorporation by reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Environmental Protection Agency must publish a notice of the change in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at U.S. EPA, Air and Radiation Docket and Information Center, 1301 Constitution Ave., NW., Room B102, EPA West Building, Washington, DC 20460, (202) 202–1744, and is available from the sources listed below. It is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html* and is available from the sources listed below:

(b) American Society for Testing and Materials, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA, 19428–2959, (610) 832–9585, *http://www.astm.org/.*

(1) ASTM D975–11 Standard Specification for Diesel Fuel Oils, approved March 1, 2011, IBR approved for § 600.107–08(b).

(2) ASTM D 1298–99 (Reapproved 2005) Standard Practice for Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method, approved

November 1, 2005, IBR approved for §§ 600.113–08(f) and (g), 600.113–12(f) and (g), 600.510–08(g), and 600.510–12(g).

(3) ASTM D 1945–03 (Reapproved 2010) Standard Test Method for Analysis of Natural Gas By Gas Chromatography, approved January 1, 2010, IBR approved for §§ 600.113–08(f) and 600.113–12(f).

(4) ASTM D 3338/D 3338M –09 Standard Test Method for Estimation of Net Heat of Combustion of Aviation Fuels, approved April 15, 2009, IBR approved for §§ 600.113–08(f) and 600.113–12(f).

(5) ASTM D 3343–05 (Reapproved 2010) Standard Test Method for Estimation of Hydrogen Content of Aviation Fuels, approved October 1, 2010, IBR approved for §§ 600.113–08(f) and 600.113–12(f).

(c) Society of Automotive Engineers, 400 Commonwealth Dr., Warrendale, PA 15096–0001, (877) 606–7323 (U.S. and Canada) or (724) 776–4970 (outside the U.S. and Canada), *http://www.sae.org.*

(1) Motor Vehicle Dimensions—Recommended Practice SAE 1100a (Report of Human Factors Engineering Committee, Society of Automotive Engineers, approved September 1973 as revised September 1975), IBR approved for § 600.315–08(c).

(2) SAE J1634, Electric Vehicle Energy Consumption and Range Test Procedure, Cancelled October 2002, IBR approved for §§ 600.116–12(a) and 600.311–12(j) and (k).

(3) SAE J1711, Recommended Practice for Measuring the Exhaust Emissions and Fuel Economy of Hybrid-Electric Vehicles, Including Plug-In Hybrid Vehicles, June 2010, IBR approved for §§ 600.116–12(b) and 600.311–12(d), (j), and (k).

(d) International Organization for Standardization, Case Postale 56, CH–1211 Geneva 20, Switzerland, (41) 22749 0111, *http://www.iso.org,* or *central@iso.org.*

(1) ISO/IEC 18004:2006(E), Information technology—Automatic identification and data capture techniques—QR Code 2005 bar code symbology specification, Second Edition, September 1, 2006, IBR approved for § 600.302–12(b).

(2) [Reserved]

Subpart B—Fuel Economy and Carbon-Related Exhaust Emission Test Procedures

■ 29. The heading for subpart B is revised as set forth above.

§§ 600.101–08, 600.101–12, 600.101–86, 600.101–93, 600.102–78, 600.103–78, 600.104–78, 600.105–78, 600.106–78, 600.107–78, 600.107–93, 600.109–78, 600.110–78, 600.111–80, 600.111–93, 600.112–78, 600.113–78, 600.113–88, and 600.113–93 [Removed]

■ 30. Subpart B is amended by removing the following sections:

§ 600.101–08.

§ 600.101–12.
§ 600.101–86.
§ 600.101–93.
§ 600.102–78.
§ 600.103–78.
§ 600.104–78.
§ 600.105–78.
§ 600.106–78.
§ 600.107–78.
§ 600.107–93.
§ 600.109–78.
§ 600.110–78.
§ 600.111–80.
§ 600.111–93.
§ 600.112–78.
§ 600.113–78.
§ 600.113–88
§ 600.113–93.

■ 31. Section § 600.106–08 is revised to read as follows:

§ 600.106–08 Equipment requirements.

The requirements for test equipment to be used for all fuel economy testing are given in subparts B and C of part 86 of this chapter.

■ 32. Section § 600.107–08 is revised to read as follows:

§ 600.107–08 Fuel specifications.

(a) The test fuel specifications for gasoline, diesel, methanol, and methanol-petroleum fuel mixtures are given in § 86.113 of this chapter, except for cold temperature FTP fuel requirements for diesel and alternative fuel vehicles, which are given in paragraph (b) of this section.

(b)(1) Diesel test fuel used for cold temperature FTP testing must comprise a winter-grade diesel fuel as specified in ASTM D975 (incorporated by reference in § 600.011). Alternatively, EPA may approve the use of a different diesel fuel, provided that the level of kerosene added shall not exceed 20 percent.

(2) The manufacturer may request EPA approval of the use of an alternative fuel for cold temperature FTP testing.

(c) Test fuels representing fuel types for which there are no specifications provided in § 86.113 of this chapter may be used if approved in advance by the Administrator.

§ 600.108–78 [Redesignated as § 600.108–08]

■ 33. Redesignate § 600.108–78 as § 600.108–08.

■ 34. Section § 600.109–08 is amended by revising paragraph (b)(3) to read as follows:

§ 600.109–08 EPA driving cycles.

* * * * *

(b) * * *

(3) A graphic representation of the range of acceptable speed tolerances is found in § 86.115 of this chapter.

* * * * *

■ 35. Section 600.111–08 is revised to read as follows:

§ 600.111–08 Test procedures.

This section provides test procedures for the FTP, highway, US06, SC03, and the cold temperature FTP tests. Testing shall be performed according to test procedures and other requirements contained in this part 600 and in part 86 of this chapter, including the provisions of part 86, subparts B, C, and S.

(a) *FTP testing procedures.* The test procedures to be followed for conducting the FTP test are those prescribed in §§ 86.127 through 86.138 of this chapter, as applicable, except as provided for in paragraph (b)(5) of this section. (The evaporative loss portion of the test procedure may be omitted unless specifically required by the Administrator.)

(b) *Highway fuel economy testing procedures.* (1) The Highway Fuel Economy Dynamometer Procedure (HFET) consists of a preconditioning highway driving sequence and a measured highway driving sequence.

(2) The HFET is designated to simulate non-metropolitan driving with an average speed of 48.6 mph and a maximum speed of 60 mph. The cycle is 10.2 miles long with 0.2 stop per mile and consists of warmed-up vehicle operation on a chassis dynamometer through a specified driving cycle. A proportional part of the diluted exhaust emission is collected continuously for subsequent analysis of hydrocarbons, carbon monoxide, carbon dioxide using a constant volume (variable dilution) sampler. Diesel dilute exhaust is continuously analyzed for hydrocarbons using a heated sample line and analyzer. Methanol and formaldehyde samples are collected and individually analyzed for methanol-fueled vehicles (measurement of methanol and formaldehyde may be omitted for 1993 through 1994 model year methanol-fueled vehicles provided a HFID calibrated on methanol is used for measuring HC plus methanol).

Methanol, ethanol, formaldehyde, and acetaldehyde samples are collected and individually analyzed for ethanol fueled vehicles.

(3) Except in cases of component malfunction or failure, all emission control systems installed on or incorporated in a new motor vehicle must be functioning during all procedures in this subpart. The Administrator may authorize maintenance to correct component malfunction or failure.

(4) The provisions of § 86.128 of this chapter apply for vehicle transmission operation during highway fuel economy testing under this subpart.

(5) Section 86.129 of this chapter applies for determination of road load power and test weight for highway fuel economy testing. The test weight for the testing of a certification vehicle will be that test weight specified by the Administrator under the provisions of part 86 of this chapter. The test weight for a fuel economy data vehicle will be that test weight specified by the Administrator from the test weights covered by that vehicle configuration. The Administrator will base his selection of a test weight on the relative projected sales volumes of the various test weights within the vehicle configuration.

(6) The HFET is designed to be performed immediately following the Federal Emission Test Procedure, §§ 86.127 through 86.138 of this chapter. When conditions allow, the tests should be scheduled in this sequence. In the event the tests cannot be scheduled within three hours of the Federal Emission Test Procedure (including one hour hot soak evaporative loss test, if applicable) the vehicle should be preconditioned as in paragraph (b)(6)(i) or (ii) of this section, as applicable.

(i) If the vehicle has experienced more than three hours of soak (68 °F–86 °F) since the completion of the Federal Emission Test Procedure, or has experienced periods of storage outdoors, or in environments where soak temperature is not controlled to 68 °F–86 °F, the vehicle must be preconditioned by operation on a dynamometer through one cycle of the EPA Urban Dynamometer Driving Schedule, § 86.115 of this chapter.

(ii) EPA may approve a manufacturer's request for additional preconditioning in unusual circumstances.

(7) Use the following procedure to determine highway fuel economy:

(i) The dynamometer procedure consists of two cycles of the Highway Fuel Economy Driving Schedule (§ 600.109–08(b)) separated by 15 seconds of idle. The first cycle of the Highway Fuel Economy Driving Schedule is driven to precondition the test vehicle and the second is driven for the fuel economy measurement.

(ii) The provisions of § 86.135 of this chapter, except for the overview and the allowance for practice runs, apply for highway fuel economy testing.

(iii) Only one exhaust sample and one background sample are collected and analyzed for hydrocarbons (except diesel hydrocarbons which are analyzed continuously), carbon monoxide, and carbon dioxide. Methanol and formaldehyde samples (exhaust and dilution air) are collected and analyzed for methanol-fueled vehicles (measurement of methanol and formaldehyde may be omitted for 1993 through 1994 model year methanol-fueled vehicles provided a HFID calibrated on methanol is used for measuring HC plus methanol). Methanol, ethanol, formaldehyde, and acetaldehyde samples are collected and analyzed for ethanol fueled vehicles.

(iv) The fuel economy measurement cycle of the test includes two seconds of idle indexed at the beginning of the second cycle and two seconds of idle indexed at the end of the second cycle.

(8) If the engine is not running at the initiation of the highway fuel economy test (preconditioning cycle), the start-up procedure must be according to the manufacturer's recommended procedures. False starts and stalls during the preconditioning cycle must be treated as in § 86.136 of this chapter. If the vehicle stalls during the measurement cycle of the highway fuel economy test, the test is voided, corrective action may be taken according to § 86.1834 of this chapter, and the vehicle may be rescheduled for testing. The person taking the corrective action shall report the action so that the test records for the vehicle contain a record of the action.

(9) The following steps must be taken for each test:

(i) Place the drive wheels of the vehicle on the dynamometer. The vehicle may be driven onto the dynamometer.

(ii) Open the vehicle engine compartment cover and position the cooling fan(s) required. Manufacturers may request the use of additional cooling fans or variable speed fan(s) for additional engine compartment or under-vehicle cooling and for controlling high tire or brake temperatures during dynamometer operation. With prior EPA approval, manufacturers may perform the test with the engine compartment closed, *e.g.* to provide adequate air flow to an intercooler (through a factory installed hood scoop). Additionally, the Administrator may conduct fuel economy testing using the additional cooling set-up approved for a specific vehicle.

(iii) Preparation of the CVS must be performed before the measurement highway driving cycle.

(iv) The provisions of § 86.137–94(b)(3) through (6) of this chapter apply for highway fuel economy test, except that only one exhaust sample collection bag and one dilution air sample collection bag need to be connected to the sample collection systems.

(v) Operate the vehicle over one Highway Fuel Economy Driving Schedule cycle according to the dynamometer driving schedule specified in § 600.109–08(b).

(vi) When the vehicle reaches zero speed at the end of the preconditioning cycle, the driver has 17 seconds to prepare for the emission measurement cycle of the test.

(vii) Operate the vehicle over one Highway Fuel Economy Driving Schedule cycle according to the dynamometer driving schedule specified in § 600.109–08(b) while sampling the exhaust gas.

(viii) Sampling must begin two seconds before beginning the first acceleration of the fuel economy measurement cycle and must end two seconds after the end of the deceleration to zero. At the end of the deceleration to zero speed, the roll or shaft revolutions must be recorded.

(10) For alcohol-based dual fuel automobiles, the procedures of § 600.111–08(a) and (b) shall be performed for each of the fuels on which the vehicle is designed to operate.

(c) *US06 Testing procedures.* The test procedures to be followed for conducting the US06 test are those prescribed in § 86.159 of this chapter, as applicable.

(d) *SC03 testing procedures.* The test procedures to be followed for conducting the SC03 test are prescribed in §§ 86.160 and 86.161 of this chapter, as applicable.

(e) *Cold temperature FTP procedures.* The test procedures to be followed for conducting the cold temperature FTP test are generally prescribed in subpart C of part 86 of this chapter, as applicable. For the purpose of fuel economy labeling, diesel vehicles are subject to cold temperature FTP testing, but are not required to measure particulate matter, as described in § 86.210 of this chapter.

(f) *Special test procedures.* The Administrator may prescribe test procedures, other than those set forth in this subpart B, for any vehicle which is not susceptible to satisfactory testing and/or testing results by the procedures set forth in this part. For example, special test procedures may be used for advanced technology vehicles, including, but not limited to fuel cell vehicles, hybrid electric vehicles using hydraulic energy storage, and vehicles equipped with hydrogen internal combustion engines. Additionally, the Administrator may conduct fuel economy and carbon-related exhaust emission testing using the special test procedures approved for a specific vehicle.

■ 36. Section 600.113–08 is amended by revising paragraph (f) to read as follows:

§ 600.113–08 Fuel economy calculations for FTP, HFET, US06, SC03 and cold temperature FTP tests.

* * * * *

(f)(1) Gasoline test fuel properties shall be determined by analysis of a fuel sample taken from the fuel supply. A sample shall be taken after each addition of fresh fuel to the fuel supply. Additionally, the fuel shall be resampled once a month to account for any fuel property changes during storage. Less frequent resampling may be permitted if EPA concludes, on the basis of manufacturer-supplied data, that the properties of test fuel in the manufacturer's storage facility will remain stable for a period longer than one month. The fuel samples shall be analyzed to determine the following fuel properties:

(i) Specific gravity per ASTM D 1298 (incorporated by reference in § 600.011).

(ii) Carbon weight fraction per ASTM D 3343 (incorporated by reference in § 600.011).

(iii) Net heating value (Btu/lb) per ASTM D 3338/D 3338M (incorporated by reference in § 600.011).

(2) Methanol test fuel shall be analyzed to determine the following fuel properties:

(i) Specific gravity using ASTM D 1298 (incorporated by reference in § 600.011). You may determine specific gravity for the blend, or you may determine specific gravity for the gasoline and methanol fuel components separately before combining the results using the following equation:

$SG = SG_g \times$ volume fraction gasoline + $SG_m \times$ volume fraction methanol.

(ii)(A) Carbon weight fraction using the following equation:

$CWF = CWF_g \times MF_g + 0.375 \times MF_m$

Where:

CWF_g = Carbon weight fraction of gasoline portion of blend per ASTM D 3343 (incorporated by reference in § 600.011).

MF_g = Mass fraction gasoline = $(G \times SG_g)/(G \times SG_g + M \times SG_m)$

MF_m = Mass fraction methanol = $(M \times SG_m)/(G \times SG_g + M \times SG_m)$

Where:

G = Volume fraction gasoline.

M = Volume fraction methanol.

SG_g = Specific gravity of gasoline as measured by ASTM D 1298 (incorporated by reference in § 600.011).

SG_m = Specific gravity of methanol as measured by ASTM D 1298 (incorporated by reference in § 600.011).

(B) Upon the approval of the Administrator, other procedures to measure the carbon weight fraction of the fuel blend may be used if the manufacturer can show that the procedures are superior to or equally as accurate as those specified in this paragraph (f)(2)(ii).

(3) Natural gas test fuel shall be analyzed to determine the following fuel properties:

(i) Fuel composition per ASTM D 1945 (incorporated by reference in § 600.011).

(ii) Specific gravity (based on fuel composition per ASTM D 1945 (incorporated by reference in § 600.011).

(iii) Carbon weight fraction based on the carbon contained only in the HC constituents of the fuel = weight of carbon in HC constituents divided by the total weight of fuel.

(iv) Carbon weight fraction of fuel = total weight of carbon in the fuel (*i.e.,* includes carbon contained in HC and in CO_2) divided by total weight of fuel.

* * * * *

■ 37. Section 600.113–12 is revised to read as follows:

§ 600.113–12 Fuel economy, CO_2 emissions, and carbon-related exhaust emission calculations for FTP, HFET, US06, SC03 and cold temperature FTP tests.

The Administrator will use the calculation procedure set forth in this paragraph for all official EPA testing of vehicles fueled with gasoline, diesel, alcohol-based or natural gas fuel. The calculations of the weighted fuel economy and carbon-related exhaust emission values require input of the weighted grams/mile values for total hydrocarbons (HC), carbon monoxide (CO), and carbon dioxide (CO_2); and, additionally for methanol-fueled automobiles, methanol (CH_3OH) and formaldehyde (HCHO); and, additionally for ethanol-fueled automobiles, methanol (CH_3OH), ethanol (C_2H_5OH), acetaldehyde (C_2H_4O), and formaldehyde (HCHO); and additionally for natural gas-fueled vehicles, non-methane hydrocarbons (NMHC) and methane (CH_4). For manufacturers selecting the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter the calculations of the carbon-related exhaust emissions require the input of grams/mile values for nitrous oxide (N_2O) and methane (CH_4). Emissions shall be determined for the FTP, HFET, US06, SC03 and cold temperature FTP tests. Additionally, the specific gravity, carbon weight fraction and net heating value of the test fuel must be determined. The FTP, HFET, US06, SC03 and cold temperature FTP fuel economy and carbon-related exhaust emission values shall be calculated as specified in this section. An example fuel economy calculation appears in Appendix II of this part.

(a) Calculate the FTP fuel economy as follows:

(1) Calculate the weighted grams/mile values for the FTP test for CO_2, HC, and CO, and where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4 as specified in § 86.144–94(b) of this chapter. Measure and record the test fuel's properties as specified in paragraph (f) of this section.

(2) Calculate separately the grams/mile values for the cold transient phase, stabilized phase and hot transient phase of the FTP test. For vehicles with more than one source of propulsion energy, one of which is a rechargeable energy storage system, or vehicles with special features that the Administrator determines may have a rechargeable energy source, whose charge can vary during the test, calculate separately the grams/mile values for the cold transient phase, stabilized phase, hot transient phase and hot stabilized phase of the FTP test.

(b) Calculate the HFET fuel economy as follows:

(1) Calculate the mass values for the highway fuel economy test for HC, CO and CO_2, and where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4 as specified in § 86.144–94(b) of this chapter. Measure and record the test fuel's properties as specified in paragraph (f) of this section.

(2) Calculate the grams/mile values for the highway fuel economy test for HC, CO and CO_2, and where applicable CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4 by dividing the mass values obtained in paragraph (b)(1) of this section, by the actual driving distance, measured in miles, as specified in § 86.135 of this chapter.

(c) Calculate the cold temperature FTP fuel economy as follows:

(1) Calculate the weighted grams/mile values for the cold temperature FTP test

for HC, CO and CO_2, and where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4 as specified in § 86.144–94(b) of this chapter. For 2008 through 2010 diesel-fueled vehicles, HC measurement is optional.

(2) Calculate separately the grams/mile values for the cold transient phase, stabilized phase and hot transient phase of the cold temperature FTP test in § 86.244 of this chapter.

(3) Measure and record the test fuel's properties as specified in paragraph (f) of this section.

(d) Calculate the US06 fuel economy as follows:

(1) Calculate the total grams/mile values for the US06 test for HC, CO and CO_2, and where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4 as specified in § 86.144–94(b) of this chapter.

(2) Calculate separately the grams/mile values for HC, CO and CO_2, and where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4, for both the US06 City phase and the US06 Highway phase of the US06 test as specified in § 86.164 of this chapter. In lieu of directly measuring the emissions of the separate city and highway phases of the US06 test according to the provisions of § 86.159 of this chapter, the manufacturer may, with the advance approval of the Administrator and using good engineering judgment, optionally analytically determine the grams/mile values for the city and highway phases of the US06 test. To analytically determine US06 City and US06 Highway phase emission results, the manufacturer shall multiply the US06 total grams/mile values determined in paragraph (d)(1) of this section by the estimated proportion of fuel use for the city and highway phases relative to the total US06 fuel use. The manufacturer may estimate the proportion of fuel use for the US06 City and US06 Highway phases by using modal CO_2, HC, and CO emissions data, or by using appropriate OBD data (*e.g.,* fuel flow rate in grams of fuel per second), or another method approved by the Administrator.

(3) Measure and record the test fuel's properties as specified in paragraph (f) of this section.

(e) Calculate the SC03 fuel economy as follows:

(1) Calculate the grams/mile values for the SC03 test for HC, CO and CO_2, and where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O and CH_4 as specified in § 86.144–94(b) of this chapter.

(2) Measure and record the test fuel's properties as specified in paragraph (f) of this section.

(f) Analyze and determine fuel properties as follows:

(1) Gasoline test fuel properties shall be determined by analysis of a fuel sample taken from the fuel supply. A sample shall be taken after each addition of fresh fuel to the fuel supply. Additionally, the fuel shall be resampled once a month to account for any fuel property changes during storage. Less frequent resampling may be permitted if EPA concludes, on the basis of manufacturer-supplied data, that the properties of test fuel in the manufacturer's storage facility will remain stable for a period longer than one month. The fuel samples shall be analyzed to determine the following fuel properties:

(i) Specific gravity measured using ASTM D 1298 (incorporated by reference in § 600.011).

(ii) Carbon weight fraction measured using ASTM D 3343 (incorporated by reference in § 600.011).

(iii) Net heating value (Btu/lb) determined using ASTM D 3338/D 3338M (incorporated by reference in § 600.011).

(2) Methanol test fuel shall be analyzed to determine the following fuel properties:

(i) Specific gravity using ASTM D 1298 (incorporated by reference in § 600.011). You may determine specific gravity for the blend, or you may determine specific gravity for the gasoline and methanol fuel components separately before combining the results using the following equation:

$$SG = SGg \times \text{volume fraction gasoline} + SGm \times \text{volume fraction methanol.}$$

(ii)(A) Carbon weight fraction using the following equation:

$$CWF = CWFg \times MFg + 0.375 \times MFm$$

Where:

CWFg = Carbon weight fraction of gasoline portion of blend measured using ASTM D 3343 (incorporated by reference in § 600.011).

MFg = Mass fraction gasoline = $(G \times SGg)/(G \times SGg + M \times SGm)$

MFm = Mass fraction methanol = $(M \times SGm)/(G \times SGg + M \times SGm)$

Where:

G = Volume fraction gasoline.

M = Volume fraction methanol.

SGg = Specific gravity of gasoline as measured using ASTM D 1298 (incorporated by reference in § 600.011).

SGm = Specific gravity of methanol as measured using ASTM D 1298 (incorporated by reference in § 600.011).

(B) Upon the approval of the Administrator, other procedures to measure the carbon weight fraction of the fuel blend may be used if the manufacturer can show that the procedures are superior to or equally as accurate as those specified in this paragraph (f)(2)(ii).

(3) Natural gas test fuel shall be analyzed to determine the following fuel properties:

(i) Fuel composition measured using ASTM D 1945 (incorporated by reference in § 600.011).

(ii) Specific gravity measured as based on fuel composition per ASTM D 1945 (incorporated by reference in § 600.011).

(iii) Carbon weight fraction, based on the carbon contained only in the hydrocarbon constituents of the fuel. This equals the weight of carbon in the hydrocarbon constituents divided by the total weight of fuel.

(iv) Carbon weight fraction of the fuel, which equals the total weight of carbon in the fuel (*i.e.,* includes carbon contained in hydrocarbons and in CO_2) divided by the total weight of fuel.

(4) Ethanol test fuel shall be analyzed to determine the following fuel properties:

(i) Specific gravity using ASTM D 1298 (incorporated by reference in § 600.011). You may determine specific gravity for the blend, or you may determine specific gravity for the gasoline and methanol fuel components separately before combining the results using the following equation:

$$SG = SGg \times \text{volume fraction gasoline} + SGe \times \text{volume fraction ethanol.}$$

(ii)(A) Carbon weight fraction using the following equation:

$$CWF = CWFg \times MFg + 0.521 \times MFe$$

Where:

CWFg = Carbon weight fraction of gasoline portion of blend measured using ASTM D 3343 (incorporated by reference in § 600.011).

MFg = Mass fraction gasoline = $(G \times SGg)/(G \times SGg + E \times SGe)$

MFe = Mass fraction ethanol = $(E \times SGe)/(G \times SGg + E \times SGe)$

Where:

G = Volume fraction gasoline.

E = Volume fraction ethanol.

SGg = Specific gravity of gasoline as measured using ASTM D 1298 (incorporated by reference in § 600.011).

SGe = Specific gravity of ethanol as measured using ASTM D 1298 (incorporated by reference in § 600.011).

(B) Upon the approval of the Administrator, other procedures to measure the carbon weight fraction of the fuel blend may be used if the manufacturer can show that the procedures are superior to or equally as accurate as those specified in this paragraph (f)(4)(ii).

(g) Calculate separate FTP, highway, US06, SC03 and Cold temperature FTP fuel economy and carbon-related exhaust emissions from the grams/mile values for total HC, CO, CO_2 and, where applicable, CH_3OH, C_2H_5OH, C_2H_4O, HCHO, NMHC, N_2O, and CH_4, and the test fuel's specific gravity, carbon weight fraction, net heating value, and additionally for natural gas, the test fuel's composition.

(1) *Emission values for fuel economy calculations.* The emission values (obtained per paragraph (a) through (e) of this section, as applicable) used in the calculations of fuel economy in this section shall be rounded in accordance with § 86.1837 of this chapter. The CO_2 values (obtained per this section, as applicable) used in each calculation of fuel economy in this section shall be rounded to the nearest gram/mile.

(2) *Emission values for carbon-related exhaust emission calculations.* (i) If the emission values (obtained per paragraph (a) through (e) of this section, as applicable) were obtained from testing with aged exhaust emission control components as allowed under § 86.1823 of this chapter, then these test values shall be used in the calculations of carbon-related exhaust emissions in this section.

(ii) If the emission values (obtained per paragraph (a) through (e) of this section, as applicable) were not obtained from testing with aged exhaust emission control components as allowed under § 86.1823 of this chapter, then these test values shall be adjusted by the appropriate deterioration factor determined according to § 86.1823 of this chapter before being used in the calculations of carbon-related exhaust emissions in this section. For vehicles within a test group, the appropriate NMOG deterioration factor may be used in lieu of the deterioration factors for CH_3OH, C_2H_5OH, and/or C_2H_4O emissions.

(iii) The emission values determined in paragraph (g)(2)(i) or (ii) of this section shall be rounded in accordance with § 86.1837 of this chapter. The CO_2 values (obtained per this section, as applicable) used in each calculation of carbon-related exhaust emissions in this section shall be rounded to the nearest gram/mile.

(iv) For manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter, N_2O and CH_4 emission values for use in the calculation of carbon-related exhaust emissions in this section shall be the values determined according to paragraph (g)(2)(iv)(A), (B), or (C) of this section.

(A) The FTP and HFET test values as determined for the emission data vehicle according to the provisions of § 86.1835 of this chapter. These values shall apply to all vehicles tested under this section that are included in the test group represented by the emission data vehicle and shall be adjusted by the appropriate deterioration factor determined according to § 86.1823 of this chapter before being used in the calculations of carbon-related exhaust emissions in this section, except that in-use test data shall not be adjusted by a deterioration factor.

(B) The FTP and HFET test values as determined according to testing conducted under the provisions of this subpart. These values shall be adjusted by the appropriate deterioration factor determined according to § 86.1823 of this chapter before being used in the calculations of carbon-related exhaust emissions in this section, except that in-use test data shall not be adjusted by a deterioration factor.

(C) For the 2012 through 2014 model years only, manufacturers may use an assigned value of 0.010 g/mi for N_2O FTP and HFET test values. This value is not required to be adjusted by a deterioration factor.

(3) The specific gravity and the carbon weight fraction (obtained per paragraph (f) of this section) shall be recorded using three places to the right of the decimal point. The net heating value (obtained per paragraph (f) of this section) shall be recorded to the nearest whole Btu/lb.

(4) For the purpose of determining the applicable in-use CO_2 exhaust emission standard under § 86.1818 of this chapter, the combined city/highway carbon-related exhaust emission value for a vehicle subconfiguration is calculated by arithmetically averaging the FTP-based city and HFET-based highway carbon-related exhaust emission values, as determined in paragraphs (h) through (n) of this section for the subconfiguration, weighted 0.55 and 0.45 respectively, and rounded to the nearest tenth of a gram per mile.

(h)(1) For gasoline-fueled automobiles tested on a test fuel specified in § 86.113 of this chapter, the fuel economy in miles per gallon is to be calculated using the following equation and rounded to the nearest 0.1 miles per gallon:

$$mpg = (5174 \times 10^4 \times CWF \times SG)/[((CWF \times HC) + (0.429 \times CO) + (0.273 \times CO_2)) \times ((0.6 \times SG \times NHV) + 5471)]$$

Where:

HC = Grams/mile HC as obtained in paragraph (g)(1) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(1) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(1) of this section.
CWF = Carbon weight fraction of test fuel as obtained in paragraph (f)(1) of this section and rounded according to paragraph (g)(3) of this section.
NHV = Net heating value by mass of test fuel as obtained in paragraph (f)(1) of this section and rounded according to paragraph (g)(3) of this section.
SG = Specific gravity of test fuel as obtained in paragraph (f)(1) of this section and rounded according to paragraph (g)(3) of this section.

(2)(i) For 2012 and later model year gasoline-fueled automobiles tested on a test fuel specified in § 86.113 of this chapter, the carbon-related exhaust emissions in grams per mile is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$$CREE = (CWF/0.273 \times HC) + (1.571 \times CO) + CO_2$$

Where:

CREE means the carbon-related exhaust emissions as defined in § 600.002.
HC = Grams/mile HC as obtained in paragraph (g)(2) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.
CWF = Carbon weight fraction of test fuel as obtained in paragraph (f)(1) of this section and rounded according to paragraph (g)(3) of this section.

(ii) For manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter, the carbon-related exhaust emissions in grams per mile for 2012 and later model year gasoline-fueled automobiles tested on a test fuel specified in § 86.113 of this chapter is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$$CREE = [(CWF/0.273) \times NMHC] + (1.571 \times CO) + CO_2 + (298 \times N_2O) + (25 \times CH_4)$$

Where:

CREE means the carbon-related exhaust emissions as defined in § 600.002.
NMHC = Grams/mile NMHC as obtained in paragraph (g)(2) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.
N_2O = Grams/mile N_2O as obtained in paragraph (g)(2) of this section.
CH_4 = Grams/mile CH_4 as obtained in paragraph (g)(2) of this section.
CWF = Carbon weight fraction of test fuel as obtained in paragraph (f)(1) of this section and rounded according to paragraph (g)(3) of this section.

(i)(1) For diesel-fueled automobiles, calculate the fuel economy in miles per gallon of diesel fuel by dividing 2778 by the sum of three terms and rounding the quotient to the nearest 0.1 mile per gallon:

(i)(A) 0.866 multiplied by HC (in grams/miles as obtained in paragraph (g)(1) of this section), or

(B) Zero, in the case of cold FTP diesel tests for which HC was not collected, as permitted in § 600.113–08(c);

(ii) 0.429 multiplied by CO (in grams/mile as obtained in paragraph (g)(1) of this section); and

(iii) 0.273 multiplied by CO_2 (in grams/mile as obtained in paragraph (g)(1) of this section).

(2)(i) For 2012 and later model year diesel-fueled automobiles, the carbon-related exhaust emissions in grams per mile is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$$CREE = (3.172 \times HC) + (1.571 \times CO) + CO_2$$

Where:

CREE means the carbon-related exhaust emissions as defined in § 600.002.
HC = Grams/mile HC as obtained in paragraph (g)(2) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.

(ii) For manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter, the carbon-related exhaust emissions in grams per mile for 2012 and later model year diesel-fueled automobiles is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$$CREE = (3.172 \times NMHC) + (1.571 \times CO) + CO_2 + (298 \times N_2O) + (25 \times CH_4)$$

Where:

CREE means the carbon-related exhaust emissions as defined in § 600.002.
NMHC = Grams/mile NMHC as obtained in paragraph (g)(2) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.
N_2O = Grams/mile N_2O as obtained in paragraph (g)(2) of this section.
CH_4 = Grams/mile CH_4 as obtained in paragraph (g)(2) of this section.

(j)(1) For methanol-fueled automobiles and automobiles designed to operate on mixtures of gasoline and methanol, the fuel economy in miles per gallon is to be calculated using the following equation:

$$mpg = (CWF \times SG \times 3781.8)/((CWF_{exHC} \times HC) + (0.429 \times CO) + (0.273 \times CO_2) + (0.375 \times CH_3OH) + (0.400 \times HCHO))$$

Where:

CWF = Carbon weight fraction of the fuel as determined in paragraph (f)(2)(ii) of this section and rounded according to paragraph (g)(3) of this section.
SG = Specific gravity of the fuel as determined in paragraph (f)(2)(i) of this section and rounded according to paragraph (g)(3) of this section.
CWF_{exHC} = Carbon weight fraction of exhaust hydrocarbons = CWF as determined in paragraph (f)(2)(ii) of this section and rounded according to paragraph (g)(3) of this section (for M100 fuel, CWF_{exHC}= 0.866).
HC = Grams/mile HC as obtained in paragraph (g)(1) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(1) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(1) of this section.
CH_3OH = Grams/mile CH_3OH (methanol) as obtained in paragraph (g)(1) of this section.
HCHO = Grams/mile HCHO (formaldehyde) as obtained in paragraph (g)(1) of this section.

(2)(i) For 2012 and later model year methanol-fueled automobiles and automobiles designed to operate on mixtures of gasoline and methanol, the carbon-related exhaust emissions in grams per mile is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$$CREE = (CWF_{exHC}/0.273 \times HC) + (1.571 \times CO) + (1.374 \times CH_3OH) + (1.466 \times HCHO) + CO_2$$

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002.
CWF_{exHC} = Carbon weight fraction of exhaust hydrocarbons = CWF as determined in paragraph (f)(2)(ii) of this section and rounded according to paragraph (g)(3) of this section (for M100 fuel, CWF_{exHC}= 0.866).
HC = Grams/mile HC as obtained in paragraph (g)(2) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.
CH_3OH = Grams/mile CH_3OH (methanol) as obtained in paragraph (g)(2) of this section.
HCHO = Grams/mile HCHO (formaldehyde) as obtained in paragraph (g)(2) of this section.

(ii) For manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter, the carbon-related exhaust emissions in grams per mile for 2012 and later model year methanol-fueled automobiles and automobiles designed to operate on mixtures of gasoline and methanol is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$$CREE = [(CWF_{exHC}/0.273) \times NMHC] + (1.571 \times CO) + (1.374 \times CH_3OH) + (1.466 \times HCHO) + CO_2 + (298 \times N_2O) + (25 \times CH_4)$$

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002.
CWF_{exHC} = Carbon weight fraction of exhaust hydrocarbons = CWF as determined in paragraph (f)(2)(ii) of this section and rounded according to paragraph (g)(3) of this section (for M100 fuel, CWF_{exHC} = 0.866).
NMHC = Grams/mile HC as obtained in paragraph (g)(2) of this section.
CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.
CH_3OH = Grams/mile CH_3OH (methanol) as obtained in paragraph (g)(2) of this section.
HCHO = Grams/mile HCHO (formaldehyde) as obtained in paragraph (g)(2) of this section.
N_2O = Grams/mile N_2O as obtained in paragraph (g)(2) of this section.
CH_4 = Grams/mile CH_4 as obtained in paragraph (g)(2) of this section.

(k)(1) For automobiles fueled with natural gas, the fuel economy in miles per gallon of natural gas is to be calculated using the following equation:

$$mpg_e = \frac{CWF_{HC/NG} \times D_{NG} \times 121.5}{(0.749 \times CH_4) + (CWF_{NMHC} \times NMHC) + (0.429 \times CO) + (0.273 \times (CO_2 - CO_{2NG}))}$$

Where:

mpg_e = miles per gasoline gallon equivalent of natural gas.

$CWF_{HC/NG}$ = carbon weight fraction based on the hydrocarbon constituents in the natural gas fuel as obtained in paragraph (f)(3) of this section and rounded according to paragraph (g)(3) of this section.

D_{NG} = density of the natural gas fuel [grams/ft³ at 68 °F (20 °C) and 760 mm Hg (101.3 kPa)] pressure as obtained in paragraph (g)(3) of this section.

CH_4, NMHC, CO, and CO_2 = weighted mass exhaust emissions [grams/mile] for methane, non-methane HC, carbon

monoxide, and carbon dioxide as obtained in paragraph (g)(2) of this section.

CWF_{NMHC} = carbon weight fraction of the non-methane HC constituents in the fuel as determined from the speciated fuel composition per paragraph (f)(3) of this section and rounded according to paragraph (g)(3) of this section.

CO_{2NG} = grams of carbon dioxide in the natural gas fuel consumed per mile of travel.

$CO_{2NG} = FC_{NG} \times D_{NG} \times WF_{CO2}$

Where:

$$FC_{NG} = \frac{(0.749 \times CH_4) + (CWF_{NMHC} \times NMHC) + (0.429 \times CO) + (0.273 \times CO_2)}{CWF_{NG} \times D_{NG}}$$

= cubic feet of natural gas fuel consumed per mile

Where:

CWF_{NG} = the carbon weight fraction of the natural gas fuel as calculated in paragraph (f)(3) of this section.

WF_{CO2} = weight fraction carbon dioxide of the natural gas fuel calculated using the mole fractions and molecular weights of the natural gas fuel constituents per ASTM D 1945 (incorporated by reference in § 600.011).

(2)(i) For automobiles fueled with natural gas, the carbon-related exhaust emissions in grams per mile is to be calculated for 2012 and later model year vehicles using the following equation and rounded to the nearest 1 gram per mile:

$CREE = 2.743 \times CH_4 + CWF_{NMHC}/0.273 \times NMHC + 1.571 \times CO + CO_2$

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002.

CH_4 = Grams/mile CH_4 as obtained in paragraph (g)(2) of this section.

NMHC = Grams/mile NMHC as obtained in paragraph (g)(2) of this section.

CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.

CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.

CWF_{NMHC} = carbon weight fraction of the non-methane HC constituents in the fuel as determined from the speciated fuel composition per paragraph (f)(3) of this section and rounded according to paragraph (f)(3) of this section.

(ii) For manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter, the carbon-related exhaust emissions in grams per mile for 2012 and later model year automobiles fueled with natural gas is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$CREE = (25 \times CH_4) + [(CWF_{NMHC}/0.273) \times NMHC] + (1.571 \times CO) + CO_2 + (298 \times N_2O)$

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002.

CH_4 = Grams/mile CH_4 as obtained in paragraph (g)(2) of this section.

NMHC = Grams/mile NMHC as obtained in paragraph (g)(2) of this section.

CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.

CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.

CWF_{NMHC} = carbon weight fraction of the non-methane HC constituents in the fuel as determined from the speciated fuel composition per paragraph (f)(3) of this section and rounded according to paragraph (f)(3) of this section.

N_2O = Grams/mile N_2O as obtained in paragraph (g)(2) of this section.

(l)(1) For ethanol-fueled automobiles and automobiles designed to operate on mixtures of gasoline and ethanol, the fuel economy in miles per gallon is to be calculated using the following equation:

$mpg = (CWF \times SG \times 3781.8)/((CWF_{exHC} \times HC) + (0.429 \times CO) + (0.273 \times CO_2) + (0.375 \times CH_3OH) + (0.400 \times HCHO) + (0.521 \times C_2H_5OH) + (0.545 \times C_2H_4O))$

Where:

CWF = Carbon weight fraction of the fuel as determined in paragraph (f)(4) of this section and rounded according to paragraph (f)(3) of this section.

SG = Specific gravity of the fuel as determined in paragraph (f)(4) of this section and rounded according to paragraph (f)(3) of this section.

CWF_{exHC}= Carbon weight fraction of exhaust hydrocarbons = CWF as determined in paragraph (f)(4) of this section and rounded according to paragraph (f)(3) of this section.

HC = Grams/mile HC as obtained in paragraph (g)(1) of this section.

CO = Grams/mile CO as obtained in paragraph (g)(1) of this section.

CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(1) of this section.

CH_3OH = Grams/mile CH_3OH (methanol) as obtained in paragraph (g)(1) of this section.

HCHO = Grams/mile HCHO (formaldehyde) as obtained in paragraph (g)(1) of this section.

C_2H_5OH = Grams/mile C_2H_5OH (ethanol) as obtained in paragraph (g)(1) of this section.

C_2H_4O = Grams/mile C_2H_4O (acetaldehyde) as obtained in paragraph (g)(1) of this section.

(2)(i) For 2012 and later model year ethanol-fueled automobiles and automobiles designed to operate on mixtures of gasoline and ethanol, the carbon-related exhaust emissions in grams per mile is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$CREE = (CWF_{exHC}/0.273 \times HC) + (1.571 \times CO) + (1.374 \times CH_3OH) + (1.466 \times HCHO) + (1.911 \times C_2H_5OH) + (1.998 \times C_2H_4O) + CO_2$

CREE means the carbon-related exhaust emission value as defined in § 600.002.

CWF_{exHC} = Carbon weight fraction of exhaust hydrocarbons = CWF as determined in paragraph (f)(4) of this section and rounded according to paragraph (f)(3) of this section.

HC = Grams/mile HC as obtained in paragraph (g)(2) of this section.

CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.

CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.

CH_3OH = Grams/mile CH_3OH (methanol) as obtained in paragraph (g)(2) of this section.

HCHO = Grams/mile HCHO (formaldehyde) as obtained in paragraph (g)(2) of this section.

C_2H_5OH = Grams/mile C_2H_5OH (ethanol) as obtained in paragraph (g)(2) of this section.

C_2H_4O = Grams/mile C_2H_4O (acetaldehyde) as obtained in paragraph (g)(2) of this section.

(ii) For manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter, the carbon-related exhaust emissions in grams per mile for 2012 and later model year ethanol-fueled automobiles and automobiles designed to operate on mixtures of gasoline and ethanol is to be calculated using the following equation and rounded to the nearest 1 gram per mile:

$CREE = [(CWF_{exHC}/0.273) \times NMHC] + (1.571 \times CO) + (1.374 \times CH_3OH) + (1.466 \times HCHO) + (1.911 \times C_2H_5OH) + (1.998 \times C_2H_4O) + CO_2 + (298 \times N_2O) + (25 \times CH_4)$

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002.

CWF_{exHC} = Carbon weight fraction of exhaust hydrocarbons = CWF as determined in paragraph (f)(4) of this section and rounded according to paragraph (f)(3) of this section.

NMHC = Grams/mile HC as obtained in paragraph (g)(2) of this section.

CO = Grams/mile CO as obtained in paragraph (g)(2) of this section.
CO_2 = Grams/mile CO_2 as obtained in paragraph (g)(2) of this section.
CH_3OH = Grams/mile CH_3OH (methanol) as obtained in paragraph (g)(2) of this section.
HCHO = Grams/mile HCHO (formaldehyde) as obtained in paragraph (g)(2) of this section.
C_2H_5OH = Grams/mile C_2H_5OH (ethanol) as obtained in paragraph (g)(2) of this section.
C_2H_4O = Grams/mile C_2H_4O (acetaldehyde) as obtained in paragraph (g)(2) of this section.
N_2O= Grams/mile N_2O as obtained in paragraph (g)(2) of this section.
CH_4= Grams/mile CH_4 as obtained in paragraph (g)(2) of this section.

(m) Manufacturers shall determine CO_2 emissions and carbon-related exhaust emissions for electric vehicles, fuel cell vehicles, and plug-in hybrid electric vehicles according to the provisions of this paragraph (m). Subject to the limitations on the number of vehicles produced and delivered for sale as described in § 86.1866 of this chapter, the manufacturer may be allowed to use a value of 0 grams/mile to represent the emissions of fuel cell vehicles and the proportion of electric operation of a electric vehicles and plug-in hybrid electric vehicles that is derived from electricity that is generated from sources that are not onboard the vehicle, as described in paragraphs (m)(1) through (3) of this section. For purposes of labeling under this part, the CO_2 emissions for electric vehicles shall be 0 grams per mile. Similarly, the CO_2 emissions for plug-in hybrid electric vehicles shall be 0 grams per mile for the proportion of electric operation that is derived from electricity that is generated from sources that are not onboard the vehicle.

(1) For 2012 and later model year electric vehicles, but not including fuel cell vehicles, the carbon-related exhaust emissions in grams per mile is to be calculated using the following equation and rounded to the nearest one gram per mile:

$CREE = CREE_{UP} - CREE_{GAS}$

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002, which may be set equal to zero for eligible 2012 through 2016 model year electric vehicles for a certain number of vehicles produced and delivered for sale as described in § 86.1866–12(a) of this chapter.

$$CREE_{UP} = \frac{EC}{GRIDLOSS} \times AVGUSUP \text{ , and}$$

$$CREE_{GAS} = 0.2485 \times TargetCO_2,$$

Where:

EC = The vehicle energy consumption in watt-hours per mile, determined according to procedures established by the Administrator under § 600.111–08(f).
GRIDLOSS = 0.93 (to account for grid transmission losses).
AVGUSUP = 0.642 (the nationwide average electricity greenhouse gas emission rate at the powerplant, in grams per watt-hour).
TargetCO_2 = The CO_2 Target Value determined according to § 86.1818 of this chapter for passenger automobiles and light trucks, respectively.

(2) For 2012 and later model year plug-in hybrid electric vehicles, the carbon-related exhaust emissions in grams per mile is to be calculated using the following equation and rounded to the nearest one gram per mile:

$CREE = (ECF \times CREE_{CD}) + [(1–ECF) \times CREE_{CS}]$,

Where:

CREE means the carbon-related exhaust emission value as defined in § 600.002;
$CREE_{CS}$ = The carbon-related exhaust emissions determined for charge-sustaining operation according to procedures established by the Administrator under § 600.116; and
$CREE_{CD} = CREE_{CDEC} + CREE_{CDGAS}$

Where:

$CREE_{CDEC}$ = The carbon-related exhaust emissions determined for electricity consumption during charge-depleting operation determined according to paragraph (m)(1) of this section; and
$CREE_{CDGAS}$ = The carbon-related exhaust emissions determined for charge-depleting operation determined according to the provisions of this section for the applicable fuel according to procedures established by the Administrator under § 600.116; and
ECF = Electricity consumption factor as determined by the Administrator.

(3) For 2012 and later model year fuel cell vehicles, the carbon-related exhaust emissions in grams per mile shall be calculated using the method specified in paragraph (m)(1) of this section, except that $CREE_{UP}$ shall be determined according to procedures established by the Administrator under § 600.111–08(f). As described in § 86.1866 of this chapter the value of CREE may be set equal to zero for a certain number of 2012 through 2016 model year fuel cell vehicles.

(n) Equations for fuels other than those specified in paragraphs (h) through (l) of this section may be used with advance EPA approval. Alternate calculation methods for fuel economy and carbon-related exhaust emissions may be used in lieu of the methods described in this section if shown to yield equivalent or superior results and if approved in advance by the Administrator.

■ 38. Section 600.114–12 is added to read as follows:

§ 600.114–12 Vehicle-specific 5-cycle fuel economy and carbon-related exhaust emission calculations.

Paragraphs (a) through (f) of this section apply to data used for fuel economy labeling under subpart D of this part. Paragraphs (d) through (f) of this section are used to calculate 5-cycle carbon-related exhaust emission values for the purpose of determining optional credits for CO_2-reducing technologies under § 86.1866 of this chapter and to calculate 5-cycle CO_2 values for the purpose of fuel economy labeling under subpart D of this part.

(a) *City fuel economy.* For each vehicle tested under § 600.010–08(a), (b), or (c), as applicable, determine the 5-cycle city fuel economy using the following equation:

$$(1)\ \text{CityFE} = \frac{0.905}{(\text{StartFC} + \text{RunningFC})}$$

Where:

$$\text{StartFC} = 0.33 \times \left(\frac{(0.76 \times \text{StartFuel}_{75} + 0.24 \times \text{StartFuel}_{20})}{4.1} \right)$$

$$\text{StartFuel}_x = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_x} - \frac{1}{\text{Bag 3 FE}_x} \right]$$

$$\text{RunningFC} = 0.82 \times \left[\frac{0.48}{\text{Bag 2 FE}_{75}} + \frac{0.41}{\text{Bag 3 FE}_{75}} + \frac{0.11}{\text{US06 City FE}} \right] + 0.18 \times \left[\frac{0.5}{\text{Bag 2 FE}_{20}} + \frac{0.5}{\text{Bag 3 FE}_{20}} \right]$$
$$+ 0.133 \times 1.083 \times \left[\frac{1}{\text{SC0 3FE}} - \left(\frac{0.61}{\text{Bag 3 FE}_{75}} + \frac{0.39}{\text{Bag 2 FE}_{75}} \right) \right]$$

(2) Terms used in the equations in this paragraph (a) are defined as follows:

Bag Y FE_X = the fuel economy in miles per gallon of fuel during bag Y of the FTP test conducted at an ambient temperature X of 75 °F or 20 °F.

SC03 FE = fuel economy in mile per gallon over the SC03 test.

US06 City FE = fuel economy in miles per gallon over the ''city'' portion of the US06 test.

(b) *Highway fuel economy.* (1) For each vehicle tested under § 600.010–08(a), (b), or (c), as applicable, determine the 5-cycle highway fuel economy using the following equation:

$$\text{HighwayFE} = \frac{0.905}{(\text{StartFC} + \text{RunningFC})}$$

Where:

$$\text{StartFC} = 0.33 \times \left(\frac{(0.76 \times \text{StartFuel}_{75} + 0.24 \times \text{StartFuel}_{20})}{60} \right)$$

$$\text{StartFuel}_x = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_x} - \frac{1}{\text{Bag 3 FE}_x} \right]$$

$$\text{RunningFC} = 1.007 \times \left[\frac{0.79}{\text{US06 HighwayFE}} + \frac{0.21}{\text{HFET FE}} \right] + 0.133 \times 0.377 \times \left[\frac{1}{\text{SC03 FE}} - \left(\frac{0.61}{\text{Bag 3 FE}_{75}} + \frac{0.39}{\text{Bag 2 FE}_{75}} \right) \right]$$

(2) If the condition specified in § 600.115–08(b)(2)(iii)(B) is met, in lieu of using the calculation in paragraph (b)(1) of this section, the manufacturer may optionally determine the highway fuel economy using the following modified 5-cycle equation which utilizes data from FTP, HFET, and US06 tests, and applies mathematic

adjustments for Cold FTP and SC03 conditions:

(i) Perform a US06 test in addition to the FTP and HFET tests.

(ii) Determine the 5-cycle highway fuel economy according to the following formula:

$$\text{HighwayFE} = \frac{0.905}{(\text{StartFC} + \text{RunningFC})}$$

Where:

$$\text{StartFC} = 0.33 \times \frac{(0.005515 + 1.13637 \times \text{StartFuel}_{75})}{60}$$

$$\text{StartFuel}_{75} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{75}} - \frac{1}{\text{Bag 3 FE}_{75}} \right]$$

$$\text{RunningFC} = 1.007 \times \left[\frac{0.79}{\text{US06 Highway FE}} + \frac{0.21}{\text{HFET FE}} \right] + \left[0.377 \times 0.133 \times \left(0.00540 + \frac{0.1357}{\text{US06 FE}} \right) \right]$$

(3) Terms used in the equations in this paragraph (b) are defined as follows:

Bag Y FE_X = the fuel economy in miles per gallon of fuel during bag Y of the FTP test conducted at an ambient temperature X of 75 °F or 20 °F.

HFET FE = fuel economy in miles per gallon over the HFET test.

SC03 FE = fuel economy in mile per gallon over the SC03 test.

US06 Highway FE = fuel economy in miles per gallon over the highway portion of the US06 test.

US06 FE = fuel economy in miles per gallon over US06 test.

(c) *Fuel economy calculations for hybrid electric vehicles.* Under the requirements of § 86.1811, hybrid electric vehicles are subject to California test methods which require FTP emission sampling for the 75 °F FTP test over four phases (bags) of the UDDS (cold-start, transient, warm-start, transient). Optionally, these four phases may be combined into two phases (phases 1 + 2 and phases 3 + 4). Calculations for these sampling methods follow.

(1) *Four-bag FTP equations.* If the 4-bag sampling method is used, manufacturers may use the equations in paragraphs (a) and (b) of this section to determine city and highway fuel economy estimates. If this method is chosen, it must be used to determine both city and highway fuel economy. Optionally, the following calculations may be used, provided that they are used to determine both city and highway fuel economy:

(i) *City fuel economy.*

$$CityFE = \frac{0.905}{(\text{StartFC} + \text{RunningFC})}$$

Where:

$$\text{StartFC} = 0.33 \times \left(\frac{(0.76 \times \text{StartFuel}_{75} + 0.24 \times \text{StartFuel}_{20})}{4.1} \right)$$

$$\text{StartFuel}_{75} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{75}} - \frac{1}{\text{Bag 3 FE}_{75}} \right] + 3.9 \times \left[\frac{1}{\text{Bag 2 FE}_{75}} - \frac{1}{\text{Bag 4 FE}_{75}} \right]$$

$$\text{StartFuel}_{20} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{20}} - \frac{1}{\text{Bag 3 FE}_{20}} \right]$$

$$\text{RunningFC} = 0.82 \times \left[\frac{0.48}{\text{Bag 4 FE}_{75}} + \frac{0.41}{\text{Bag 3 FE}_{75}} + \frac{0.11}{\text{US06 City FE}} \right]$$
$$+ 0.18 \times \left[\frac{0.5}{\text{Bag 2 FE}_{20}} + \frac{0.5}{\text{Bag 3 FE}_{20}} \right] + 0.133 \times 1.083 \times \left[\frac{1}{\text{SC03 FE}} - \left(\frac{0.61}{\text{Bag 3 FE}_{75}} + \frac{0.39}{\text{Bag 4 FE}_{75}} \right) \right]$$

(ii) *Highway fuel economy.*

$$\text{HighwayFE} = \frac{0.905}{(\text{StartFC} + \text{RunningFC})}$$

Where:

$$\text{StartFC} = 0.33 \times \left(\frac{(0.76 \times \text{StartFuel}_{75}) + (0.24 \times \text{StartFuel}_{20})}{60} \right)$$

$$\text{StartFuel}_{75} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{75}} - \frac{1}{\text{Bag 3 FE}_{75}} \right] + 3.9 \times \left[\frac{1}{\text{Bag 2 FE}_{75}} - \frac{1}{\text{Bag 4 FE}_{75}} \right]$$

$$\text{StartFuel}_{20} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{20}} - \frac{1}{\text{Bag 3 FE}_{20}} \right]$$

$$\text{RunningFC} = 1.007 \times \left[\frac{0.79}{\text{US06 Highway FE}} + \frac{0.21}{\text{HFET FE}} \right] + 0.133 \times 0.377 \times \left[\frac{1}{\text{SC03 FE}} - \left(\frac{0.61}{\text{Bag 3 FE}_{75}} + \frac{0.39}{\text{Bag 4 FE}_{75}} \right) \right]$$

(2) *Two-bag FTP equations.* If the 2-bag sampling method is used for the 75 °F FTP test, it must be used to determine both city and highway fuel economy. The following calculations must be used to determine both city and highway fuel economy:

(i) *City fuel economy.*

$$CityFE = \frac{0.905}{(\text{Start FC} + \text{Running FC})}$$

Where:

$$\text{StartFC} = 0.33 \times \left(\frac{(0.76 \times \text{StartFuel}_{75}) + (0.24 \times \text{StartFuel}_{20})}{4.1} \right)$$

$$\text{StartFuel}_{75} = 7.5 \times \left[\frac{1}{\text{Bag 1/2 FE}_{75}} - \frac{1}{\text{Bag 3/4 FE}_{75}} \right]$$

$$\text{StartFuel}_{20} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{20}} - \frac{1}{\text{Bag 3 FE}_{20}} \right]$$

$$\text{RunningFC} = 0.82 \times \left[\frac{0.90}{\text{Bag 3/4 FE}_{75}} + \frac{0.10}{\text{US06 City FE}} \right]$$
$$+ 0.18 \times \left[\frac{0.5}{\text{Bag 2 FE}_{20}} + \frac{0.5}{\text{Bag 3 FE}_{20}} \right] + 0.133 \times 1.083 \times \left[\frac{1}{\text{SC03 FE}} - \left(\frac{1.0}{\text{Bag 3/4 FE}_{75}} \right) \right]$$

(ii) *Highway fuel economy.*

$$\text{HighwayFE} = \frac{0.905}{(\text{Start FC} + \text{Running FC})}$$

Where:

$$\text{StartFC} = 0.33 \times \left(\frac{(0.76 \times \text{StartFuel}_{75}) + (0.24 \times \text{StartFuel}_{20})}{60} \right)$$

$$\text{StartFuel}_{75} = 7.5 \times \left[\frac{1}{\text{Bag 1/2 FE}_{75}} - \frac{1}{\text{Bag 3/4 FE}_{75}} \right]$$

$$\text{StartFuel}_{20} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{20}} - \frac{1}{\text{Bag 3 FE}_{20}} \right]$$

$$\text{RunningFC} = 1.007 \times \left[\frac{0.79}{\text{US06 Highway FE}} + \frac{0.21}{\text{HFET FE}} \right] + 0.133 \times 0.377 \times \left[\frac{1}{\text{SC03 FE}} - \left(\frac{1.0}{\text{Bag 3/4 FE}_{75}} \right) \right]$$

(3) For hybrid electric vehicles using the modified 5-cycle highway calculation in paragraph (b)(2) of this section, the equation in paragraph (b)(2)(ii)(A) of this section applies except that the equation for Start $Fuel_{75}$ will be replaced with one of the following:

(i) The equation for Start $Fuel_{75}$ for hybrids tested according to the 4-bag FTP is:

$$\text{StartFuel}_{75} = 3.6 \times \left[\frac{1}{\text{Bag 1 FE}_{75}} - \frac{1}{\text{Bag 3 FE}_{75}} \right] + 3.9 \times \left[\frac{1}{\text{Bag 2 FE}_{75}} - \frac{1}{\text{Bag 4 FE}_{75}} \right]$$

(ii) The equation for Start $Fuel_{75}$ for hybrids tested according to the 2-bag FTP is:

$$\text{StartFuel}_{75} = 7.5 \times \left[\frac{1}{\text{Bag 1/2 FE}_{75}} - \frac{1}{\text{Bag 3/4 FE}_{75}} \right]$$

(4) Terms used in the equations in this paragraph (b) are defined as follows:

Bag X/Y FE_{75} = fuel economy in miles per gallon of fuel during combined phases X and Y of the FTP test conducted at an ambient temperature of 75 °F.

Bag Y FE_X = the fuel economy in miles per gallon of fuel during bag Y of the FTP test conducted at an ambient temperature X of 75 °F or 20 °F.

HFET FE = fuel economy in miles per gallon over the HFET test.

SC03 FE = fuel economy in mile per gallon over the SC03 test.

US06 City FE = fuel economy in miles per gallon over the city portion of the US06 test.

US06 Highway FE = fuel economy in miles per gallon over the highway portion of the US06 test.

(d) *City CO_2 emissions and carbon-related exhaust emissions.* For each vehicle tested, determine the 5-cycle city CO_2 emissions and carbon-related exhaust emissions using the following equation:

$$(1)\ \text{City CREE} = \frac{\left(\text{Start CREE} + \text{Running CREE}\right)}{0.905}$$

Where:

$$\text{StartCREE} = 0.33 \times \left(\frac{\left(0.76 \times \text{Start CREE}_{75} + 0.24 \times \text{Start CREE}_{20}\right)}{4.1} \right)$$

$$\text{Start CREE}_{X} = 3.6 \times \left(\text{Bag 1 CREE}_{X} - \text{Bag 3 CREE}_{X}\right)$$

$$\text{Running CREE} = 0.82 \times \left[\left(0.48 \times \text{Bag2CREE}_{75}\right) + \left(0.41 \times \text{Bag3CREE}_{75}\right) + \left(0.11 \times \text{US06 City CREE}\right)\right] +$$
$$0.18 \times \left[\left(0.5 \times \text{Bag2CREE}_{20}\right) + \left(0.5 \times \text{Bag3CREE}_{20}\right)\right] +$$
$$0.133 \times 1.083 \times \left[\text{SC03 CREE} - \left(\left(0.61 \times \text{Bag3CREE}_{75}\right) + \left(0.39 \times \text{Bag2CREE}_{75}\right)\right)\right]$$

(2) To determine the City CO_2 emissions, use the appropriate CO_2 grams/mile values instead of CREE values in the equations in this paragraph (d).

(3) Terms used in the equations in this paragraph (d) are defined as follows:

Bag Y $CREE_X$ = the carbon-related exhaust emissions in grams per mile during bag Y of the FTP test conducted at an ambient temperature X of 75 °F or 20 °F.

US06 City CREE = carbon-related exhaust emissions in grams per mile over the city portion of the US06 test.

SC03 CREE = carbon-related exhaust emissions in grams per mile over the SC03 test.

(e) *Highway CO_2 emissions and carbon-related exhaust emissions.* (1) For each vehicle tested, determine the 5-cycle highway carbon-related exhaust emissions using the following equation:

$$\text{Highway CREE} = \frac{(\text{Start CREE} + \text{Running CREE})}{0.905}$$

Where:

$$\text{Start CREE} = 0.33 \times \left(\frac{(0.76 \times \text{Start CREE}_{75}) + \left(\begin{matrix} 0.24 \times \text{Start} \\ \text{CREE}_{20} \end{matrix} \right)}{60} \right)$$

$$\text{Start CREE}_{X} = 3.6 \times (\text{Bag 1 CREE}_{X} - \text{Bag 3 CREE}_{X})$$

Running CREE =

$$1.007 \times [(0.79 \times \text{US06 Highway CREE}) + (0.21 \times \text{HFET CREE})] +$$
$$0.133 \times 0.377 \times [\text{SC03 CREE} - ((0.61 \times \text{Bag3CREE}_{75}) + (0.39 \times \text{Bag2CREE}_{75}))]$$

(2) If the condition specified in § 600.115–08(b)(2)(iii)(B) is met, in lieu of using the calculation in paragraph (e)(1) of this section, the manufacturer may optionally determine the highway carbon-related exhaust emissions using the following modified 5-cycle equation which utilizes data from FTP, HFET, and US06 tests, and applies mathematic adjustments for Cold FTP and SC03 conditions:

(i) Perform a US06 test in addition to the FTP and HFET tests.

(ii) Determine the 5-cycle highway carbon-related exhaust emissions according to the following formula:

$$\text{Highway CREE} = \frac{(\text{Start CREE} + \text{Running CREE})}{0.905}$$

Where:

$$\text{StartFC} = 0.33 \times \frac{((0.005515 \times \text{A}) + 1.13637 \times \text{StartFuel}_{75})}{60}$$

$$\text{Start CREE}_{75} = 3.6 \times (\text{Bag 1 CREE}_{75} - \text{Bag 3 CREE}_{75})$$

$$\text{RunningFC} = 1.007 \times \left[\frac{0.79}{\text{US06 Highway FE}} + \frac{0.21}{\text{HFET FE}} \right] + \left[0.377 \times 0.133 \times \left((0.00540 \times \text{A}) + \frac{0.1357}{\text{US06 FE}} \right) \right]$$

(3) To determine the Highway CO_2 emissions, use the appropriate CO_2 grams/mile values instead of CREE values in the equations in this paragraph (e).

(4) Terms used in the equations in this paragraph (e) are defined as follows:

A = 8,887 for gasoline-fueled vehicles, 10,180 for diesel-fueled vehicles, or an appropriate value specified by the Administrator for other fuels.

Bag Y CREE_X = the carbon-related exhaust emissions in grams per mile during bag Y of the FTP test conducted at an ambient temperature X of 75 °F or 20 °F.

US06 Highway CREE = carbon-related exhaust emissions in grams per mile over the highway portion of the US06 test.

US06 CREE = carbon-related exhaust emissions in grams per mile over the US06 test.

HFET CREE = carbon-related exhaust emissions in grams per mile over the HFET test.

SC03 CREE = carbon-related exhaust emissions in grams per mile over the SC03 test.

(f) *CO_2 and carbon-related exhaust emissions calculations for hybrid electric vehicles.* Hybrid electric vehicles shall be tested according to California test methods which require FTP emission sampling for the 75 °F FTP test over four phases (bags) of the UDDS (cold-start, transient, warm-start, transient). Optionally, these four phases may be combined into two phases (phases 1 + 2 and phases 3 + 4). Calculations for these sampling methods follow.

(1) *Four-bag FTP equations.* If the 4-bag sampling method is used, manufacturers may use the equations in paragraphs (a) and (b) of this section to determine city and highway CO_2 and carbon-related exhaust emissions values. If this method is chosen, it must be used to determine both city and highway CO_2 emissions and carbon-related exhaust emissions. Optionally, the following calculations may be used, provided that they are used to determine both city and highway CO_2 and carbon-related exhaust emissions values:

(i) *City CO_2 emissions and carbon-related exhaust emissions.*

$$\text{City CREE} = \frac{(\text{Start CREE} + \text{Running CREE})}{0.905}$$

Where:

$$\text{Start CREE} = 0.33 \times \left(\frac{(0.76 \times \text{Start CREE}_{75} + 0.24 \times \text{Start CREE}_{20})}{4.1} \right)$$

$$\text{Start CREE}_{75} = 3.6 \times (\text{Bag 1 CREE}_{75} - \text{Bag 3 CREE}_{75}) + 3.9 \times (\text{Bag 2 CREE}_{75} - \text{Bag 4 CREE}_{75})$$

$$\text{Start CREE}_{20} = 3.6 \times (\text{Bag 1 CREE}_{20} - \text{Bag 3 CREE}_{20})$$

$$\text{Running CREE} = 0.82 \times [(0.48 \times \text{Bag4CREE}_{75}) + (0.41 \times \text{Bag3CREE}_{75}) + (0.11 \times \text{US06 City CREE})] + 0.18 \times [(0.5 \times \text{Bag2CREE}_{20}) + (0.5 \times \text{Bag3CREE}_{20})] + 0.133 \times 1.083 \times [\text{SC03 CREE} - ((0.61 \times \text{Bag3CREE}_{75}) + (0.39 \times \text{Bag4CREE}_{75}))]$$

(ii) *Highway CO_2 emissions and carbon-related exhaust emissions.*

$$\text{Highway CREE} = \frac{(\text{Start CREE} + \text{Running CREE})}{0.905}$$

Where:

$$\text{Start CREE} = 0.33 \times \left(\frac{(0.76 \times \text{Start CREE}_{75} + 0.24 \times \text{Start CREE}_{20})}{60} \right)$$

$$\text{Start CREE}_{75} = 3.6 \times (\text{Bag 1 CREE}_{75} - \text{Bag 3 CREE}_{75}) + 3.9 \times (\text{Bag 2 CREE}_{75} - \text{Bag 4 CREE}_{75})$$

$$\text{Start CREE}_{20} = 3.6 \times (\text{Bag 1 CREE}_{20} - \text{Bag 3 CREE}_{20})$$

$$\text{Running CREE} = 1.007 \times [(0.79 \times \text{US06 Highway CREE}) + (0.21 \times \text{HFET CREE})] +$$
$$0.133 \times 0.377 \times [\text{SC03 CREE} - ((0.61 \times \text{Bag3CREE}_{75}) + (0.39 \times \text{Bag4CREE}_{75}))]$$

(2) *Two-bag FTP equations.* If the 2-bag sampling method is used for the 75 °F FTP test, it must be used to determine both city and highway CO_2 emissions and carbon-related exhaust emissions. The following calculations must be used to determine both city and highway CO_2 emissions and carbon-related exhaust emissions:

(i) *City CO_2 emissions and carbon-related exhaust emissions.*

$$\text{City CREE} = \frac{(\text{Start CREE} + \text{Running CREE})}{0.905}$$

Where:

$$\textit{Start CREE} = 0.33 \times \left(\frac{(0.76 \times \text{Start CREE}_{75} + 0.24 \times \text{Start CREE}_{20})}{4.1} \right)$$

$$\text{Start CREE}_{75} = 7.5 \times (\text{Bag 1/2 CREE}_{75} - \text{Bag 3/4 CREE}_{75})$$

$$\text{StartCREE}_{20} = 3.6 \times (\text{Bag1CREE}_{20} - \text{Bag3CREE}_{20})$$

$$\text{RunningCREE} = 0.82 \times [(0.90 \times \text{Bag3/4CREE}_{75}) + (0.10 \times \text{US06CityCREE})] +$$
$$0.18 \times [(0.5 \times \text{Bag2CREE}_{20}) + (0.5 \times \text{Bag3CREE}_{20})] +$$
$$0.133 \times 1.083 \times [\text{SC03CREE} - (\text{Bag3/4CREE}_{75})]$$

(ii) *Highway CO_2 emissions and carbon-related exhaust emissions.*

$$\text{Highway CREE} = \frac{(\text{Start CREE} + \text{Running CREE})}{0.905}$$

Where:

$$\text{Start CREE} = 0.33 \times \left(\frac{(0.76 \times \text{Start CREE}_{75} + 0.24 \times \text{Start CREE}_{20})}{60} \right)$$

$$\text{Start CREE}_{75} = 7.5 \times (\text{Bag 1/2 CREE}_{75} - \text{Bag 3/4 CREE}_{75})$$

$$\text{Start CREE}_{20} = 3.6 \times (\text{Bag 1 CREE}_{20} - \text{Bag 3 CREE}_{20})$$

$$\text{Running CREE} = 1.007 \times [(0.79 \times \text{US06 Highway CREE}) + (0.21 \times \text{HFET CREE})] + 0.133 \times 0.377 \times [\text{SC03 CREE} - \text{Bag 3/4}_{75} \text{ CREE}]$$

(3) For hybrid electric vehicles using the modified 5-cycle highway calculation in paragraph (e)(2) of this section, the equation in paragraph (e)(2)(ii)(A) of this section applies except that the equation for Start $CREE_{75}$ will be replaced with one of the following:

(i) The equation for Start $CREE_{75}$ for hybrids tested according to the 4-bag FTP is:

Start $CREE_{75}$= 3.6 × (Bag 1 $CREE_{75}$ − Bag 3 $CREE_{75}$ + 3.9 × (Bag 2 $CREE_{75}$ − Bag 4 $CREE_{75}$)

(ii) The equation for Start $CREE_{75}$ for hybrids tested according to the 2-bag FTP is:

Start $CREE_{75}$= 7.5 × (Bag ½ $CREE_{75}$ − Bag ¾ $CREE_{75}$)

(4) To determine the City and Highway CO_2 emissions, use the appropriate CO_2 grams/mile values instead of CREE values in the equations in paragraphs (f)(1) through (3) of this section.

(5) Terms used in the equations in this paragraph (e) are defined as follows:

Bag Y $CREE_X$ = the carbon-related exhaust emissions in grams per mile during bag Y of the FTP test conducted at an ambient temperature X of 75 °F or 20 °F.US06 City CREE = carbon-related exhaust emissions in grams per mile over the City portion of the US06 test.

SC03 CREE = carbon-related exhaust emissions in grams per mile over the SC03 test.

US06 Highway CREE = carbon-related exhaust emissions in grams per mile over the Highway portion of the US06 test.

HFET CREE = carbon-related exhaust emissions in grams per mile over the HFET test.

Bag X/Y $CREE_{75}$ = carbon-related exhaust emissions in grams per mile of fuel during combined phases X and Y of the FTP test conducted at an ambient temperature of 75 °F.

§ 600.115–08 [Redesignated as § 600.115–11]

■ 39. Section 600.115–08 is redesignated as § 600.115–11 and is revised to read as follows:

§ 600.115–11 Criteria for determining the fuel economy label calculation method.

This section provides the criteria to determine if the derived 5-cycle method for determining fuel economy label values, as specified in § 600.210–08(a)(2) or (b)(2) or § 600.210–12(a)(2) or (b)(2), as applicable, may be used to determine label values. Separate criteria apply to city and highway fuel economy for each test group. The provisions of this section are optional. If this option is not chosen, or if the criteria provided in this section are not met, fuel economy label values must be determined according to the vehicle-specific 5-cycle method specified in § 600.210–08(a)(1) or (b)(1) or § 600.210–12(a)(1) or (b)(1), as applicable. However, dedicated alternative-fuel vehicles, dual fuel vehicles when operating on the alternative fuel, plug-in hybrid electric vehicles, MDPVs, and vehicles imported by Independent Commercial Importers may use the derived 5-cycle method for determining fuel economy label values whether or not the criteria provided in this section are met.

(a) *City fuel economy criterion.* (1) For each test group certified for emission compliance under § 86.1848 of this chapter, the FTP, HFET, US06, SC03 and Cold FTP tests determined to be official under § 86.1835 of this chapter are used to calculate the vehicle-specific 5-cycle city fuel economy which is then compared to the derived 5-cycle city fuel economy, as follows:

(i) The vehicle-specific 5-cycle city fuel economy from the official FTP, HFET, US06, SC03 and Cold FTP tests for the test group is determined according to the provisions of § 600.114–08(a) or (c) or § 600.114–12(a) or (c) and rounded to the nearest one tenth of a mile per gallon.

(ii) Using the same FTP data as used in paragraph (a)(1)(i) of this section, the corresponding derived 5-cycle city fuel economy is calculated according to the following equation:

$$\text{Derived 5-cycle city fuel economy} = \frac{1}{\left(\{City\ Intercept\} + \frac{\{City\ Slope\}}{FTP\ FE}\right)}$$

Where:

City Intercept = Intercept determined by the Administrator. *See* § 600.210–08(a)(2)(iii) or § 600.210–12(a)(2)(iii).

City Slope = Slope determined by the Administrator. *See* § 600.210–08(a)(2)(iii) or § 600.210–12(a)(2)(ii).

FTP FE = the FTP-based city fuel economy from the official test used for certification compliance, determined under § 600.113–08(a), rounded to the nearest tenth.

(2) The derived 5-cycle fuel economy value determined in paragraph (a)(1)(ii) of this section is multiplied by 0.96 and rounded to the nearest one tenth of a mile per gallon.

(3) If the vehicle-specific 5-cycle city fuel economy determined in paragraph (a)(1)(i) of this section is greater than or equal to the value determined in paragraph (a)(2) of this section, then the manufacturer may base the city fuel economy estimates for the model types covered by the test group on the derived 5-cycle method specified in § 600.210–08(a)(2) or (b)(2) or § 600.210–12(a)(2) or (b)(2), as applicable.

(b) *Highway fuel economy criterion.* The determination for highway fuel economy depends upon the outcome of the determination for city fuel economy in paragraph (a)(3) of this section for each test group.

(1) If the city determination for a test group made in paragraph (a)(3) of this section does not allow the use of the derived 5-cycle method, then the highway fuel economy values for all model types represented by the test group are likewise not allowed to be determined using the derived 5-cycle method, and must be determined according to the vehicle-specific 5-cycle method specified in § 600.210–08(a)(1) or (b)(1) or § 600.210–12(a)(1) or (b)(1), as applicable.

(2) If the city determination made in paragraph (a)(3) of this section allows the use of the derived 5-cycle method, a separate determination is made for the highway fuel economy labeling method as follows:

(i) For each test group certified for emission compliance under § 86.1848 of this chapter, the FTP, HFET, US06, SC03 and Cold FTP tests determined to be official under § 86.1835 of this chapter are used to calculate the vehicle-specific 5-cycle highway fuel economy, which is then compared to the derived 5-cycle highway fuel economy, as follows:

(A) The vehicle-specific 5-cycle highway fuel economy from the official FTP, HFET, US06, SC03 and Cold FTP tests for the test group is determined according to the provisions of § 600.114–08(b)(1) or § 600.114–12(b)(1) and rounded to the nearest one tenth of a mile per gallon.

(B) Using the same HFET data as used in paragraph (b)(2)(i)(A) of this section, the corresponding derived 5-cycle highway fuel economy is calculated using the following equation:

$$\text{Derived 5-cycle highway fuel economy} = \frac{1}{\left(\{\text{Highway Intercept}\} + \frac{\{\text{Highway Slope}\}}{\text{HFET FE}}\right)}$$

Where:

Highway Intercept = Intercept determined by the Administrator. See § 600.210–08(a)(2)(iii) or § 600.210–12(a)(2)(iii).

Highway Slope = Slope determined by the Administrator. See § 600.210–08(a)(2)(iii) or § 600.210–12(a)(2)(iii).

HFET FE = the HFET-based highway fuel economy determined under § 600.113–08(b), rounded to the nearest tenth.

(ii) The derived 5-cycle highway fuel economy calculated in paragraph (b)(2)(i)(B) of this section is multiplied by 0.95 and rounded to the nearest one tenth of a mile per gallon.

(iii) (A) If the vehicle-specific 5-cycle highway fuel economy of the vehicle tested in paragraph (b)(2)(i)(A) of this section is greater than or equal to the value determined in paragraph (b)(2)(ii) of this section, then the manufacturer may base the highway fuel economy estimates for the model types covered by the test group on the derived 5-cycle method specified in § 600.210–08(a)(2) or (b)(2) or § 600.210–12(a)(2) or (b)(2), as applicable.

(B) If the vehicle-specific 5-cycle highway fuel economy determined in paragraph (b)(2)(i)(A) of this section is less than the value determined in paragraph (b)(2)(ii) of this section, the manufacturer may determine the highway fuel economy for the model types covered by the test group on the modified 5-cycle equation specified in § 600.114–08(b)(2) or § 600.114–12(b)(2).

(c) The manufacturer will apply the criteria in paragraph (a) and (b) of this section to every test group for each model year.

(d) The tests used to make the evaluations in paragraphs (a) and (b) of this section will be the procedures for official test determinations under § 86.1835. Adjustments and/or substitutions to the official test data may be made with advance approval of the Administrator.

■ 40. Section 600.116–12 is added to subpart B to read as follows:

§ 600.116–12 Special procedures related to electric vehicles and plug-in hybrid electric vehicles.

(a) Determine fuel economy label values for electric vehicles as specified in §§ 600.210 and 600.311 using the procedures of SAE J1634 (incorporated by reference in § 600.011), with the following clarifications and modifications:

(1) Use one of the following approaches to define end-of-test criteria for vehicles whose maximum speed is less than the maximum speed specified in the driving schedule, where the vehicle's maximum speed is determined, to the nearest 0.1 mph, from observing the highest speed over the first duty cycle (FTP, HFET, etc.):

(i) If the vehicle can follow the driving schedule within the speed tolerances specified in § 86.115 of this chapter up to its maximum speed, the end-of-test criterion is based on the point at which the vehicle can no longer meet the specified speed tolerances up to and including its maximum speed.

(ii) If the vehicle cannot follow the driving schedule within the speed tolerances specified in § 86.115 of this chapter up to its maximum speed, the end-of-test criterion is based on the following procedure:

(A) Measure and record the vehicle's speed (to the nearest 0.1 mph) while making a best effort to follow the specified driving schedule.

(B) This recorded sequence of driving speeds becomes the driving schedule for the test vehicle. Apply the end-of-test criterion based on the point at which the vehicle can no longer meet the specified speed tolerances over this new driving schedule. The driving to establish the new driving schedule may be done separately, or as part of the measurement procedure.

(2) Soak time between repeat duty cycles (four-bag FTP, HFET, etc.) may be up to 30 minutes. No recharging may occur during the soak time.

(3) Recharging the vehicle's battery must start within three hours after the end of testing.

(4) Do not apply the C coefficient adjustment specified in Section 4.4.2.

(5) We may approve alternate measurement procedures with respect to electric vehicles if they are necessary or appropriate for meeting the objectives of this part.

(b) Determine performance values for plug-in hybrid electric vehicles as specified in §§ 600.210 and 600.311 using the procedures of SAE J1711 (incorporated by reference in § 600.011), with the following clarifications and modifications:

(1) To determine fuel economy and CREE values to demonstrate compliance with CAFE and GHG standards, calculate composite values representing combined operation during charge-deplete and charge-sustain operation using the following utility factors except as specified in this paragraph (b):

TABLE 1 OF § 600.116–12—FLEET UTILITY FACTORS FOR URBAN "CITY" DRIVING

Schedule range for UDDS phases, miles	Cumulative F	Sequential F
3.59	0.125	0.125
7.45	0.243	0.117
11.04	0.338	0.095
14.90	0.426	0.088
18.49	0.497	0.071
22.35	0.563	0.066
25.94	0.616	0.053
29.80	0.666	0.049
33.39	0.705	0.040
37.25	0.742	0.037
40.84	0.772	0.030
44.70	0.800	0.028
48.29	0.822	0.022
52.15	0.843	0.021
55.74	0.859	0.017
59.60	0.875	0.016
63.19	0.888	0.013
67.05	0.900	0.012
70.64	0.909	0.010

TABLE 2 OF § 600.116–12—FLEET UTILITY FACTORS FOR HIGHWAY DRIVING

Schedule range for HFET, miles	Cumulative F	Sequential F
10.3	0.123	0.123
20.6	0.240	0.117
30.9	0.345	0.105
41.2	0.437	0.092
51.5	0.516	0.079
61.8	0.583	0.067
72.1	0.639	0.056

(2) To determine fuel economy and CO_2 emission values for labeling purposes, calculate composite values representing combined operation during charge-deplete and charge-sustain operation using the following utility factors except as specified in this paragraph (b):

TABLE 3 OF § 600.116–12—MULTI-DAY INDIVIDUAL UTILITY FACTORS FOR URBAN "CITY" DRIVING

Schedule range for UDDS phases, miles	Equivalent 5-cycle distance, miles	Cumulative F	Sequential F
3.59	2.51	0.08	0.08
7.45	5.22	0.15	0.08
11.04	7.73	0.22	0.06
14.90	10.43	0.28	0.06
18.49	12.94	0.33	0.05
22.35	15.65	0.38	0.05
25.94	18.16	0.43	0.04
29.80	20.86	0.47	0.04
33.39	23.37	0.50	0.04
37.25	26.08	0.54	0.04
40.84	28.59	0.57	0.03
44.70	31.29	0.60	0.03
48.29	33.80	0.62	0.02
52.15	36.51	0.65	0.02
55.74	39.02	0.67	0.02
59.60	41.72	0.69	0.02
63.19	44.23	0.71	0.02
67.05	46.94	0.72	0.02
70.64	49.45	0.74	0.01
74.50	52.15	0.75	0.01
78.09	54.66	0.78	0.03
81.95	57.37	0.79	0.01
85.54	59.88	0.80	0.01
89.40	62.58	0.81	0.01
92.99	65.09	0.82	0.01

TABLE 4 OF § 600.116–12—MULTI-DAY INDIVIDUAL UTILITY FACTORS FOR HIGHWAY DRIVING

Schedule range for HFET phases, miles	Equivalent 5-cycle distance, miles	Cumulative F	Sequential F
10.30	7.21	0.21	0.21

TABLE 4 OF § 600.116–12—MULTI-DAY INDIVIDUAL UTILITY FACTORS FOR HIGHWAY DRIVING—Continued

Schedule range for HFET phases, miles	Equivalent 5-cycle distance, miles	Cumulative F	Sequential F
20.60	14.42	0.36	0.16
30.90	21.63	0.48	0.12
41.20	28.84	0.57	0.09
51.50	36.05	0.64	0.07
61.80	43.26	0.70	0.06
72.10	50.47	0.75	0.04
82.40	57.68	0.78	0.04
92.70	64.89	0.81	0.03
103.00	72.10	0.83	0.02
113.30	79.31	0.85	0.02

(3) You may calculate performance values under paragraphs (b)(1) and (2) of this section by combining phases during FTP testing. For example, you may treat the first 7.45 miles as a single phase by adding the individual utility factors for that portion of driving and assigning emission levels to the combined phase. Do this consistently throughout a test run.

(4) Instead of the utility factors specified in paragraphs (b)(1) and (2) of this section, calculate utility factors using the following equation for vehicles whose maximum speed is less than the maximum speed specified in the driving schedule, where the vehicle's maximum speed is determined, to the nearest 0.1 mph, from observing the highest speed over the first duty cycle (FTP, HFET, etc.):

$$UF_i = 1 - \left[\exp\left(\sum_{j=1}^{k} \left(\left(\frac{d_i}{ND} \right)^j \times C_j \right) \right) \right] - \sum_{i=1}^{n} UF_{i-1}$$

Where:

UF_i = the utility factor for phase i. Let $UF_0 = 0$.

j = a counter to identify the appropriate term in the summation (with terms numbered consecutively).

k = the number of terms in the equation (see Table 3 of this section).

d_i = the distance driven in phase i.

ND = the normalized distance. Use 399 for both FTP and HFET operation.

C_j = the coefficient for term j from the following table:

TABLE 5 OF § 600.116–12—CITY/HIGHWAY SPECIFIC UTILITY FACTOR COEFFICIENTS

Coefficient	Fleet values for CAFE and GHG values		Multi-day individual value for labeling
	City	Highway	City or highway
1	14.86	4.8	13.1
2	2.965	13	−18.7
3	−84.05	−65	5.22
4	153.7	120	8.15
5	−43.59	−100.00	3.53
6	−96.94	31.00	−1.34
7	14.47	.....	−4.01
8	91.70	.....	−3.90
9	−46.36	.....	−1.15
10	.....	.....	3.88

n = the number of test phases (or bag measurements) before the vehicle reaches the end-of-test criterion.

(5) The end-of-test criterion is based on a 1 percent Net Energy Change as specified in Section 3.8. The Administrator may approve alternate Net Energy Change tolerances as specified in Section 3.9.1 or Appendix C if the 1 percent threshold is insufficient or inappropriate for marking the end of charge-deplete operation.

(6) Use the vehicle's Actual Charge-Depleting Range, R_{cda}, as specified in Section 6.1.3 for evaluating the end-of-test criterion.

(7) Measure and record AC watt-hours throughout the recharging procedure. Position the measurement appropriately to account for any losses in the charging system.

(8) We may approve alternate measurement procedures with respect to plug-in hybrid electric vehicles if they are necessary or appropriate for meeting the objectives of this part.

Subpart C—Procedures for Calculating Fuel Economy and Carbon-related Exhaust Emission Values

■ 41. The heading for subpart C is revised as set forth above.

§§ 600.201–08, 600.201–12, 600.201–86, 600.201–93, 600.202–77, 600.203–77, 600.204–77, 600.205–77, 600.206–86, 600.206–93, 600.207–86, 600.207–93, 600.208–77, 600.209–85, 600.209–95, and 600.211–08 [Removed]

■ 42. Subpart C is amended by removing the following sections:

§ 600.201–08.
§ 600.201–12.
§ 600.201–86.
§ 600.201–93.
§ 600.202–77.
§ 600.203–77.
§ 600.204–77.
§ 600.205–77.
§ 600.206–86.
§ 600.206–93.
§ 600.207–86.
§ 600.207–93.
§ 600.208–77.
§ 600.209–85.
§ 600.209–95.
§ 600.211–08.

■ 43. Section 600.206–12 is revised to read as follows:

§ 600.206–12 Calculation and use of FTP-based and HFET-based fuel economy, CO_2 emissions, and carbon-related exhaust emission values for vehicle configurations.

(a) Fuel economy, CO_2 emissions, and carbon-related exhaust emissions values determined for each vehicle under § 600.113–08(a) and (b) and as approved in § 600.008 (c), are used to determine FTP-based city, HFET-based highway, and combined FTP/Highway-based fuel economy, CO_2 emissions, and carbon-related exhaust emission values for each vehicle configuration for which data are available. Note that fuel economy for some alternative fuel vehicles may mean miles per gasoline gallon equivalent and/or miles per unit of fuel consumed. For example, electric vehicles will determine miles per kilowatt-hour in addition to miles per gasoline gallon equivalent, and fuel cell vehicles will determine miles per kilogram of hydrogen.

(1) If only one set of FTP-based city and HFET-based highway fuel economy values is accepted for a vehicle configuration, these values, rounded to the nearest tenth of a mile per gallon, comprise the city and highway fuel economy values for that configuration. If only one set of FTP-based city and HFET-based highway CO_2 emissions and carbon-related exhaust emission values is accepted for a vehicle configuration, these values, rounded to the nearest gram per mile, comprise the city and highway CO_2 emissions and carbon-related exhaust emission values for that configuration.

(2) If more than one set of FTP-based city and HFET-based highway fuel economy and/or carbon-related exhaust emission values are accepted for a vehicle configuration:

(i) All data shall be grouped according to the subconfiguration for which the data were generated using sales projections supplied in accordance with § 600.208–12(a)(3).

(ii) Within each group of data, all fuel economy values are harmonically averaged and rounded to the nearest 0.0001 of a mile per gallon and all CO_2 emissions and carbon-related exhaust emission values are arithmetically averaged and rounded to the nearest tenth of a gram per mile in order to determine FTP-based city and HFET-based highway fuel economy, CO_2 emissions, and carbon-related exhaust emission values for each subconfiguration at which the vehicle configuration was tested.

(iii) All FTP-based city fuel economy, CO_2 emissions, and carbon-related exhaust emission values and all HFET-based highway fuel economy and carbon-related exhaust emission values calculated in paragraph (a)(2)(ii) of this section are (separately for city and highway) averaged in proportion to the sales fraction (rounded to the nearest 0.0001) within the vehicle configuration (as provided to the Administrator by the manufacturer) of vehicles of each tested subconfiguration. Fuel economy values shall be harmonically averaged, and CO_2 emissions and carbon-related exhaust emission values shall be arithmetically averaged. The resultant fuel economy values, rounded to the nearest 0.0001 mile per gallon, are the FTP-based city and HFET-based highway fuel economy values for the vehicle configuration. The resultant CO_2 emissions and carbon-related exhaust emission values, rounded to the nearest tenth of a gram per mile, are the FTP-based city and HFET-based highway CO_2 emissions and carbon-related exhaust emission values for the vehicle configuration.

(3)(i) For the purpose of determining average fuel economy under § 600.510, the combined fuel economy value for a vehicle configuration is calculated by harmonically averaging the FTP-based city and HFET-based highway fuel economy values, as determined in paragraph (a)(1) or (2) of this section, weighted 0.55 and 0.45 respectively, and rounded to the nearest 0.0001 mile per gallon. A sample of this calculation appears in Appendix II of this part.

(ii) For the purpose of determining average carbon-related exhaust emissions under § 600.510, the combined carbon-related exhaust emission value for a vehicle configuration is calculated by arithmetically averaging the FTP-based city and HFET-based highway carbon-related exhaust emission values, as determined in paragraph (a)(1) or (2) of this section, weighted 0.55 and 0.45 respectively, and rounded to the nearest tenth of gram per mile.

(4) For alcohol dual fuel automobiles and natural gas dual fuel automobiles the procedures of paragraphs (a)(1) or (2) of this section, as applicable, shall be used to calculate two separate sets of FTP-based city, HFET-based highway, and combined values for fuel economy, CO_2 emissions, and carbon-related exhaust emissions for each configuration.

(i) Calculate the city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emission values from the tests performed using gasoline or diesel test fuel.

(ii) Calculate the city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emission values from the tests performed using alcohol or natural gas test fuel.

(b) If only one equivalent petroleum-based fuel economy value exists for an electric vehicle configuration, that value, rounded to the nearest tenth of a mile per gallon, will comprise the petroleum-based fuel economy for that configuration.

(c) If more than one equivalent petroleum-based fuel economy value exists for an electric vehicle configuration, all values for that vehicle configuration are harmonically averaged and rounded to the nearest 0.0001 mile per gallon for that configuration.

■ 44. Section 600.207–12 is added to read as follows:

§ 600.207–12 Calculation and use of vehicle-specific 5-cycle-based fuel economy and CO_2 emission values for vehicle configurations.

(a) Fuel economy and CO_2 emission values determined for each vehicle under § 600.114 and as approved in § 600.008(c), are used to determine vehicle-specific 5-cycle city and highway fuel economy and CO_2 emission values for each vehicle configuration for which data are available.

(1) If only one set of 5-cycle city and highway fuel economy and CO_2 emission values is accepted for a vehicle configuration, these values, where fuel economy is rounded to the nearest 0.0001 of a mile per gallon and the CO_2 emission value in grams per mile is rounded to the nearest tenth of a gram per mile, comprise the city and highway fuel economy and CO_2 emission values for that configuration.

(2) If more than one set of 5-cycle city and highway fuel economy and CO_2

emission values are accepted for a vehicle configuration:

(i) All data shall be grouped according to the subconfiguration for which the data were generated using sales projections supplied in accordance with § 600.209–12(a)(3).

(ii) Within each subconfiguration of data, all fuel economy values are harmonically averaged and rounded to the nearest 0.0001 of a mile per gallon in order to determine 5-cycle city and highway fuel economy values for each subconfiguration at which the vehicle configuration was tested, and all CO_2 emissions values are arithmetically averaged and rounded to the nearest tenth of gram per mile to determine 5-cycle city and highway CO_2 emission values for each subconfiguration at which the vehicle configuration was tested.

(iii) All 5-cycle city fuel economy values and all 5-cycle highway fuel economy values calculated in paragraph (a)(2)(ii) of this section are (separately for city and highway) averaged in proportion to the sales fraction (rounded to the nearest 0.0001) within the vehicle configuration (as provided to the Administrator by the manufacturer) of vehicles of each tested subconfiguration. The resultant values, rounded to the nearest 0.0001 mile per gallon, are the 5-cycle city and 5-cycle highway fuel economy values for the vehicle configuration.

(iv) All 5-cycle city CO_2 emission values and all 5-cycle highway CO_2 emission values calculated in paragraph (a)(2)(ii) of this section are (separately for city and highway) averaged in proportion to the sales fraction (rounded to the nearest 0.0001) within the vehicle configuration (as provided to the Administrator by the manufacturer) of vehicles of each tested subconfiguration. The resultant values, rounded to the nearest 0.1 grams per mile, are the 5-cycle city and 5-cycle highway CO_2 emission values for the vehicle configuration.

(3) [Reserved]

(4) For alcohol dual fuel automobiles and natural gas dual fuel automobiles the procedures of paragraphs (a)(1) and (2) of this section shall be used to calculate two separate sets of 5-cycle city and highway fuel economy and CO_2 emission values for each configuration.

(i) Calculate the 5-cycle city and highway fuel economy and CO_2 emission values from the tests performed using gasoline or diesel test fuel.

(ii) Calculate the 5-cycle city and highway fuel economy and CO_2 emission values from the tests performed using alcohol or natural gas test fuel, if 5-cycle testing has been performed. Otherwise, the procedure in § 600.210–12(a)(3) or (b)(3) applies.

(b) If only one equivalent petroleum-based fuel economy value exists for an electric configuration, that value, rounded to the nearest tenth of a mile per gallon, will comprise the petroleum-based 5-cycle fuel economy for that configuration.

(c) If more than one equivalent petroleum-based 5-cycle fuel economy value exists for an electric vehicle configuration, all values for that vehicle configuration are harmonically averaged and rounded to the nearest 0.0001 mile per gallon for that configuration.

■ 45. Section 600.208–12 is revised to read as follows:

§ 600.208–12 Calculation of FTP-based and HFET-based fuel economy, CO_2 emissions, and carbon-related exhaust emissions for a model type.

(a) Fuel economy, CO_2 emissions, and carbon-related exhaust emissions for a base level are calculated from vehicle configuration fuel economy, CO_2 emissions, and carbon-related exhaust emissions as determined in § 600.206–12(a), (b), or (c) as applicable, for low-altitude tests.

(1) If the Administrator determines that automobiles intended for sale in the State of California and in section 177 states are likely to exhibit significant differences in fuel economy, CO_2 emissions, and carbon-related exhaust emissions from those intended for sale in other states, she will calculate fuel economy, CO_2 emissions, and carbon-related exhaust emissions for each base level for vehicles intended for sale in California and in section 177 states and for each base level for vehicles intended for sale in the rest of the states.

(2) In order to highlight the fuel efficiency, CO_2 emissions, and carbon-related exhaust emissions of certain designs otherwise included within a model type, a manufacturer may wish to subdivide a model type into one or more additional model types. This is accomplished by separating subconfigurations from an existing base level and placing them into a new base level. The new base level is identical to the existing base level except that it shall be considered, for the purposes of this paragraph, as containing a new basic engine. The manufacturer will be permitted to designate such new basic engines and base level(s) if:

(i) Each additional model type resulting from division of another model type has a unique car line name and that name appears on the label and on the vehicle bearing that label;

(ii) The subconfigurations included in the new base levels are not included in any other base level which differs only by basic engine (*i.e.,* they are not included in the calculation of the original base level fuel economy values); and

(iii) All subconfigurations within the new base level are represented by test data in accordance with § 600.010(c)(1)(ii).

(3) The manufacturer shall supply total model year sales projections for each car line/vehicle subconfiguration combination.

(i) Sales projections must be supplied separately for each car line-vehicle subconfiguration intended for sale in California and each car line/vehicle subconfiguration intended for sale in the rest of the states if required by the Administrator under paragraph (a)(1) of this section.

(ii) Manufacturers shall update sales projections at the time any model type value is calculated for a label value.

(iii) The provisions of paragraph (a)(3) of this section may be satisfied by providing an amended application for certification, as described in § 86.1844 of this chapter.

(4) Vehicle configuration fuel economy, CO_2 emissions, and carbon-related exhaust emissions, as determined in § 600.206–12(a), (b) or (c), as applicable, are grouped according to base level.

(i) If only one vehicle configuration within a base level has been tested, the fuel economy, CO_2 emissions, and carbon-related exhaust emissions from that vehicle configuration will constitute the fuel economy, CO_2 emissions, and carbon-related exhaust emissions for that base level.

(ii) If more than one vehicle configuration within a base level has been tested, the vehicle configuration fuel economy values are harmonically averaged in proportion to the respective sales fraction (rounded to the nearest 0.0001) of each vehicle configuration and the resultant fuel economy value rounded to the nearest 0.0001 mile per gallon; and the vehicle configuration CO_2 emissions and carbon-related exhaust emissions are arithmetically averaged in proportion to the respective sales fraction (rounded to the nearest 0.0001) of each vehicle configuration and the resultant carbon-related exhaust emission value rounded to the nearest tenth of a gram per mile.

(5) The procedure specified in paragraph (a)(1) through (4) of this section will be repeated for each base level, thus establishing city, highway, and combined fuel economy, CO_2

emissions, and carbon-related exhaust emissions for each base level.

(6) [Reserved]

(7) For alcohol dual fuel automobiles and natural gas dual fuel automobiles, the procedures of paragraphs (a)(1) through (6) of this section shall be used to calculate two separate sets of city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emissions for each base level.

(i) Calculate the city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emissions from the tests performed using gasoline or diesel test fuel.

(ii) Calculate the city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emissions from the tests performed using alcohol or natural gas test fuel.

(b) For each model type, as determined by the Administrator, a city, highway, and combined fuel economy value, CO_2 emission value, and a carbon-related exhaust emission value will be calculated by using the projected sales and values for fuel economy, CO_2 emissions, and carbon-related exhaust emissions for each base level within the model type. Separate model type calculations will be done based on the vehicle configuration fuel economy, CO_2 emissions, and carbon-related exhaust emissions as determined in § 600.206–12(a), (b) or (c), as applicable.

(1) If the Administrator determines that automobiles intended for sale in the State of California and in section 177 states are likely to exhibit significant differences in fuel economy, CO_2 emissions, and carbon-related exhaust emissions from those intended for sale in other states, he or she will calculate values for fuel economy, CO_2 emissions, and carbon-related exhaust emissions for each model type for vehicles intended for sale in California and in section 177 states and for each model type for vehicles intended for sale in the rest of the states.

(2) The sales fraction for each base level is calculated by dividing the projected sales of the base level within the model type by the projected sales of the model type and rounding the quotient to the nearest 0.0001.

(3)(i) The FTP-based city fuel economy values of the model type (calculated to the nearest 0.0001 mpg) are determined by dividing one by a sum of terms, each of which corresponds to a base level and which is a fraction determined by dividing:

(A) The sales fraction of a base level; by

(B) The FTP-based city fuel economy value for the respective base level.

(ii) The FTP-based city carbon-related exhaust emission value of the model type (calculated to the nearest gram per mile) are determined by a sum of terms, each of which corresponds to a base level and which is a product determined by multiplying:

(A) The sales fraction of a base level; by

(B) The FTP-based city carbon-related exhaust emission value for the respective base level.

(iii) The FTP-based city CO_2 emissions of the model type (calculated to the nearest gram per mile) are determined by a sum of terms, each of which corresponds to a base level and which is a product determined by multiplying:

(A) The sales fraction of a base level; by

(B) The FTP-based city CO_2 emissions for the respective base level.

(4) The procedure specified in paragraph (b)(3) of this section is repeated in an analogous manner to determine the highway and combined fuel economy, CO_2 emissions, and carbon-related exhaust emissions for the model type.

(5) For alcohol dual fuel automobiles and natural gas dual fuel automobiles, the procedures of paragraphs (b)(1) through (4) of this section shall be used to calculate two separate sets of city, highway, and combined fuel economy values and two separate sets of city, highway, and combined CO_2 and carbon-related exhaust emission values for each model type.

(i) Calculate the city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emission values from the tests performed using gasoline or diesel test fuel.

(ii) Calculate the city, highway, and combined fuel economy, CO_2 emissions, and carbon-related exhaust emission values from the tests performed using alcohol or natural gas test fuel.

■ 46. Section 600.209–12 is added to read as follows:

§ 600.209–12 Calculation of vehicle-specific 5-cycle fuel economy and CO_2 emission values for a model type.

(a) *Base level.* 5-cycle fuel economy and CO_2 emission values for a base level are calculated from vehicle configuration 5-cycle fuel economy and CO_2 emission values as determined in § 600.207 for low-altitude tests.

(1) If the Administrator determines that automobiles intended for sale in the State of California are likely to exhibit significant differences in fuel economy and CO_2 emissions from those intended for sale in other states, he will calculate fuel economy and CO_2 emission values for each base level for vehicles intended for sale in California and for each base level for vehicles intended for sale in the rest of the states.

(2) In order to highlight the fuel efficiency and CO_2 emissions of certain designs otherwise included within a model type, a manufacturer may wish to subdivide a model type into one or more additional model types. This is accomplished by separating subconfigurations from an existing base level and placing them into a new base level. The new base level is identical to the existing base level except that it shall be considered, for the purposes of this paragraph, as containing a new basic engine. The manufacturer will be permitted to designate such new basic engines and base level(s) if:

(i) Each additional model type resulting from division of another model type has a unique car line name and that name appears on the label and on the vehicle bearing that label;

(ii) The subconfigurations included in the new base levels are not included in any other base level which differs only by basic engine (*i.e.,* they are not included in the calculation of the original base level fuel economy values); and

(iii) All subconfigurations within the new base level are represented by test data in accordance with § 600.010(c)(i)(ii).

(3) The manufacturer shall supply total model year sales projections for each car line/vehicle subconfiguration combination.

(i) Sales projections must be supplied separately for each car line-vehicle subconfiguration intended for sale in California and each car line/vehicle subconfiguration intended for sale in the rest of the states if required by the Administrator under paragraph (a)(1) of this section.

(ii) Manufacturers shall update sales projections at the time any model type value is calculated for a label value.

(iii) The provisions of this paragraph (a)(3) may be satisfied by providing an amended application for certification, as described in § 86.1844 of this chapter.

(4) 5-cycle vehicle configuration fuel economy and CO_2 emission values, as determined in § 600.207–12(a), (b), or (c), as applicable, are grouped according to base level.

(i) If only one vehicle configuration within a base level has been tested, the fuel economy and CO_2 emission values from that vehicle configuration constitute the fuel economy and CO_2 emission values for that base level.

(ii) If more than one vehicle configuration within a base level has been tested, the vehicle configuration

fuel economy values are harmonically averaged in proportion to the respective sales fraction (rounded to the nearest 0.0001) of each vehicle configuration and the resultant fuel economy value rounded to the nearest 0.0001 mile per gallon.

(iii) If more than one vehicle configuration within a base level has been tested, the vehicle configuration CO_2 emission values are arithmetically averaged in proportion to the respective sales fraction (rounded to the nearest 0.0001) of each vehicle configuration and the resultant CO_2 emission value rounded to the nearest 0.1 gram per mile.

(5) The procedure specified in § 600.209–12(a) will be repeated for each base level, thus establishing city and highway fuel economy and CO_2 emission values for each base level.

(6) [Reserved]

(7) For alcohol dual fuel automobiles and natural gas dual fuel automobiles, the procedures of paragraphs (a)(1) through (6) of this section shall be used to calculate two separate sets of city, highway, and combined fuel economy and CO_2 emission values for each base level.

(i) Calculate the city and highway fuel economy and CO_2 emission values from the tests performed using gasoline or diesel test fuel.

(ii) If 5-cycle testing was performed on the alcohol or natural gas test fuel, calculate the city and highway fuel economy and CO_2 emission values from the tests performed using alcohol or natural gas test fuel.

(b) *Model type.* For each model type, as determined by the Administrator, city and highway fuel economy and CO_2 emissions values will be calculated by using the projected sales and fuel economy and CO_2 emission values for each base level within the model type. Separate model type calculations will be done based on the vehicle configuration fuel economy and CO_2 emission values as determined in § 600.207, as applicable.

(1) If the Administrator determines that automobiles intended for sale in the State of California are likely to exhibit significant differences in fuel economy and CO_2 emissions from those intended for sale in other states, he will calculate fuel economy and CO_2 emission values for each model type for vehicles intended for sale in California and for each model type for vehicles intended for sale in the rest of the states.

(2) The sales fraction for each base level is calculated by dividing the projected sales of the base level within the model type by the projected sales of the model type and rounding the quotient to the nearest 0.0001.

(3)(i) The 5-cycle city fuel economy values of the model type (calculated to the nearest 0.0001 mpg) are determined by dividing one by a sum of terms, each of which corresponds to a base level and which is a fraction determined by dividing:

(A) The sales fraction of a base level; by

(B) The 5-cycle city fuel economy value for the respective base level.

(ii) The 5-cycle city CO_2 emissions of the model type (calculated to the nearest tenth of a gram per mile) are determined by a sum of terms, each of which corresponds to a base level and which is a product determined by multiplying:

(A) The sales fraction of a base level; by

(B) The 5-cycle city CO_2 emissions for the respective base level.

(4) The procedure specified in paragraph (b)(3) of this section is repeated in an analogous manner to determine the highway and combined fuel economy and CO_2 emission values for the model type.

(5) For alcohol dual fuel automobiles and natural gas dual fuel automobiles the procedures of paragraphs (b)(1) through (4) of this section shall be used to calculate two separate sets of city and highway fuel economy and CO_2 emission values for each model type.

(i) Calculate the city and highway fuel economy and CO_2 emission values from the tests performed using gasoline or diesel test fuel.

(ii) Calculate the city, highway, and combined fuel economy and CO_2 emission values from the tests performed using alcohol or natural gas test fuel, if 5-cycle testing was performed on the alcohol or natural gas test fuel. Otherwise, the procedure in § 600.210–12(a)(3) or (b)(3) applies.

■ 47. Section 600.210–08 is amended by adding paragraph (f) to read as follows:

§ 600.210–08 Calculation of fuel economy values for labeling.

* * * * *

(f) *Sample calculations.* An example of the calculation required in this subpart is in Appendix III of this part.

■ 48. Section § 600.210–12 is added to read as follows:

§ 600.210–12 Calculation of fuel economy and CO_2 emission values for labeling.

(a) *General labels.* Except as specified in paragraphs (d) and (e) of this section, fuel economy and CO_2 emissions for general labels may be determined by one of two methods. The first is based on vehicle-specific model-type 5-cycle data as determined in § 600.209–12(b). This method is available for all vehicles and is required for vehicles that do not qualify for the second method as described in § 600.115 (other than electric vehicles). The second method, the derived 5-cycle method, determines fuel economy and CO_2 emissions values from the FTP and HFET tests using equations that are derived from vehicle-specific 5-cycle model type data, as determined in paragraph (a)(2) of this section. Manufacturers may voluntarily lower fuel economy values and raise CO_2 values if they determine that the label values from any method are not representative of the fuel economy or CO_2 emissions for that model type.

(1) *Vehicle-specific 5-cycle labels.* The city and highway model type fuel economy determined in § 600.209–12(b), rounded to the nearest mpg, and the city and highway model type CO_2 emissions determined in § 600.209–12(b), rounded to the nearest gram per mile, comprise the fuel economy and CO_2 emission values for general fuel economy labels, or, alternatively;

(2) *Derived 5-cycle labels.* Derived 5-cycle city and highway label values are determined according to the following method:

(i)(A) For each model type, determine the derived five-cycle city fuel economy using the following equation and coefficients determined by the Administrator:

$$\text{Derived 5-cycle City Fuel Economy} = \frac{1}{\left(\{\text{City Intercept}\} + \frac{\{\text{City Slope}\}}{\text{MT FTP FE}}\right)}$$

Where:

City Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

City Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

MT FTP FE = the model type FTP-based city fuel economy determined under § 600.208–12(b), rounded to the nearest 0.0001 mpg.

(B) For each model type, determine the derived five-cycle city CO_2 emissions using the following equation and coefficients determined by the Administrator:

Derived 5−cycle City CO_2 = ({City Intercept} × A) + ({City Slope} × MT FTP CO_2)

Where:

A = 8,887 for gasoline-fueled vehicles, 10,180 for diesel-fueled vehicles, or an appropriate value specified by the Administrator for other fuels.

City Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

City Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

MT FTP CO_2 = the model type FTP-based city CO_2 emissions determined under § 600.208–12(b), rounded to the nearest 0.1 grams per mile.

(ii)(A) For each model type, determine the derived five-cycle highway fuel economy using the equation below and coefficients determined by the Administrator:

$$\text{Derived 5-cycle Highway Fuel Economy} = \frac{1}{\left(\{\text{Highway Intercept}\} + \frac{\{\text{Highway Slope}\}}{\text{MT HFET FE}}\right)}$$

Where:

Highway Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

Highway Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

MT HFET FE = the model type highway fuel economy determined under § 600.208–12(b), rounded to the nearest 0.0001 mpg.

(B) For each model type, determine the derived five-cycle highway CO_2 emissions using the equation below and coefficients determined by the Administrator:

Derived 5-cycle Highway CO_2 = ({Highway Intercept} × A) + ({Highway Slope} × MT HFET CO_2)

Where:

A = 8,887 for gasoline-fueled vehicles, 10,180 for diesel-fueled vehicles, or an appropriate value specified by the Administrator for other fuels.

Highway Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

Highway Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

MT HFET CO_2 = the model type highway CO_2 emissions determined under § 600.208–12(b), rounded to the nearest 0.1 grams per mile.

(iii) Unless and until superseded by written guidance from the Administrator, the following intercepts and slopes shall be used in the equations in paragraphs (a)(2)(i) and (ii) of this section:

City Intercept = 0.003259.

City Slope = 1.1805.

Highway Intercept = 0.001376.

Highway Slope = 1.3466.

(iv) The Administrator will periodically update the slopes and intercepts through guidance and will determine the model year that the new coefficients must take effect. The Administrator will issue guidance no later than six months prior to the earliest starting date of the effective model year (*e.g.,* for 2011 models, the earliest start of the model year is January 2, 2010, so guidance would be issued by July 1, 2009.) Until otherwise instructed by written guidance from the Administrator, manufacturers must use the coefficients that are currently in effect.

(3) *General alternate fuel economy and CO_2 emissions label values for dual fuel vehicles.*

(i)(A) City and Highway fuel economy label values for dual fuel alcohol-based and natural gas vehicles when using the alternate fuel are separately determined by the following calculation:

$$Derived\ FE_{alt} = FE_{alt} \times \frac{5cycle_{gas}}{FE_{gas}}$$

Where:

FE_{alt} = The unrounded FTP-based model-type city or HFET-based model-type highway fuel economy from the alternate fuel, as determined in § 600.208–12(b)(5)(ii).

5cycle FE_{gas} = The unrounded vehicle-specific or derived 5-cycle model-type city or highway fuel economy, as determined in paragraph (a)(1) or (2) of this section.

FE_{gas} = The unrounded FTP-based city or HFET-based model type highway fuel economy from gasoline (or diesel), as determined in § 600.208–12(b)(5)(i).

The result, rounded to the nearest whole number, is the alternate fuel label value for dual fuel vehicles.

(B) City and Highway CO_2 label values for dual fuel alcohol-based and natural gas vehicles when using the alternate fuel are separately determined by the following calculation:

$$Derived\ CO2_{alt} = CO2_{alt} \times \frac{5cycle\ CO2_{gas}}{CO2_{gas}}$$

Where:

$CO2_{alt}$ = The unrounded FTP-based model-type city or HFET-based model-type CO_2 emissions value from the alternate fuel, as determined in § 600.208–12(b)(5)(ii).

5cycle $CO2_{gas}$ = The unrounded vehicle-specific or derived 5-cycle model-type city or highway CO_2 emissions value, as determined in paragraph (a)(1) or (2) of this section.

$CO2_{gas}$ = The unrounded FTP-based city or HFET-based model type highway CO_2 emissions value from gasoline (or diesel), as determined in § 600.208–12(b)(5)(i).

The result, rounded to the nearest whole number, is the alternate fuel CO_2 emissions label value for dual fuel vehicles.

(ii) Optionally, if complete 5-cycle testing has been performed using the alternate fuel, the manufacturer may choose to use the alternate fuel label city or highway fuel economy and CO_2 emission values determined in § 600.209–12(b)(5)(ii), rounded to the nearest whole number.

(4) *General alternate fuel economy and CO_2 emissions label values for electric vehicles.* Determine FTP-based city and HFET-based highway fuel economy label values for electric

vehicles as described in § 600.116. Convert W-hour/mile results to miles per kW-hr and miles per gasoline gallon equivalent. CO_2 label information is based on tailpipe emissions only, so CO_2 emissions from electric vehicles are assumed to be zero.

(5) *General alternate fuel economy and CO_2 emissions label values for fuel cell vehicles.* Determine FTP-based city and HFET-based highway fuel economy label values for electric vehicles using procedures specified by the Administrator. Convert kilograms of hydrogen/mile results to miles per kilogram of hydrogen and miles per gasoline gallon equivalent. CO_2 label information is based on tailpipe emissions only, so CO_2 emissions from fuel cell vehicles are assumed to be zero.

(b) *Specific labels.* Except as specified in paragraphs (d) and (e) of this section, fuel economy and CO_2 emissions for specific labels may be determined by one of two methods. The first is based on vehicle-specific configuration 5-cycle data as determined in § 600.207. This method is available for all vehicles and is required for vehicles that do not qualify for the second method as described in § 600.115 (other than electric vehicles). The second method, the derived 5-cycle method, determines fuel economy and CO_2 emissions values from the FTP and HFET tests using equations that are derived from vehicle-specific 5-cycle configuration data, as determined in paragraph (b)(2) of this section. Manufacturers may voluntarily lower fuel economy values and raise CO_2 values if they determine that the label values from either method are not representative of the fuel economy or CO_2 emissions for that model type.

(1) *Vehicle-specific 5-cycle labels.* The city and highway configuration fuel economy determined in § 600.207, rounded to the nearest mpg, and the city and highway configuration CO_2 emissions determined in § 600.207, rounded to the nearest gram per mile, comprise the fuel economy and CO_2 emission values for specific fuel economy labels, or, alternatively;

(2) *Derived 5-cycle labels.* Specific city and highway label values from derived 5-cycle are determined according to the following method:

(i)(A) Determine the derived five-cycle city fuel economy of the configuration using the equation below and coefficients determined by the Administrator:

$$\text{Derived 5-cycle City Fuel Economy} = \frac{1}{\left(\{\text{City Intercept}\} + \frac{\{\text{City Slope}\}}{\text{Config FTP FE}}\right)}$$

Where:

City Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

City Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

Config FTP FE = the configuration FTP-based city fuel economy determined under § 600.206, rounded to the nearest 0.0001 mpg.

(B) Determine the derived five-cycle city CO_2 emissions of the configuration using the equation below and coefficients determined by the Administrator:

Derived 5-cycle City CO_2 = {City Intercept} + {City Slope} × Config FTP CO_2

Where:

City Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

City Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle city fuel economy data.

Config FTP CO_2 = the configuration FTP-based city CO_2 emissions determined under § 600.206, rounded to the nearest 0.1 grams per mile.

(ii)(A) Determine the derived five-cycle highway fuel economy of the configuration using the equation below and coefficients determined by the Administrator:

$$\text{Derived 5-cycle Highway Fuel Economy} = \frac{1}{\left(\{\text{Highway Intercept}\} + \frac{\{\text{Highway Slope}\}}{\text{Config HFET FE}}\right)}$$

Where:

Highway Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

Highway Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

Config HFET FE = the configuration highway fuel economy determined under § 600.206, rounded to the nearest tenth.

(B) Determine the derived five-cycle highway CO_2 emissions of the configuration using the equation below and coefficients determined by the Administrator:

Derived 5-cycle city Highway CO_2 = {Highway Intercept} + {Highway Slope} × Config HFET CO_2

Where:

Highway Intercept = Intercept determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

Highway Slope = Slope determined by the Administrator based on historic vehicle-specific 5-cycle highway fuel economy data.

Config HFET CO_2 = the configuration highway fuel economy determined under § 600.206, rounded to the nearest tenth.

(iii) The slopes and intercepts of paragraph (a)(2)(iii) of this section apply.

(3) *Specific alternate fuel economy and CO_2 emissions label values for dual fuel vehicles.* (i)(A) Specific city and highway fuel economy label values for dual fuel alcohol-based and natural gas vehicles when using the alternate fuel are separately determined by the following calculation:

$$\text{Derived } FE_{alt} = FE_{alt} \times \frac{5 \text{ cycle}_{gas}}{FE_{gas}}$$

Where:

FE_{alt} = The unrounded FTP-based configuration city or HFET-based configuration highway fuel economy from the alternate fuel, as determined in § 600.206.

5cycle FE_{gas} = The unrounded vehicle-specific or derived 5-cycle configuration

city or highway fuel economy as determined in paragraph (b)(1) or (2) of this section.

FE_{gas} = The unrounded FTP-based city or HFET-based configuration highway fuel economy from gasoline, as determined in § 600.206.

The result, rounded to the nearest whole number, is the alternate fuel label value for dual fuel vehicles.

(B) Specific city and highway CO_2 emission label values for dual fuel alcohol-based and natural gas vehicles when using the alternate fuel are separately determined by the following calculation:

$$Derived\ CO2_{alt} = CO2_{alt} \times \frac{5cycle\ CO2_{gas}}{CO2_{gas}}$$

$$\text{Derived } FE_{alt} = FE_{alt} \times \frac{5 \text{ cycle}_{gas}}{FE_{gas}}$$

Where:

$CO2_{alt}$ = The unrounded FTP-based configuration city or HFET-based configuration highway CO_2 emissions value from the alternate fuel, as determined in § 600.206.

5cycle $CO2_{gas}$ = The unrounded vehicle-specific or derived 5-cycle configuration city or highway CO_2 emissions value as determined in paragraph (b)(1) or (b)(2) of this section.

$CO2_{gas}$ = The unrounded FTP-based city or HFET-based configuration highway CO_2 emissions value from gasoline, as determined in § 600.206.

The result, rounded to the nearest whole number, is the alternate fuel CO_2 emissions label value for dual fuel vehicles.

(ii) Optionally, if complete 5-cycle testing has been performed using the alternate fuel, the manufacturer may choose to use the alternate fuel label city or highway fuel economy and CO_2 emission values determined in § 600.207–12(a)(4)(ii), rounded to the nearest whole number.

(4) *Specific alternate fuel economy and CO_2 emissions label values for electric vehicles.* Determine FTP-based city and HFET-based highway fuel economy label values for electric vehicles as described in § 600.116. Determine these values by running the appropriate repeat test cycles. Convert W-hour/mile results to miles per kW-hr and miles per gasoline gallon equivalent. CO_2 label information is based on tailpipe emissions only, so CO_2 emissions from electric vehicles are assumed to be zero.

(5) *Specific alternate fuel economy and CO_2 emissions label values for fuel cell vehicles.* Determine FTP-based city and HFET-based highway fuel economy label values for fuel cell vehicles using procedures specified by the Administrator. Convert kilograms of hydrogen/mile results to miles per kilogram of hydrogen and miles per gasoline gallon equivalent. CO_2 label information is based on tailpipe emissions only, so CO_2 emissions from fuel cell vehicles are assumed to be zero.

(c) *Calculating combined fuel economy.* (1) For the purposes of calculating the combined fuel economy for a model type, to be used in displaying on the label and for determining annual fuel costs under subpart D of this part, the manufacturer shall use one of the following procedures:

(i) For gasoline-fueled, diesel-fueled, alcohol-fueled, and natural gas-fueled automobiles, and for dual fuel automobiles that can operate on gasoline or diesel fuel, harmonically average the unrounded city and highway fuel economy values, determined in paragraphs (a)(1) or (2) of this section and (b)(1) or (2) of this section, weighted 0.55 and 0.45 respectively. Round the result to the nearest whole mpg. (An example of this calculation procedure appears in Appendix II of this part).

(ii) For alcohol dual fuel and natural gas dual fuel automobiles operated on the alternate fuel, harmonically average the unrounded city and highway values from the tests performed using the alternative fuel as determined in paragraphs (a)(3) and (b)(3) of this section, weighted 0.55 and 0.45 respectively. Round the result to the nearest whole mpg.

(iii) For electric vehicles, calculate the combined fuel economy, in miles per kW-hr and miles per gasoline gallon equivalent, by harmonically averaging the unrounded city and highway values, weighted 0.55 and 0.45 respectively. Round miles per kW-hr to the nearest 0.001 and round miles per gasoline gallon equivalent to the nearest whole number.

(iv) For plug-in hybrid electric vehicles, calculate a combined fuel economy value, in miles per gasoline gallon equivalent as follows:

(A) Determine city and highway fuel economy values for vehicle operation after the battery has been fully discharged (''gas only operation'' or ''charge-sustaining mode'') as described in paragraphs (a) and (b) of this section.

(B) Determine city and highway fuel economy values for vehicle operation starting with a full battery charge (''all-electric operation'' or ''gas plus electric operation'', as appropriate, or ''charge-depleting mode'') as described in § 600.116. For battery energy, convert W-hour/mile results to miles per gasoline gallon equivalent or miles per diesel gallon equivalent, as applicable. Note that you must also express battery-based fuel economy values in miles per kW-hr for calculating annual fuel cost as described in § 600.311.

(C) Calculate a composite city fuel economy value and a composite highway fuel economy value by combining the separate results for battery and engine operation using the procedures described in § 600.116). Apply the derived 5-cycle adjustment to these composite values. Use these values to calculate the vehicle's combined fuel economy as described in paragraph (c)(1)(i) of this section.

(v) For fuel cell vehicles, calculate the combined fuel economy, in miles per kilogram and miles per gasoline gallon equivalent, by harmonically averaging the unrounded city and highway values, weighted 0.55 and 0.45 respectively. Round miles per kilogram to the nearest whole number and round miles per gasoline gallon equivalent to the nearest whole number.

(2) For the purposes of calculating the combined CO_2 emissions value for a model type, to be used in displaying on the label under subpart D of this part, the manufacturer shall:

(i) For gasoline-fueled, diesel-fueled, alcohol-fueled, and natural gas-fueled automobiles, and for dual fuel automobiles that can operate on gasoline or diesel fuel, arithmetically average the unrounded city and highway values, determined in

paragraphs (a)(1) or (2) of this section and (b)(1) or (2) of this section, weighted 0.55 and 0.45 respectively, and round to the nearest whole gram per mile; or

(ii) For alcohol dual fuel and natural gas dual fuel automobiles operated on the alternate fuel, arithmetically average the unrounded city and highway CO_2 emission values from the tests performed using the alternative fuel as determined in paragraphs (a)(3) and (b)(3) of this section, weighted 0.55 and 0.45 respectively, and round to the nearest whole gram per mile.

(iii) CO_2 label information is based on tailpipe emissions only, so CO_2 emissions from electric vehicles and fuel cell vehicles are assumed to be zero.

(iv) For plug-in hybrid electric vehicles, calculate combined CO_2 emissions as follows:

(A) Determine city and highway CO_2 emission rates for vehicle operation after the battery has been fully discharged (''gas only operation'' or ''charge-sustaining mode'') as described in paragraphs (a) and (b) of this section.

(B) Determine city and highway CO_2 emission rates for vehicle operation starting with a full battery charge (''all-electric operation'' or ''gas plus electric operation'', as appropriate, or ''charge-depleting mode'') as described in § 600.116. Note that CO_2 label information is based on tailpipe emissions only, so CO_2 emissions from electricity are assumed to be zero.

(C) Calculate a composite city CO_2 emission rate and a composite highway CO_2 emission rate by combining the separate results for battery and engine operation using the procedures described in § 600.116. Use these values to calculate the vehicle's combined fuel economy as described in paragraph (c)(1)(i) of this section.

(d) *Calculating combined fuel economy and CO_2 emissions.* (1) If the criteria in § 600.115–11(a) are met for a model type, both the city and highway fuel economy and CO_2 emissions values must be determined using the vehicle-specific 5-cycle method. If the criteria in § 600.115–11(b) are met for a model type, the city fuel economy and CO_2 emissions values may be determined using either method, but the highway fuel economy and CO_2 emissions values must be determined using the vehicle-specific 5-cycle method (or modified 5-cycle method as allowed under § 600.114–12(b)(2)).

(2) If the criteria in § 600.115 are not met for a model type, the city and highway fuel economy and CO_2 emission label values must be determined by using the same method, either the derived 5-cycle or vehicle-specific 5-cycle.

(3) Manufacturers may use any of the following methods for determining 5-cycle values for fuel economy and CO_2 emissions for electric vehicles:

(i) Generate 5-cycle data as described in paragraph (a)(1) of this section.

(ii) Decrease fuel economy values by 30 percent and increase CO_2 emission values by 30 percent relative to data generated from 2-cycle testing.

(iii) Manufacturers may ask the Administrator to approve adjustment factors for deriving 5-cycle fuel economy results from 2-cycle test data based on operating data from their in-use vehicles. Such data should be collected from multiple vehicles with different drivers over a range of representative driving routes and conditions. The Administrator may approve such an adjustment factor for any of the manufacturer's vehicle models that are properly represented by the collected data.

(e) *Fuel economy values and other information for advanced technology vehicles.* (1) The Administrator may prescribe an alternative method of determining the city and highway model type fuel economy and CO_2 emission values for general, unique or specific fuel economy labels other than those set forth in this subpart C for advanced technology vehicles including, but not limited to fuel cell vehicles, hybrid electric vehicles using hydraulic energy storage, and vehicles equipped with hydrogen internal combustion engines.

(2) For advanced technology vehicles, the Administrator may prescribe special methods for determining information other than fuel economy that is required to be displayed on fuel economy labels as specified in § 600.302–12(e).

(f) *Sample calculations.* An example of the calculation required in this subpart is in Appendix III of this part.

Subpart D—Fuel Economy Labeling

■ 49. The heading for subpart D is revised as set forth above.

§§ 600.301–08, 600.301–12, 600.301–86, 600.301–95, 600.302–77, 600.303–77, 600.304–77, 600.305–77, 600.306–86, 600.307–86, 600.307–95, 600.310–86, 600.311–86, 600.313–86, 600.314–01, 600.314–86, and 600.315–82 [Removed]

■ 50. Subpart D is amended by removing the following sections:

§ 600.301–08.
§ 600.301–12.
§ 600.301–86.
§ 600.301–95.
§ 600.302–77.
§ 600.303–77.
§ 600.304–77.
§ 600.305–77.
§ 600.306–86.
§ 600.307–86.
§ 600.307–95.
§ 600.310–86.
§ 600.311–86.
§ 600.313–86.
§ 600.314–01.
§ 600.314–86.
§ 600.315–82.

§ 600.306–08 [Redesignated as § 600.301]

§ 600.307–08 [Redesignated as § 600.302–08]

§ 600.312–86 [Redesignated as § 600.312–08]

§ 600.313–01 [Redesignated as § 600.313–08]

§ 600.316–78 [Redesignated as § 600.316–08]

■ 51. Redesignate specific sections in subpart D as follows:

old section	new section
600.306–08	600.301
600.307–08	600.302–08
600.312–86	600.312–08
600.313–01	600.313–08
600.316–78	600.316–08

■ 52. Newly redesignated § 600.301 is revised to read as follows:

§ 600.301 Labeling requirements.

(a) Prior to being offered for sale, each manufacturer shall affix or cause to be affixed and each dealer shall maintain or cause to be maintained on each automobile:

(1) A general fuel economy label (initial, or updated as required in § 600.314) as described in § 600.302 or:

(2) A specific label, for those automobiles manufactured or imported before the date that occurs 15 days after general labels have been determined by the manufacturer, as described in § 600.210–08(b) or § 600.210–12(b).

(i) If the manufacturer elects to use a specific label within a model type (as defined in § 600.002, he shall also affix specific labels on all automobiles within this model type, except on those automobiles manufactured or imported before the date that labels are required to bear range values as required by paragraph (b) of this section, or determined by the Administrator, or as permitted under § 600.310.

(ii) If a manufacturer elects to change from general to specific labels or vice versa within a model type, the manufacturer shall, within five calendar days, initiate or discontinue as applicable, the use of specific labels on all vehicles within a model type at all facilities where labels are affixed.

(3) For any vehicle for which a specific label is requested which has a combined FTP/HFET-based fuel economy value, as determined in § 600.513, at or below the minimum tax-free value, the following statement must appear on the specific label:

''[Manufacturer's name] may have to pay IRS a Gas Guzzler Tax on this vehicle because of the low fuel economy.''

(4)(i) At the time a general fuel economy value is determined for a model type, a manufacturer shall, except as provided in paragraph (a)(4)(ii) of this section, relabel, or cause to be relabeled, vehicles which:

(A) Have not been delivered to the ultimate purchaser, and

(B) Have a combined FTP/HFET-based model type fuel economy value (as determined in § 600.208–08(b) or § 600.208–12(b) of 0.1 mpg or more below the lowest fuel economy value at which a Gas Guzzler Tax of $0 is to be assessed.

(ii) The manufacturer has the option of re-labeling vehicles during the first five working days after the general label value is known.

(iii) For those vehicle model types which have been issued a specific label and are subsequently found to have tax liability, the manufacturer is responsible for the tax liability regardless of whether the vehicle has been sold or not or whether the vehicle has been relabeled or not.

(b) The manufacturer shall include the current range of fuel economy of comparable automobiles (as described in §§ 600.311 and 600.314) in the label of each vehicle manufactured or imported more than 15 calendar days after the current range is made available by the Administrator.

(1) Automobiles manufactured or imported before a date 16 or more calendar days after the initial label range is made available under § 600.311 shall include the range from the previous model year.

(2) Automobiles manufactured or imported more than 15 calendar days after the label range is made available under § 600.311 shall be labeled with the current range of fuel economy of comparable automobiles as approved for that label.

(c) The fuel economy label must be readily visible from the exterior of the automobile and remain affixed until the time the automobile is delivered to the ultimate consumer.

(1) It is preferable that the fuel economy label information be incorporated into the Automobile Information Disclosure Act label, provided that the prominence and legibility of the fuel economy label is maintained. For this purpose, all fuel economy label information must be placed on a separate section in the Automobile Information Disclosure Act label and may not be intermixed with that label information, except for vehicle descriptions as noted in § 600.303–08(d)(1).

(2) The fuel economy label must be located on a side window. If the window is not large enough to contain both the Automobile Information Disclosure Act label and the fuel economy label, the manufacturer shall have the fuel economy label affixed on another window and as close as possible to the Automobile Information Disclosure Act label.

(3) The manufacturer shall have the fuel economy label affixed in such a manner that appearance and legibility are maintained until after the vehicle is delivered to the ultimate consumer.

(d) The labeling requirements specified in this subpart for 2008 model year vehicles continue to apply through the 2011 model year. In the 2012 model year, manufacturers may label their vehicles as specified in this subpart for either 2008 or 2012 model years. The labeling requirements specified in this subpart for 2012 model year vehicles are mandatory for 2013 and later model years.

§ 600.302–08 [Amended]

■ 53. Newly redesignated § 600.302–08 is amended by removing and reserving paragraphs (h) through (j).

■ 54. Section § 600.302–12 is added to subpart D to read as follows:

§ 600.302–12 Fuel economy label—general provisions.

This section describes labeling requirements and specifications that apply to all vehicles. The requirements and specifications in this section and those in §§ 600.304 through 600.310 are illustrated in Appendix VI of this part.

(a) *Basic format.* Fuel economy labels must be rectangular in shape with a minimum width of 174 mm and a minimum height of 114 mm. The required label can be divided into three fields separated and outlined by a continuous border, as described in paragraphs (b) through (e) of this section.

(b) *Border.* Create a continuous black border to outline the label and separate the three information fields. Include the following information in the top and bottom portions of the border:

(1) In the left portion of the upper border, include ''EPA'' and ''DOT'' with a horizontal line in between (''EPA divided by DOT'').

(2) Immediately to the right of the Agency names, include the heading ''Fuel Economy and Environment''.

(3) Identify the vehicle's fuel type on the right-most portion of the upper border in a blue-colored field as follows:

(i) For vehicles designed to operate on a single fuel, identify the appropriate fuel. For example, identify the vehicle as ''Gasoline Vehicle'', ''Diesel Vehicle'', ''Compressed Natural Gas Vehicle'', ''Hydrogen Fuel Cell Vehicle'', etc. This includes hybrid electric vehicles that do not have plug-in capability. Include a logo corresponding to the fuel to the left of this designation as follows:

(A) For gasoline, include a fuel pump logo.

(B) For diesel fuel, include a fuel pump logo with a ''D'' inscribed in the base of the fuel pump.

(C) For natural gas, include the established CNG logo.

(D) For hydrogen fuel cells, include the expression ''H_2''.

(ii) Identify flexible-fuel vehicles and dual-fuel vehicles as ''Flexible-Fuel Vehicle Gasoline-Ethanol (E85)'', ''Flexible-Fuel Vehicle Diesel-Natural Gas'', etc. Include a fuel pump logo or a combination of logos to the left of this designation as appropriate. For example, for vehicles that operate on gasoline or ethanol, include a fuel pump logo and the designation ''E85''.

(iii) Identify plug-in hybrid electric vehicles as ''Plug-In Hybrid Vehicle Electricity-Gasoline'' or ''Plug-In Hybrid Vehicle Electricity-Diesel''. Include a fuel pump logo as specified in paragraph (b)(3)(i) of this section and an electric plug logo to the left of this designation.

(iv) Identify electric vehicles as ''Electric Vehicle''. Include an electric plug logo to the left of this designation.

(4) Include the following statement in the upper left portion of the lower border: ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per gallon. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.'' For *a, b, c,* and *d,* insert the appropriate values established by EPA, including consideration of the type of fuel that is required for the vehicle. See §§ 600.303 through 600.310 for alternate statements that apply for vehicles that use a fuel other than gasoline or diesel fuel.

(5) In the lower left portion of the lower border, include the Web site reference, ''fueleconomy.gov'', and the following statement: ''Calculate

personalized estimates and compare vehicles''.

(6) Include a field in the right-most portion of the lower border to allow for accessing interactive information with mobile electronic devices. To do this, include an image of a QR code that will direct mobile electronic devices to an EPA-specified Web site with fuel economy information. Generate the QR code as specified in ISO/IEC 18004 (incorporated by reference in § 600.011). To the left of the QR code, include the vertically oriented caption ''Smartphone QR Code™''.

(7) Along the lower edge of the lower border, to the left of the field with the QR Code, include the logos for EPA, the Department of Transportation, and the Department of Energy.

(c) *Fuel economy and cost values.* Include the following elements in the field at the top of the label:

(1) The elements specified in this paragraph (c)(1) for vehicles that run on gasoline or diesel fuel with no plug-in capability. See §§ 600.304 through 600.310 for specifications that apply for other vehicles.

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) The combined fuel economy value as determined in § 600.311 below the heading. Include the expression ''combined city/hwy'' below this number.

(iii) The fuel pump logo to the left of the combined fuel economy value. For diesel fuel, include a fuel pump logo with a ''D'' inscribed in the base of the fuel pump.

(iv) The units identifier and specific fuel economy values to the right of the combined fuel economy rating as follows:

(A) Include the term ''MPG'' in the upper portion of the designated space.

(B) Include the city fuel economy value determined in § 600.311 in the lower left portion of the designated space. Include the expression ''city'' below this number.

(C) Include the highway fuel economy value determined in § 600.311 in the lower right portion of the designated space. Include the expression ''highway'' below this number.

(v) The fuel consumption rate determined in § 600.311, below the combined fuel economy value, followed by the expression ''gallons per 100 miles''.

(2) In the upper middle portion of the field, include the following statement: ''___ range from *x* to *y* MPG. The best vehicle rates *z* MPGe.'' Fill in the blank with the appropriate vehicle class (such as Small SUVs). For *x, y,* and *z,* insert the appropriate values established by EPA.

(3) Include one of the following statements in the right side of the field:

(i) For vehicles with calculated fuel costs higher than the average vehicle as specified in § 600.311: ''You spend $*x* more in fuel costs over 5 years compared to the average new vehicle.'' Complete the statement by including the calculated increase in fuel costs as specified in § 600.311.

(ii) For all other vehicles: ''You save $*x* in fuel costs over 5 years compared to the average new vehicle.'' Complete the statement by including the calculated fuel savings as specified in § 600.311. Note that this includes fuel savings of $0.

(d) *Annual fuel cost.* Include the following statement in the field in the lower left portion of the label: ''Annual fuel cost $*x''.* Complete this statement using the value for annual fuel cost determined in § 600.311.

(e) *Performance ratings.* Include the following information in the field in the lower left portion of the label:

(1) The heading, ''Fuel Economy and Greenhouse Gas Rating (tailpipe only)'' in the top left corner of the field.

(2) A slider bar below the heading in the left portion of the field to characterize the vehicle's fuel economy and greenhouse gas ratings, as determined in § 600.311. Position a box with a downward-pointing wedge above the slider bar positioned to show where that vehicle's fuel economy rating falls relative to the total range; include the vehicle's fuel economy rating inside the box. If the greenhouse gas rating from § 600.311 is different than the fuel economy rating, position a second box with an upward-pointing wedge below the slider bar positioned to show where that vehicle's greenhouse gas rating falls relative to the total range; include the vehicle's greenhouse gas rating inside the box. Include the expression ''CO_2'' to the left of the box with the greenhouse gas rating and add the expression MPG to the left of the box with the fuel economy rating. Include the number 1 inside the border at the left end of the slider bar. Include the number 10 inside the border at the right end of the slider bar and add the term ''Best'' below the slider bar, directly under the number. EPA will periodically calculate and publish updated rating values as described in § 600.311. Add color to the slider bar such that it is blue at the left end of the range, white at the right end of the range, and shaded continuously across the range.

(3) The heading, ''Smog Rating (tailpipe only)'' in the top right corner of the field.

(4) Insert a slider bar in the right portion of the field to characterize the vehicle's level of emission control for ozone-related air pollutants relative to that of all vehicles. Position a box with a downward-pointing wedge above the slider bar positioned to show where that vehicle's emission rating falls relative to the total range. Include the vehicle's emission rating (as described in § 600.311) inside the box. Include the number 1 in the border at the left end of the slider bar and add the expression ''Smog Rating'' under the slider bar, directly below the number. Include the number 10 in the border at the right end of the slider bar and add the term ''Best'' below the slider bar, directly under the number. EPA will periodically calculate and publish updated range values as described in § 600.311. Add color to the slider bar such that it is blue at the left end of the range, white at the right end of the range, and shaded continuously across the range.

(5) The following statements below the slider bars: ''This vehicle emits *x* grams CO_2 per mile. The best emits 0 grams per mile (tailpipe only). Producing and distributing fuel also create emissions; learn more at fueleconomy.gov.'' For *x,* insert the vehicle's composite CO_2 emission rate as described in § 600.311. See §§ 600.308 and 600.310 for specifications that apply for vehicles powered by electricity.

(f) *Vehicle description.* Where the fuel economy label is physically incorporated with the Motor Vehicle Information and Cost Savings Act label, no further vehicle description is needed. If the fuel economy label is separate from the Automobile Information Disclosure Act label, describe the vehicle in a location on the label that does not interfere with the other required information. In cases where the vehicle description may not easily fit on the label, the manufacturer may request Administrator approval of modifications to the label format to accommodate this information. Include the following items in the vehicle description, if applicable:

(1) Model year.

(2) Vehicle car line.

(3) Engine displacement, in cubic inches, cubic centimeters, or liters whichever is consistent with the customary description of that engine.

(4) Transmission class.

(5) Other descriptive information, as necessary, such as number of engine cylinders, to distinguish otherwise identical model types or, in the case of

specific labels, vehicle configurations, as approved by the Administrator.

(g) [Reserved]

(h) *Gas guzzler provisions.* For vehicles requiring a tax statement under § 600.513, add the phrase ''$*x* gas guzzler tax'', where $*x* is the value of the tax. The tax value required by this paragraph (h) is based on the combined fuel economy value for the model type calculated according to § 600.513 and rounded to the nearest 0.1 mpg.

(i) *Alternative label provisions for special cases.* The Administrator may approve modifications to the style guidelines if space is limited. The Administrator may also prescribe special label format and information requirements for vehicles that are not specifically described in this subpart, such as hydrogen-fueled internal combustion engines or hybrid electric vehicles that have engines operating on fuels other than gasoline or diesel fuel. The Administrator may also approve alternate wording of statements on the label if that is necessary or appropriate for a given fuel or combination of fuels. The revised labeling specifications will conform to the principles established in this subpart, with any appropriate modifications or additions to reflect the vehicle's unique characteristics. See 49 U.S.C. 32908(b)(1)(F).

(j) *Rounding.* Unless the regulation specifies otherwise, do not round intermediate values, but round final calculated values identified in this subpart to the nearest whole number.

(k) *Updating information.* EPA will periodically publish updated information that is needed to comply with the labeling requirements in this subpart. This includes the annual mileage rates and fuel-cost information, the ''best and worst'' values needed for calculating relative ratings for individual vehicles, and the various rating criteria as specified in § 600.311.

■ 55. Section 600.303–12 is added to subpart D to read as follows:

§ 600.303–12 Fuel economy label—special requirements for flexible-fuel vehicles.

Fuel economy labels for flexible-fuel vehicles must meet the specifications described in § 600.302, the modifications described in this section. This section describes how to label vehicles equipped with gasoline engines. If the vehicle has a diesel engine, all the references to ''gas'' or ''gasoline'' in this section are understood to refer to ''diesel'' or ''diesel fuel'', respectively.

(a) For qualifying vehicles, include the following additional sentence in the statement identified in § 600.302–12(b)(4): ''This is a dual fueled automobile.'' See the definition of ''dual fueled automobile'' in § 600.002.

(b) You may include fuel economy information as described in § 600.302–12(c)(1), or you may include the following elements instead:

(1) The heading ''Fuel Economy'' near the top left corner of the field.

(2) The combined fuel economy value as determined in § 600.311 below the heading. Include the expression ''combined city/hwy'' below this number.

(3) The fuel pump logo and other logos as specified in § 600.302–12(b)(3)(ii) to the left of the combined fuel economy value.

(4) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(i) Include the term ''MPG'' in the upper portion of the designated space.

(ii) Include the city fuel economy value determined in § 600.311 in the lower left portion of the designated space. Include the expression ''city'' below this number.

(iii) Include the highway fuel economy value determined in § 600.311 in the lower right portion of the designated space. Include the expression ''highway'' below this number.

(5) The fuel consumption rate determined in § 600.311, to the right of the fuel economy information. Include the expression ''gallons per 100 miles'' below the numerical value.

(6) The sub-heading ''Driving Range'' below the combined fuel economy value, with range bars below this sub-heading as follows:

(i) Insert a horizontal range bar nominally 80 mm long to show how far the vehicle can drive from a full tank of gasoline. Include a vehicle logo at the right end of the range bar. Include the following left-justified expression inside the range bar: ''Gasoline: *x* miles''. Complete the expression by identifying the appropriate value for total driving range from § 600.311.

(ii) Insert a second horizontal range bar as described in paragraph (b)(7)(i) of this section that shows how far the vehicle can drive from a full tank with the second fuel. Establish the length of the line based on the proportion of driving ranges for the different fuels. Identify the appropriate fuel in the range bar.

(c) Add the following statement after the statements described in § 600.302–12(c)(2): ''Values are based on gasoline and do not reflect performance and ratings based on E85.'' Adjust this statement as appropriate for vehicles designed to operate on different fuels.

■ 56. Section 600.304–12 is added to subpart D to read as follows:

§ 600.304–12 Fuel economy label—special requirements for hydrogen fuel cell vehicles.

Fuel economy labels for hydrogen fuel cell vehicles must meet the specifications described in § 600.302, with the following modifications:

(a) Include the following statement instead of the statement specified in § 600.302–12(b)(4): ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per kilogram of hydrogen. Vehicle emissions are a significant cause of global warming and smog.'' For *a, b, c,* and *d,* insert the appropriate values established by EPA.

(b) Include the following elements instead of the information identified in § 600.302–12(c)(1):

(1) The heading ''Fuel Economy'' near the top left corner of the field.

(2) The combined fuel economy value as determined in § 600.311 below the heading. Include the expression ''combined city/hwy'' below this number.

(3) The logo specified in § 600.302–12(b)(3)(ii) to the left of the combined fuel economy value.

(4) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(i) Include the term ''MPGe'' in the upper portion of the designated space.

(ii) Include the city fuel economy value determined in § 600.311 in the lower left portion of the designated space. Include the expression ''city'' below this number.

(iii) Include the highway fuel economy value determined in § 600.311 in the lower right portion of the designated space. Include the expression ''highway'' below this number.

(5) The fuel consumption rate determined in § 600.311, to the right of the fuel economy information. Include the expression ''kg H_2 per 100 miles'' below the numerical value.

(6) The sub-heading ''Driving Range'' below the combined fuel economy value. Below this sub-heading, insert a horizontal range bar nominally 80 mm long to show how far the vehicle can drive when fully fueled. Include a vehicle logo at the right end of the range bar. Include the following left-justified expression inside the range bar: ''When fully fueled, vehicle can travel about

* * *''. Below the right end of the range bar, include the expression ''*x* miles''; complete the expression by identifying the appropriate value for total driving range from § 600.311. Include numbers below the bar showing the scale, with numbers starting at 0 and increasing in equal increments. Use good engineering judgment to divide the range bar into four, five, or six increments.

■ 57. Section 600.306–12 is added to subpart D to read as follows:

§ 600.306–12 Fuel economy label—special requirements for compressed natural gas vehicles.

Fuel economy labels for dedicated natural gas vehicles must meet the specifications described in § 600.302, with the following modifications:

(a) Include the following statement instead of the statement specified in § 600.302–12(b)(4): ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per gasoline gallon equivalent. Vehicle emissions are a significant cause of global warming and smog.'' For *a, b, c,* and *d,* insert the appropriate values established by EPA.

(b) Include the following elements instead of the information identified in § 600.302–12(c)(1):

(1) The heading ''Fuel Economy'' near the top left corner of the field.

(2) The combined fuel economy value as determined in § 600.311 below the heading. Include the expression ''combined city/hwy'' below this number.

(3) The logo specified in § 600.302–12(b)(3)(ii) to the left of the combined fuel economy value.

(4) The units identifier and specific fuel economy ratings to the right of the combined fuel economy value as follows:

(i) Include the term ''MPGe'' in the upper portion of the designated space.

(ii) Include the city fuel economy value determined in § 600.311 in the lower left portion of the designated space. Include the expression ''city'' below this number.

(iii) Include the highway fuel economy value determined in § 600.311 in the lower right portion of the designated space. Include the expression ''highway'' below this number.

(5) The fuel consumption rate determined in § 600.311, to the right of the fuel economy information. Include the expression ''equivalent gallons per 100 miles'' below the numerical value.

(6) The sub-heading ''Driving Range'' below the combined fuel economy value. Below this sub-heading, insert a horizontal range bar nominally 80 mm long to show how far the vehicle can drive when fully fueled. Include a vehicle logo at the right end of the range bar. Include the following left-justified expression inside the range bar: ''When fully fueled, vehicle can travel about * * *''''. Below the right end of the range bar, include the expression ''*x* miles''; complete the expression by identifying the appropriate value for total driving range from § 600.311. Include numbers below the bar showing the scale, with numbers starting at 0 and increasing in equal increments. Use good engineering judgment to divide the range bar into four, five, or six increments.

■ 58. Section 600.308–12 is added to subpart D to read as follows:

§ 600.308–12 Fuel economy label format requirements—plug-in hybrid electric vehicles.

Fuel economy labels for plug-in hybrid electric vehicles must meet the specifications described in § 600.302, with the exceptions and additional specifications described in this section. This section describes how to label vehicles equipped with gasoline engines. If the vehicle has a diesel engine, all the references to ''gas'' or ''gasoline'' in this section are understood to refer to ''diesel'' or ''diesel fuel'', respectively.

(a) Include the following statement instead of the statement specified in § 600.302–12(b)(4): ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per gallon and $*e* per kW-hr. Vehicle emissions are a significant cause of global warming and smog.'' For *a, b, c, d,* and *e,* insert the appropriate values established by EPA. For qualifying vehicles, include the following additional sentence: ''This is a dual fueled automobile.'' See the definition of ''dual fueled automobile in § 600.002.

(b) Include the following elements instead of the information identified in § 600.302–12(c)(1):

(1) The heading ''Fuel Economy'' near the top left corner of the field. Include the statement specified in § 600.312–12(c)(2) to the right of the heading.

(2) An outlined box below the heading with the following information:

(i) The sub-heading ''Electricity'' if the vehicle's engine starts only after the battery is fully discharged, or ''Electricity + Gasoline'' if the vehicle uses combined power from the battery and the engine before the battery is fully discharged.

(ii) The expression ''Charge Time: *x* hours (240V)'' below the sub-heading, where *x* is the time to charge the battery as specified in § 600.311. Change the specified voltage if appropriate as specified in § 600.311.

(iii) The combined fuel economy value for the charge-depleting mode of operation as determined in § 600.311 below the charge time. Include the expression ''combined city/highway'' below this number.

(iv) An electric plug logo to the left of the combined fuel economy value. For vehicles that use combined power from the battery and the engine before the battery is fully discharged, also include the fuel pump logo.

(v) The units identifier and consumption ratings to the right of the combined fuel economy value as follows:

(A) Include the term ''MPGe'' in the upper portion of the designated space.

(B) If the vehicle's engine starts only after the battery is fully discharged, identify the vehicle's electricity consumption rate as specified in § 600.311. Below the number, include the expression: ''kW-hrs per 100 miles''.

(C) If the vehicle uses combined power from the battery and the engine before the battery is fully discharged, identify the vehicle's gasoline consumption rate as specified in § 600.311; to the right of this number, include the expression: ''gallons per 100 miles''. Below the gasoline consumption rate, identify the vehicle's electricity consumption rate as specified in § 600.311; to the right of this number, include the expression: ''kW-hrs per 100 miles''.

(3) A second outlined box to the right of the box described in paragraph (b)(2) of this section with the following information:

(i) The sub-heading ''Gasoline Only''.

(ii) The combined fuel economy value for operation after the battery is fully discharged as determined in § 600.311 below the sub-heading. Include the expression ''combined city/highway'' below this number.

(iii) A fuel pump logo to the left of the combined fuel economy value.

(iv) The units identifier and consumption rating to the right of the combined fuel economy value as follows:

(A) Include the term ''MPG'' in the upper portion of the designated space.

(B) Identify the vehicle's gasoline consumption rate as specified in § 600.311.

Below this number, include the expression: ''gallons per 100 miles''.

(4) Insert a horizontal range bar below the boxes specified in paragraphs (b)(2) and

(3) of this section that shows how far the vehicle can drive before the battery is fully discharged, and also how far the vehicle can drive before running out of fuel, as described in § 600.311. Scale the range bar such that the driving range at the point of fully discharging the battery is directly between the two boxes. Identify the driving range up to fully discharging the battery underneath that point on the range bar (*e.g.,* ''50 miles''). Use solid black for the gasoline-only portion of the range bar. Include the left-justified expression ''Gasoline only'' in the gasoline-only portion of the range bar. Similarly, in the electric portion of the range bar, include the left-justified expression ''All electric range'' if the vehicle's engine starts only after the battery is fully discharged, or ''Electricity + Gasoline'' if the vehicle uses combined power from the battery and the engine before the battery is fully discharged. Include a vehicle logo at the right end of the range bar. Extend an arrow from the battery portion of the range bar up to the right side of the box described in paragraph (b)(2) of this section. Similarly, extend an arrow from the gasoline-only portion of the range bar up to the left side of the box described in paragraph (b)(3) of this section. Include numbers below the bar showing the scale, with at least three evenly spaced increments to cover operation before the battery is fully discharged. Include one more increment using that same scale into the gasoline-only portion of the range bar. Indicate a broken line toward the right end of the range bar, followed by the vehicle's total driving distance before running out of fuel, as described in § 600.311. Adjust the scale and length of the range bar if the specifications in this paragraph (a)(5) do not work for your vehicle. Include a left-justified heading above the range bar with the expression: ''Driving Range''. For vehicles that use combined power from the battery and the engine before the battery is fully discharged, add the following statement below the range bar described in this paragraph (b)(4): ''All electric range = x miles''; complete the expression by identifying the appropriate value for driving range starting from a full battery before the engine starts as described in § 600.311.

(c) Include the following statement instead of the one identified in § 600.302–12(c)(5): ''This vehicle emits *x* grams CO_2 per mile. The best emits 0 grams per mile (tailpipe only). Producing and distributing fuel and electricity also create emissions; learn more at fueleconomy.gov.'' For *x,* insert the vehicle's composite CO_2 emission rate as described in § 600.311.

■ 59. Section 600.310–12 is added to subpart D to read as follows:

§ 600.310–12 Fuel economy label format requirements—electric vehicles.

Fuel economy labels for electric vehicles must meet the specifications described in § 600.302, with the following modifications:

(a) Include the following statement instead of the statement specified in § 600.302–12(b)(4): ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per kW-hr. Vehicle emissions are a significant cause of global warming and smog.'' For *a, b, c,* and *d,* insert the appropriate values established by EPA.

(b) Include the following elements instead of the information identified in § 600.302–12(c)(1):

(1) The heading ''Fuel Economy'' near the top left corner of the field.

(2) The combined fuel economy value as determined in § 600.311 below the heading. Include the expression ''combined city/hwy'' below this number.

(3) An electric plug logo to the left of the combined fuel economy value.

(4) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(i) Include the term ''MPGe'' in the upper portion of the designated space.

(ii) Include the city fuel economy value determined in § 600.311 in the lower left portion of the designated space. Include the expression ''city'' below this number.

(iii) Include the highway fuel economy value determined in § 600.311 in the lower right portion of the designated space. Include the expression ''highway'' below this number.

(5) The fuel consumption rate determined in § 600.311, to the right of the fuel economy information. Include the expression ''kW-hrs per 100 miles'' below the numerical value.

(6) The sub-heading ''Driving Range'' below the combined fuel economy value. Below this sub-heading, insert a horizontal range bar nominally 80 mm long to show how far the vehicle can drive when fully fueled. Include a vehicle logo at the right end of the range bar. Include the following left-justified expression inside the range bar: ''When fully charged, vehicle can travel about * * *''. Below the right end of the range bar, include the expression ''*x* miles''; complete the expression by identifying the appropriate value for total driving range from § 600.311. Include numbers below the bar showing the scale, with numbers starting at 0 and increasing in equal increments. Use good engineering judgment to divide the range bar into four, five, or six increments.

(7) Below the driving range information, the expression ''Charge Time: *x* hours (240V)'', where *x* is the time to charge the battery as specified in § 600.311. Change the specified voltage if appropriate as specified in § 600.311.

(c) Include the following statement instead of the one identified in § 600.302–12(c)(5): ''This vehicle emits *x* grams CO_2 per mile. The best emits 0 grams per mile (tailpipe only). Does not include emissions from generating electricity; learn more at fueleconomy.gov.'' For *x,* insert the vehicle's composite CO_2 emission rate as described in § 600.311.

■ 60. Section 600.311–12 is added to subpart D to read as follows:

§ 600.311–12 Determination of values for fuel economy labels.

(a) *Fuel economy.* Determine city and highway fuel economy values as described in § 600.210–12(a) and (b). Determine combined fuel economy values as described in § 600.210–12(c). Note that the label for plug-in hybrid electric vehicles requires separate values for combined fuel economy for vehicle operation before and after the vehicle's battery is fully discharged; we generally refer to these modes as ''Blended Electric+Gas'' (or ''Electric Only'', as applicable) and ''Gas only''.

(b) *CO_2* emission rate. Determine the engine-related CO_2 emission rate as described in § 600.210–12(d).

(c) *Fuel consumption rate.* Calculate the fuel consumption rate as follows:

(1) For vehicles with engines that are not plug-in hybrid electric vehicles, calculate the fuel consumption rate in gallons per 100 miles (or gasoline gallon equivalent per 100 miles for fuels other than gasoline or diesel fuel) with the following formula, rounded to the first decimal place:

Fuel Consumption Rate = 100/MPG

Where:

MPG = The unrounded value for combined fuel economy from § 600.210–12(c).

(2) For plug-in hybrid electric vehicles, calculate two separate fuel consumption rates as follows:

(i) Calculate the fuel consumption rate based on engine operation after the

battery is fully discharged as described in paragraph (c)(1) of this section.

(ii) Calculate the fuel consumption rate during operation before the battery is fully discharged in kW-hours per 100 miles as described in SAE J1711 (incorporated by reference in § 600.011), as described in § 600.116.

(3) For electric vehicles, calculate the fuel consumption rate in kW-hours per 100 miles with the following formula, rounded to the nearest whole number:

Fuel Consumption Rate = 100/MPG

Where:

MPG = The combined fuel economy value from paragraph (a) of this section, in miles per kW-hour.

(4) For hydrogen fuel cell vehicles, calculate the fuel consumption rate in kilograms of hydrogen per 100 miles with the following formula, rounded to the nearest whole number:

Fuel Consumption Rate = 100/MPG

Where:

MPG = The combined fuel economy value from paragraph (a) of this section, in miles per kilogram of hydrogen.

(d) *Fuel economy and greenhouse gas ratings.* Determine a vehicle's fuel economy and greenhouse gas ratings as follows:

(1) For gasoline-fueled vehicles that are not plug-in hybrid electric vehicles (including flexible fuel vehicles that operate on gasoline), establish a single rating based only on the vehicle's combined fuel economy from paragraph (a) of this section. For all other vehicles, establish a fuel economy rating based on the vehicle's combined fuel economy and establish a separate greenhouse gas rating based on combined CO_2 emission rates from paragraph (b) of this section.

(2) We will establish the fuel economy rating based on fuel consumption values specified in paragraph (c) of this section. We will establish the value dividing the 5 and 6 ratings based on the fuel consumption corresponding to the projected achieved Corporate Average Fuel Economy level for the applicable model year. This is intended to prevent below-average vehicles from getting an above-average fuel economy rating for the label. We will establish the remaining cutpoints based on a statistical evaluation of available information from the certification database for all model types. Specifically, the mean value plus two standard deviations will define the point between the 1 and 2 ratings. The mean value minus two standard deviations will define the point between the 9 and 10 ratings. The 1 rating will apply for any vehicle with higher fuel consumption rates than the 2 rating; similarly, the 10 rating will apply for any vehicle with lower fuel consumption rates than the 9 rating. We will calculate range values for the remaining intermediate ratings by dividing the range into equal intervals. We will convert the resulting range intervals to equivalent miles-per-gallon values. We will define the greenhouse gas ratings by converting the values from the fuel economy rating intervals to equivalent CO_2 emission rates using the conventional conversion factor for gasoline (8887 g CO_2 per gallon of consumed fuel).

(e) *Annual fuel cost.* Calculate annual fuel costs as follows:

(1) Except as specified in paragraph (e)(3) of this section, calculate the total annual fuel cost with the following formula, rounded to nearest $50:

Annual Fuel Cost = Fuel Price/MPG × Average Annual Miles

W

Fuel Price = The estimated fuel price provided by EPA for the type of fuel required for the vehicle. The units are dollars per gallon for gasoline and diesel fuel, dollars per gasoline gallon equivalent for natural gas, dollars per kW-hr for plug-in electricity, and dollars per kilogram of hydrogen for hydrogen fuel cell vehicles.

MPG = The combined fuel economy value from paragraph (a) of this section. The units are miles per gallon for gasoline and diesel fuel, miles per gasoline gallon equivalent for natural gas, miles per kW-hr for plug-in electricity, and miles per kilogram of hydrogen for hydrogen fuel cell vehicles.

Average Annual Miles = The estimated annual mileage figure provided by EPA, in miles.

(2) For dual fuel vehicles and flexible fuel vehicles, disregard operation on the alternative fuel.

(3) For plug-in hybrid electric vehicles, calculate annual fuel cost as described in this paragraph (e)(3). This description applies for vehicles whose engine starts only after the battery is fully discharged. Use good engineering judgment to extrapolate this for calculating annual fuel cost for vehicles that use combined power from the battery and the engine before the battery is fully discharged. Calculate annual fuel cost as follows:

(i) Determine the charge-depleting ranges for city and highway operation as described in paragraph (j)(4)(i) of this section. Adjust each of these values for 5-cycle operation.

(ii) Calculate multi-day individual utility factors (UF) as described in § 600.116 corresponding to the driving ranges from paragraph (e)(3)(i) of this section.

(iii) Calculate values for the vehicle's average fuel economy over the charge-depleting range (in miles per kW-hr) for city and highway operation as described in § 600.210. Adjust each of these values for 5-cycle operation. Convert these to $/mile values by dividing the appropriate fuel price from paragraph (e)(1) of this section by the average fuel economy determined in this paragraph (e)(3)(iii).

(iv) Calculate values for the vehicle's average fuel economy over the charge-sustaining range (in miles per gallon) for city and highway operation as described in § 600.210–12. Adjust each of these values for 5-cycle operation. Convert these to $/mile values by dividing the appropriate fuel price from paragraph (e)(1) of this section by the average fuel economy determined in this paragraph (e)(3)(iv).

(v) Calculate a composite $/mile value for city driving using the following equation:

$$\$/mile = \$/mile_{CD} \times UF + \$/mile_{CS} \times (1 - UF)$$

(vi) Repeat the calculation in paragraph (e)(3)(v) of this section for highway driving.

(vii) Calculate the annual fuel cost based the combined values for city and highway driving using the following equation:

$$\text{Annual fuel cost} = (\$/mile_{city} \times 0.55 + \$/mile_{hwy} \times 0.45) \times \text{Average Annual Miles}$$

(f) *Fuel savings.* Calculate an estimated five-year cost increment relative to an average vehicle by multiplying the unrounded annual fuel cost from paragraph (e) of this section by 5 and subtracting this value from the average five-year fuel cost. We will calculate the average five-year fuel cost from the annual fuel cost equation in paragraph (e) of this section based on a gasoline-fueled vehicle with a mean fuel economy value, consistent with the value dividing the 5 and 6 ratings under paragraph (d) of this section. The average five-year fuel cost for model year 2012 is $12,600 for a 22-mpg vehicle that drives 15,000 miles per year with gasoline priced at $3.70 per gallon. We may periodically update this five-year reference fuel cost for later model years to better characterize the fuel economy for an average vehicle. Round the calculated five-year cost increment to the nearest $50. Negative values represent a cost increase compared to the average vehicle.

(g) *Smog rating.* Establish a rating for exhaust emissions other than CO_2 based on the applicable emission standards as shown in Table 2 of this section. For

Independent Commercial Importers that import vehicles not subject to Tier 2 emission standards, the vehicle's smog rating is 1. If EPA or California emission standards change in the future, we may revise the emission levels corresponding to each rating for future model years as appropriate to reflect the changed standards. If this occurs, we would publish the revised ratings as described in § 600.302–12(k), allowing sufficient lead time to make the changes; we would also expect to initiate a rulemaking to update the smog rating in the regulation.

TABLE 1 TO § 600.311–12—CRITERIA FOR ESTABLISHING SMOG RATING

Rating	U.S. EPA Tier 2 emission standard	California Air Resources Board LEV II emission standard
1	—	ULEV &LEV II large trucks
2	Bin 8	SULEV II large trucks
3	Bin 7	—
4	Bin 6	LEV II, option 1
5	Bin 5	LEV II
6	Bin 4	ULEV II
7	Bin 3	—
8	Bin 2	SULEV II
9	—	PZEV
10	Bin 1	ZEV

(h) *Ranges of fuel economy and CO_2 emission values.* We will determine the range of combined fuel economy and CO_2 emission values for each vehicle class identified in § 600.315. We will generally update these range values before the start of each model year based on the lowest and highest values within each vehicle class. We will also use this same information to establish a range of fuel economy values for all vehicles. Continue to use the most recently published numbers until we update them, even if you start a new model year before we publish the range values for the new model year.

(i) [Reserved]

(j) *Driving range.* Determine the driving range for certain vehicles as follows:

(1) For vehicles operating on nonpressurized liquid fuels, determine the vehicle's driving range in miles by multiplying the combined fuel economy described in paragraph (a) of this section by the vehicle's usable fuel storage capacity, rounded to the nearest whole number.

(2) For electric vehicles, determine the vehicle's overall driving range as described in Section 8 of SAE J1634 (incorporated by reference in § 600.011), as described in § 600.116. Determine separate range values for FTP-based city and HFET-based highway driving, then calculate a combined value by arithmetically averaging the two values, weighted 0.55 and 0.45 respectively, and rounding to the nearest whole number.

(3) For natural gas vehicles, determine the vehicle's driving range in miles by multiplying the combined fuel economy described in paragraph (a) of this section by the vehicle's usable fuel storage capacity (expressed in gasoline gallon equivalents), rounded to the nearest whole number.

(4) For plug-in hybrid electric vehicles, determine the battery driving range and overall driving range as described in SAE J1711 (incorporated by reference in § 600.011), as described in § 600.116, as follows:

(i) Determine the vehicle's Actual Charge-Depleting Range, R_{cda}. Determine separate range values for FTP-based city and HFET-based highway driving, then calculate a combined value by arithmetically averaging the two values, weighted 0.55 and 0.45 respectively, and rounding to the nearest whole number. Precondition the vehicle as needed to minimize engine operation for consuming stored fuel vapors in evaporative canisters; for example, you may purge the evaporative canister or time a refueling event to avoid engine starting related to purging the canister. For vehicles that use combined power from the battery and the engine before the battery is fully discharged, also use this procedure to establish an all electric range by determining the distance the vehicle drives before the engine starts, rounded to the nearest mile. You may represent this as a range of values. We may approve adjustments to these procedures if they are necessary to properly characterize a vehicle's all electric range.

(ii) Use good engineering judgment to calculate the vehicle's operating distance before the fuel tank is empty when starting with a full fuel tank and a fully charged battery, consistent with the procedure and calculation specified in this paragraph (j), rounded to the nearest 10 miles.

(5) For hydrogen fuel cell vehicles, determine the vehicle's driving range in miles by multiplying the combined fuel economy described in paragraph (a) of this section by the vehicle's usable fuel storage capacity (expressed in kilograms of hydrogen), rounded to the nearest whole number.

(k) *Charge time.* For electric vehicles, determine the time it takes to fully charge the battery from a 240 volt power source to the point that the battery meets the manufacturer's end-of-charge criteria, consistent with the procedures specified in SAE J1634 (incorporated by reference in § 600.011) for electric vehicles and in SAE J1711 (incorporated by reference in § 600.011) for plug-in hybrid electric vehicles, as described in § 600.116. This value may be more or less than the 12-hour minimum charging time specified for testing. You must alternatively specify the charge time based on a standard 120 volt power source if the vehicle cannot be charged at the higher voltage.

(l) *California-specific values.* If the Administrator determines that automobiles intended for sale in California are likely to exhibit significant differences in fuel economy or other label values from those intended for sale in other states, the Administrator will compute separate values for each class of automobiles for California and for the other states.

■ 61. Section 600.314–08 is revised to read as follows:

§ 600.314–08 Updating label values, annual fuel cost, Gas Guzzler Tax, and range of fuel economy for comparable automobiles.

(a) The label values established in § 600.312 shall remain in effect for the model year unless updated in accordance with paragraph (b) of this section.

(b)(1) The manufacturer shall recalculate the model type fuel economy values for any model type containing

base levels affected by running changes specified in § 600.507.

(2) For separate model types created in § 600.209–08(a)(2) or § 600.209–12(a)(2), the manufacturer shall recalculate the model type values for any additions or deletions of subconfigurations to the model type. Minimum data requirements specified in § 600.010(c) shall be met prior to recalculation.

(3) Label value recalculations shall be performed as follows:

(i) The manufacturer shall use updated total model year projected sales for label value recalculations.

(ii) All model year data approved by the Administrator at the time of the recalculation for that model type shall be included in the recalculation.

(iii) Using the additional data under this paragraph (b), the manufacturer shall calculate new model type city and highway values in accordance with § 600.210 except that the values shall be rounded to the nearest 0.1 mpg.

(iv) The existing label values, calculated in accordance with § 600.210, shall be rounded to the nearest 0.1 mpg.

(4)(i) If the recalculated city or highway fuel economy value in paragraph (b)(3)(iii) of this section is less than the respective city or highway value in paragraph (b)(3)(iv) of this section by 1.0 mpg or more, the manufacturer shall affix labels with the recalculated model type values (rounded to the nearest whole mpg) to all new vehicles of that model type beginning on the day of implementation of the running change.

(ii) If the recalculated city or highway fuel economy value in paragraph (b)(3)(iii) of this section is higher than the respective city or highway value in paragraph (b)(3)(iv) of this section by 1.0 mpg or more, then the manufacturer has the option to use the recalculated values for labeling the entire model type beginning on the day of implementation of the running change.

(c) For fuel economy labels updated using recalculated fuel economy values determined in accordance with paragraph (b) of this section, the manufacturer shall concurrently update all other label information (*e.g.,* the annual fuel cost, range of comparable vehicles and the applicability of the Gas Guzzler Tax as needed).

(d) The Administrator shall periodically update the range of fuel economies of comparable automobiles based upon all label data supplied to the Administrator.

(e) The manufacturer may request permission from the Administrator to calculate and use label values based on test data from vehicles which have not completed the Administrator-ordered confirmatory testing required under the provisions of § 600.008–08(b). If the Administrator approves such a calculation the following procedures shall be used to determine if relabeling is required after the confirmatory testing is completed.

(1) The Administrator-ordered confirmatory testing shall be completed as quickly as possible.

(2) Using the additional data under paragraph (e)(1) of this section, the manufacturer shall calculate new model type city and highway values in accordance with §§ 600.207 and 600.210 except that the values shall be rounded to the nearest 0.1 mpg.

(3) The existing label values, calculated in accordance with § 600.210, shall be rounded to the nearest 0.1 mpg.

(4) The manufacturer may need to revise fuel economy labels as follows:

(i) If the recalculated city or highway fuel economy value in paragraph (b)(3)(iii) of this section is less than the respective city or highway value in paragraph (b)(3)(iv) of this section by 0.5 mpg or more, the manufacturer shall affix labels with the recalculated model type MPG values (rounded to the nearest whole number) to all new vehicles of that model type beginning 15 days after the completion of the confirmatory test.

(ii) If both the recalculated city or highway fuel economy value in paragraph (b)(3)(iii) of this section is less than the respective city or highway value in paragraph (b)(3)(iv) of this section by 0.1 mpg or more and the recalculated gas guzzler tax rate determined under the provisions of § 600.513–08 is larger, the manufacturer shall affix labels with the recalculated model type values and gas guzzler tax statement and rates to all new vehicles of that model type beginning 15 days after the completion of the confirmatory test.

(5) For fuel economy labels updated using recalculated fuel economy values determined in accordance with paragraph (e)(4) of this section, the manufacturer shall concurrently update all other label information (*e.g.,* the annual fuel cost, range of comparable vehicles and the applicability of the Gas Guzzler Tax if required by Department of Treasury regulations).

■ 62. Section 600.315–08 is amended by revising paragraphs (a)(2) and (c) introductory text to read as follows:

§ 600.315–08 Classes of comparable automobiles.

(a) * * *

(2) The Administrator will classify light trucks (nonpassenger automobiles) into the following classes: Small pickup trucks, standard pickup trucks, vans, minivans, and SUVs. Starting in the 2013 model year, SUVs will be divided between small sport utility vehicles and standard sport utility vehicles. Pickup trucks and SUVs are separated by car line on the basis of gross vehicle weight rating (GVWR). For a product line with more than one GVWR, establish the characteristic GVWR value for the product line by calculating the arithmetic average of all distinct GVWR values less than or equal to 8,500 pounds available for that product line. The Administrator may determine that specific light trucks should be most appropriately placed in a different class or in the special purpose vehicle class as provided in paragraphs (a)(3)(i) and (ii) of this section, based on the features and characteristics of the specific vehicle, consumer information provided by the manufacturer, and other information available to consumers.

(i) Small pickup trucks. Pickup trucks with a GVWR below 6,000 pounds.

(ii) Standard pickup trucks. Pickup trucks with a GVWR at or above 6,000 pounds and at or below 8,500 pounds.

(iii) Vans.

(iv) Minivans.

(v) Small sport utility vehicles. Sport utility vehicles with a GVWR below 6,000 pounds.

(vi) Standard sport utility vehicles. Sport utility vehicles with a GVWR at or above 6,000 pounds and at or below 10,000 pounds.

* * * * *

(c) All interior and cargo dimensions are measured in inches to the nearest 0.1 inch. All dimensions and volumes shall be determined from the base vehicles of each body style in each car line, and do not include optional equipment. The dimensions H61, W3, W5, L34, H63, W4, W6, L51, H201, L205, L210, L211, H198, W201, and volume V1 are to be determined in accordance with the procedures outlined in Motor Vehicle Dimensions SAE 1100a (incorporated by reference in § 600.011), except as follows:

* * * * *

■ 63. Newly redesignated § 600.316–08 is revised to read as follows:

§ 600.316–08 Multistage manufacture.

Where more than one person is the manufacturer of a vehicle, the final stage manufacturer (as defined in 49 CFR 529.3) is treated as the vehicle manufacturer for purposes of compliance with this subpart.

Subpart E—Dealer Availability of Fuel Economy Information

■ 64. The heading for subpart E is revised as set forth above.

§§ 600.401–77, 600.402–77, 600.403–77, 600.404–77, 600.405–77, 600.406–77, 600.407–77 [Removed]

■ 65. Subpart E is amended by removing the following sections:

§ 600.401–77.
§ 600.402–77.
§ 600.403–77.
§ 600.404–77.
§ 600.405–77.
§ 600.406–77.
§ 600.407–77.

Subpart F—Procedures for Determining Manufacturer's Average Fuel Economy and Manufacturer's Average Carbon-related Exhaust Emissions

■ 66. The heading for subpart F is revised as set forth above.

§§ 600.501–12, 600.501–85, 600.501–86, 600.501–93, 600.503–78, 600.504–78, 600.505–78, 600.507–86, 600.510–86, 600.510–93, 600.512–01, 600.512–86, 600.513–81, 600.513–91 [Removed]

■ 67. Subpart F is amended by removing the following sections:

§ 600.501–12.
§ 600.501–85.
§ 600.501–86.
§ 600.501–93.
§ 600.503–78.
§ 600.504–78.
§ 600.505–78.
§ 600.507–86.
§ 600.510–86.
§ 600.510–93.
§ 600.512–01.
§ 600.512–86.
§ 600.513–81.
§ 600.513–91.

§ 600.502–81 [Redesignated as § 600.502]

■ 68. Redesignate § 600.502–81 as § 600.502.

■ 69. Newly redesignated § 600.502 is revised to read as follows:

§ 600.502 Definitions.

The following definitions apply to this subpart in addition to those in § 600.002:

(a) The *Declared value* of imported components shall be:

(1) The value at which components are declared by the importer to the U.S. Customs Service at the date of entry into the customs territory of the United States; or

(2) With respect to imports into Canada, the declared value of such components as if they were declared as imports into the United States at the date of entry into Canada; or

(3) With respect to imports into Mexico, the declared value of such components as if they were declared as imports into the United States at the date of entry into Mexico.

(b) *Cost of production of a car line* shall mean the aggregate of the products of:

(1) The average U.S. dealer wholesale price for such car line as computed from each official dealer price list effective during the course of a model year, and

(2) The number of automobiles within the car line produced during the part of the model year that the price list was in effect.

(c) *Equivalent petroleum-based fuel economy value* means a number representing the average number of miles traveled by an electric vehicle per gallon of gasoline.

■ 70. Section 600.507–12 is amended by revising paragraph (a) introductory text and paragraph (c) to read as follows:

§ 600.507–12 Running change data requirements.

(a) Except as specified in paragraph (d) of this section, the manufacturer shall submit additional running change fuel economy and carbon-related exhaust emissions data as specified in paragraph (b) of this section for any running change approved or implemented under § 86.1842 of this chapter, which:

* * * * *

(c) The manufacturer shall submit the fuel economy data required by this section to the Administrator in accordance with § 600.314.

* * * * *

§ 600.509–86 [Redesignated as § 600.509–08]

■ 71. Redesignate § 600.509–86 as § 600.509–08.

■ 72. Section 600.510–08 is amended by revising paragraph (g)(1)(ii) to read as follows:

§ 600.510–08 Calculation of average fuel economy.

* * * * *

(g) * * *

(1) * * *

(ii)(A) The net heating value for alcohol fuels shall be premeasured using a test method which has been approved in advance by the Administrator.

(B) The density for alcohol fuels shall be determined per ASTM D 1298 (incorporated by reference at § 600.011).

* * * * *

73. Section 600.510–12 is amended by revising paragraphs (b)(2) introductory text, (b)(3) introductory text, (c)(2)(iv)(B), (g)(1), (i) introductory text (and equation), and (j)(2) to read as follows:

§ 600.510–12 Calculation of average fuel economy and average carbon-related exhaust emissions.

* * * * *

(b) * * *

(2) The combined city/highway fuel economy and carbon-related exhaust emission values will be calculated for each model type in accordance with § 600.208 except that:

* * * * *

(3) The fuel economy and carbon-related exhaust emission values for each vehicle configuration are the combined fuel economy and carbon-related exhaust emissions calculated according to § 600.206–12(a)(3) except that:

* * * * *

(c) * * *

(2) * * *

(iv) * * *

(B) The combined model type fuel economy value for operation on alcohol fuel as determined in § 600.208–12(b)(5)(ii) divided by 0.15 provided the requirements of paragraph (g) of this section are met; or

* * * * *

(g)(1) Alcohol dual fuel automobiles and natural gas dual fuel automobiles must provide equal or greater energy efficiency while operating on alcohol or natural gas as while operating on gasoline or diesel fuel to obtain the CAFE credit determined in paragraphs (c)(2)(iv) and (v) of this section or to obtain the carbon-related exhaust emissions credit determined in paragraphs (j)(2)(ii) and (iii) of this section. The following equation must hold true:

$$E_{alt}/E_{pet} \geq 1$$

Where:

$E_{alt} = [FE_{alt}/(NHV_{alt} \times D_{alt})] \times 10^6$ = energy efficiency while operating on alternative fuel rounded to the nearest 0.01 miles/million BTU.

$E_{pet} = [FE_{pet}/(NHV_{pet} \times D_{pet})] \times 10^6$ = energy efficiency while operating on gasoline or diesel (petroleum) fuel rounded to the nearest 0.01 miles/million BTU.

FE_{alt} is the fuel economy [miles/gallon for liquid fuels or miles/100 standard cubic feet for gaseous fuels] while operated on the alternative fuel as determined in § 600.113–12(a) and (b).

FE_{pet} is the fuel economy [miles/gallon] while operated on petroleum fuel (gasoline or diesel) as determined in § 600.113–12(a) and (b).

NHV_{alt} is the net (lower) heating value [BTU/lb] of the alternative fuel.

NHV_{pet} is the net (lower) heating value [BTU/lb] of the petroleum fuel.

D_{alt} is the density [lb/gallon for liquid fuels or lb/100 standard cubic feet for gaseous fuels] of the alternative fuel.

D_{pet} is the density [lb/gallon] of the petroleum fuel.

(i) The equation must hold true for both the FTP city and HFET highway fuel economy values for each test of each test vehicle.

(ii)(A) The net heating value for alcohol fuels shall be premeasured using a test method which has been approved in advance by the Administrator.

(B) The density for alcohol fuels shall be premeasured using ASTM D 1298 (incorporated by reference at § 600.011).

(iii) The net heating value and density of gasoline are to be determined by the manufacturer in accordance with § 600.113.

* * * * *

(i) For model years 2012 through 2015, and for each category of automobile identified in paragraph (a)(1) of this section, the maximum decrease in average carbon-related exhaust emissions determined in paragraph (j) of this section attributable to alcohol dual fuel automobiles and natural gas dual fuel automobiles shall be calculated using the following formula, and rounded to the nearest tenth of a gram per mile:

$$\text{Maximum Decrease} = \frac{8887}{\left[\frac{8887}{FltAvg} - MPG_{MAX}\right]} - FltAvg$$

Where:

FltAvg = The fleet average CREE value in grams per mile, rounded to the nearest whole number, for passenger automobiles or light trucks determined for the applicable model year according to paragraph (j) of this section, except by assuming all alcohol dual fuel and natural gas dual fuel automobiles are operated exclusively on gasoline (or diesel) fuel.

MPG_{MAX} = The maximum increase in miles per gallon determined for the appropriate model year in paragraph (h) of this section.

* * * * *

(j) * * *

(2) A sum of terms, each of which corresponds to a model type within that category of automobiles and is a product determined by multiplying the number of automobiles of that model type produced by the manufacturer in the model year by:

(i) For gasoline-fueled and diesel-fueled model types, the carbon-related exhaust emissions value calculated for that model type in accordance with paragraph (b)(2) of this section; or

(ii)(A) For alcohol-fueled model types, for model years 2012 through 2015, the carbon-related exhaust emissions value calculated for that model type in accordance with paragraph (b)(2) of this section multiplied by 0.15 and rounded to the nearest gram per mile, except that manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter must perform this calculation such that N_2O and CH_4 values are not multiplied by 0.15; or

(B) For alcohol-fueled model types, for model years 2016 and later, the carbon-related exhaust emissions value calculated for that model type in accordance with paragraph (b)(2) of this section; or

(iii)(A) For natural gas-fueled model types, for model years 2012 through 2015, the carbon-related exhaust emissions value calculated for that model type in accordance with paragraph (b)(2) of this section multiplied by 0.15 and rounded to the nearest gram per mile, except that manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter must perform this calculation such that N_2O and CH_4 values are not multiplied by 0.15; or

(B) For natural gas-fueled model types, for model years 2016 and later, the carbon-related exhaust emissions value calculated for that model type in accordance with paragraph (b)(2) of this section; or

(iv) For alcohol dual fuel model types, for model years 2012 through 2015, the arithmetic average of the following two terms, the result rounded to the nearest gram per mile:

(A) The combined model type carbon-related exhaust emissions value for operation on gasoline or diesel fuel as determined in § 600.208–12(b)(5)(i); and

(B) The combined model type carbon-related exhaust emissions value for operation on alcohol fuel as determined in § 600.208–12(b)(5)(ii) multiplied by 0.15 provided the requirements of paragraph (g) of this section are met, except that manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter must perform this calculation such that N_2O and CH_4 values are not multiplied by 0.15; or

(v) For natural gas dual fuel model types, for model years 2012 through 2015, the arithmetic average of the following two terms; the result rounded to the nearest gram per mile:

(A) The combined model type carbon-related exhaust emissions value for operation on gasoline or diesel as determined in § 600.208–12(b)(5)(i); and

(B) The combined model type carbon-related exhaust emissions value for operation on natural gas as determined in § 600.208–12(b)(5)(ii) multiplied by 0.15 provided the requirements of paragraph (g) of this section are met, except that manufacturers complying with the fleet averaging option for N_2O and CH_4 as allowed under § 86.1818 of this chapter must perform this calculation such that N_2O and CH_4 values are not multiplied by 0.15.

(vi) For alcohol dual fuel model types, for model years 2016 and later, the combined model type carbon-related exhaust emissions value determined according to the following formula and rounded to the nearest gram per mile:

$$CREE = (F \times CREE_{alt}) + ((1 - F) \times CREE_{gas})$$

Where:

F = 0.00 unless otherwise approved by the Administrator according to the provisions of paragraph (k) of this section;

$CREE_{alt}$ = The combined model type carbon-related exhaust emissions value for operation on alcohol fuel as determined in § 600.208–12(b)(5)(ii); and

$CREE_{gas}$ = The combined model type carbon-related exhaust emissions value for operation on gasoline or diesel fuel as determined in § 600.208–12(b)(5)(i).

(vii) For natural gas dual fuel model types, for model years 2016 and later, the combined model type carbon-related exhaust emissions value determined according to the following formula and rounded to the nearest gram per mile:

$$CREE = (F \times CREE_{alt}) + ((1 - F) \times CREE_{gas})$$

Where:

F = 0.00 unless otherwise approved by the Administrator according to the provisions of paragraph (k) of this section;

$CREE_{alt}$ = The combined model type carbon-related exhaust emissions value for operation on natural gas as determined in § 600.208–12(b)(5)(ii); and

$CREE_{gas}$ = The combined model type carbon-related exhaust emissions value for operation on gasoline or diesel fuel as determined in § 600.208–12(b)(5)(i).

* * * * *

§ 600.511–80 [Redesignated as § 600.511–08]

■ 74. Redesignate § 600.511–80 as § 600.511–08.

■ 75. Section 600.512–12 is amended by revising paragraph (c) to read as follows:

§ 600.512–12 Model year report.

* * * * *

(c) The model year report must include the following information:

(1)(i) All fuel economy data used in the FTP/HFET-based model type calculations under § 600.208, and subsequently required by the Administrator in accordance with § 600.507;

(ii) All carbon-related exhaust emission data used in the FTP/HFET-based model type calculations under § 600.208, and subsequently required by the Administrator in accordance with § 600.507;

(2) (i) All fuel economy data for certification vehicles and for vehicles tested for running changes approved under § 86.1842 of this chapter;

(ii) All carbon-related exhaust emission data for certification vehicles and for vehicles tested for running changes approved under § 86.1842 of this chapter;

(3) Any additional fuel economy and carbon-related exhaust emission data submitted by the manufacturer under § 600.509;

(4)(i) A fuel economy value for each model type of the manufacturer's product line calculated according to § 600.510–12(b)(2);

(ii) A carbon-related exhaust emission value for each model type of the manufacturer's product line calculated according to § 600.510–12(b)(2);

(5)(i) The manufacturer's average fuel economy value calculated according to § 600.510–12(c);

(ii) The manufacturer's average carbon-related exhaust emission value calculated according to § 600.510–12(j);

(6) A listing of both domestically and nondomestically produced car lines as determined in § 600.511 and the cost information upon which the determination was made; and

(7) The authenticity and accuracy of production data must be attested to by the corporation, and shall bear the signature of an officer (a corporate executive of at least the rank of vice-president) designated by the corporation. Such attestation shall constitute a representation by the manufacturer that the manufacturer has established reasonable, prudent procedures to ascertain and provide production data that are accurate and authentic in all material respects and that these procedures have been followed by employees of the manufacturer involved in the reporting process. The signature of the designated officer shall constitute a representation by the required attestation.

(8) [Reserved]

(9) The ''required fuel economy level'' pursuant to 49 CFR parts 531 or 533, as applicable. Model year reports shall include information in sufficient detail to verify the accuracy of the calculated required fuel economy level, including but is not limited to, production information for each unique footprint within each model type contained in the model year report and the formula used to calculate the required fuel economy level. Model year reports shall include a statement that the method of measuring vehicle track width, measuring vehicle wheelbase and calculating vehicle footprint is accurate and complies with applicable Department of Transportation requirements.

(10) The ''required fuel economy level'' pursuant to 49 CFR parts 531 or 533 as applicable, and the applicable fleet average CO_2 emission standards. Model year reports shall include information in sufficient detail to verify the accuracy of the calculated required fuel economy level and fleet average CO_2 emission standards, including but is not limited to, production information for each unique footprint within each model type contained in the model year report and the formula used to calculate the required fuel economy level and fleet average CO_2 emission standards. Model year reports shall include a statement that the method of measuring vehicle track width, measuring vehicle wheelbase and calculating vehicle footprint is accurate and complies with applicable Department of Transportation and EPA requirements.

(11) A detailed (but easy to understand) list of vehicle models and the applicable in-use CREE emission standard. The list of models shall include the applicable carline/subconfiguration parameters (including carline, equivalent test weight, road-load horsepower, axle ratio, engine code, transmission class, transmission configuration and basic engine); the test parameters (ETW and a, b, c, dynamometer coefficients) and the associated CREE emission standard. The manufacturer shall provide the method of identifying EPA engine code for applicable in-use vehicles.

■ 76. § 600.513–08 is revised to read as follows:

§ 600.513–08 Gas Guzzler Tax.

(a) This section applies only to passenger automobiles sold after December 27, 1991, regardless of the model year of those vehicles. For alcohol dual fuel and natural gas dual fuel automobiles, the fuel economy while such automobiles are operated on gasoline will be used for Gas Guzzler Tax assessments.

(1) The provisions of this section do not apply to passenger automobiles exempted for Gas Guzzler Tax assessments by applicable Federal law and regulations. However, the manufacturer of an exempted passenger automobile may, in its discretion, label such vehicles in accordance with the provisions of this section.

(2) For 1991 and later model year passenger automobiles, the combined FTP/HFET-based model type fuel economy value determined in § 600.208 used for Gas Guzzler Tax assessments shall be calculated in accordance with the following equation, rounded to the nearest 0.1 mpg:

$$FE_{adj} = FE[((0.55 \times a_g \times c) + (0.45 \times c) + (0.5556 \times a_g) + 0.4487)/((0.55 \times a_g) + 0.45)] + IW_g$$

Where:

FE_{adj} = Fuel economy value to be used for determination of gas guzzler tax assessment rounded to the nearest 0.1 mpg.

FE = Combined model type fuel economy calculated in accordance with § 600.208, rounded to the nearest 0.0001 mpg.

a_g = Model type highway fuel economy, calculated in accordance with § 600.208, rounded to the nearest 0.0001 mpg divided by the model type city fuel economy calculated in accordance with § 600.208, rounded to the nearest 0.0001 mpg. The quotient shall be rounded to 4 decimal places.

c = gas guzzler adjustment factor = 1.300×10^{-3} for the 1986 and later model years.

$IW_g = (9.2917 \times 10^{-3} \times SF_{3IWCG} FE_{3IWCG}) - (3.5123 \times 10^{-3} \times SF_{4ETWG} \times FE_{4IWCG})$.

Note: Any calculated value of IW less than zero shall be set equal to zero.

SF_{3IWCG} = The 3000 lb. inertia weight class sales in the model type divided by the total model type sales; the quotient shall be rounded to 4 decimal places.

SF_{4ETWG} = The 4000 lb. equivalent test weight sales in the model type divided by the total model type sales, the quotient shall be rounded to 4 decimal places.

FE_{3IWCG} = The 3000 lb. inertial weight class base level combined fuel economy used to calculate the model type fuel economy rounded to the nearest 0.0001 mpg.

FE_{4IWCG} = The 4000 lb. inertial weight class base level combined fuel economy used to calculate the model type fuel economy rounded to the nearest 0.001 mpg.

(b)(1) For passenger automobiles sold after December 31, 1990, with a combined FTP/HFET-based model type fuel economy value of less than 22.5 mpg (as determined in § 600.208), calculated in accordance with paragraph (a)(2) of this section and rounded to the nearest 0.1 mpg, each vehicle fuel economy label shall include a Gas Guzzler Tax statement pursuant to 49 U.S.C. 32908(b)(1)(E). The tax amount stated shall be as specified in paragraph (b)(2) of this section.

(2) For passenger automobiles with a combined general label model type fuel economy value of:

At least * * *	but less than * * *	the Gas Guzzler Tax statement shall show a tax of * * *
(i) 22.5	.....	$0
(ii) 21.5	22.5	$1,000
(iii) 20.5	21.5	$1,300
(iv) 19.5	20.5	$1,700
(v) 18.5	19.5	$2,100
(vi) 17.5	18.5	$2,600
(vii) 16.5	17.5	$3,000
(viii) 15.5	16.5	$3,700
(ix) 14.5	15.5	$4,500
(x) 13.5	14.5	$5,400
(xi) 12.5	13.5	$6,400
(xii) —	12.5	$7,700

■ 77. The heading for Appendix I to Part 600 is revised to read as follows:

Appendix I to Part 600—Highway Fuel Economy Driving Schedule

* * * * *

■ 78. Appendix II to Part 600 is amended by revising paragraph (b)(4) to read as follows:

Appendix II to Part 600—Sample Fuel Economy Calculations

* * * * *

(b) * * *

(4) Assume that the same vehicle was tested by the Federal Highway Fuel Economy Test Procedure and a calculation similar to that shown in (b)(3) of this section resulted in a highway fuel economy of MPG_h of 36.9. According to the procedure in § 600.210–08(c) or § 600.210–12(c), the combined fuel economy (called MPG_{comb}) for the vehicle may be calculated by substituting the city and highway fuel economy values into the following equation:

$$MPG_{comb} = \frac{1}{\frac{0.55}{MPG_c} + \frac{0.45}{MPG_h}}$$

$$MPG_{comb} = \frac{1}{\frac{0.55}{27.9} + \frac{0.45}{36.9}}$$

$$MPG_{comb} = 31.3$$

■ 79. The heading for Appendix IV to Part 600 is revised to read as follows:

Appendix IV to Part 600—Sample Fuel Economy Labels for 2008 Through 2012 Model Year Vehicles

■ 80. The heading for Appendix V to Part 600 is revised to read as follows:

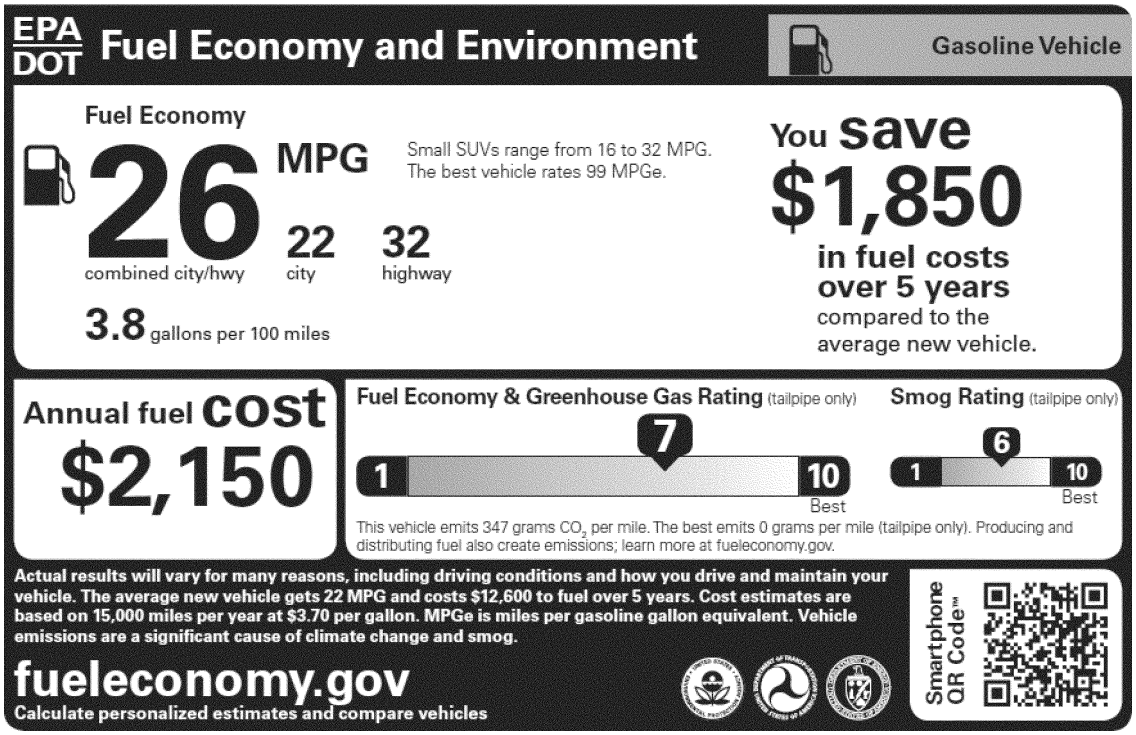
Appendix V to Part 600—Fuel Economy Label Style Guidelines for 2008 Through 2012 Model Year Vehicles

■ 81. Appendix VI to Part 600 is added to read as follows:

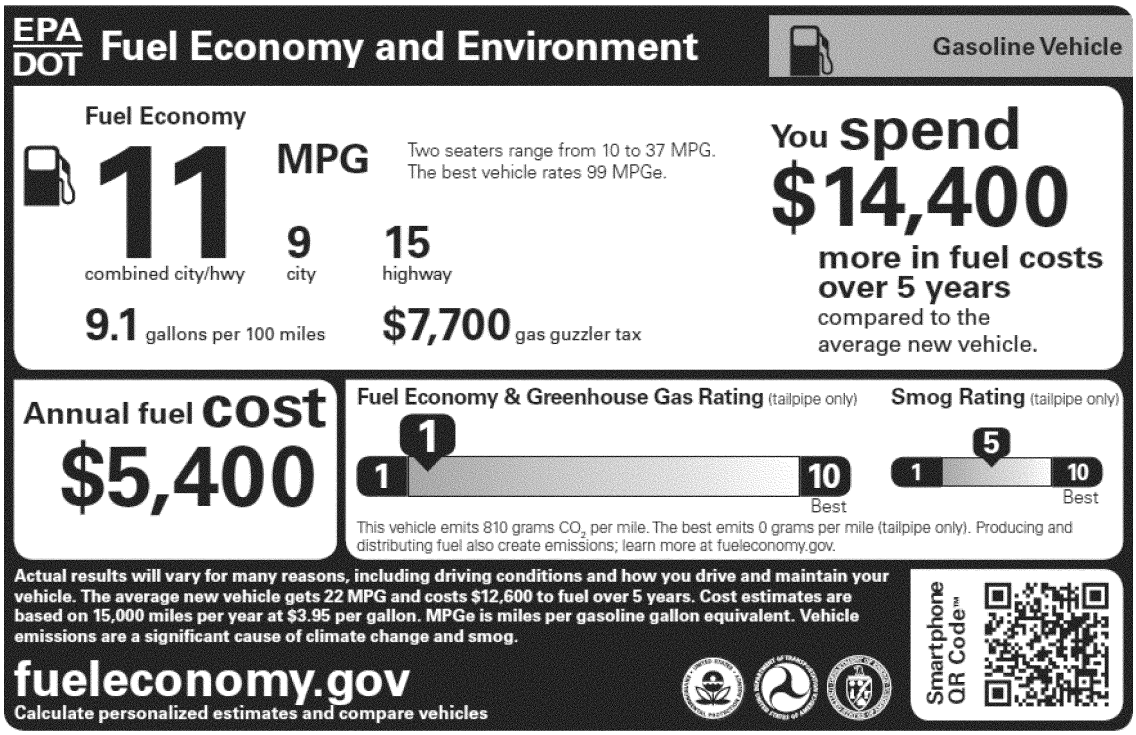
Appendix VI to Part 600—Sample Fuel Economy Labels and Style Guidelines for 2013 and Later Model Years

This appendix illustrates label content and format for 2013 and later model years. Manufacturers must make a good faith effort to conform to these templates and follow these formatting specifications. EPA will make available electronic files for creating labels.

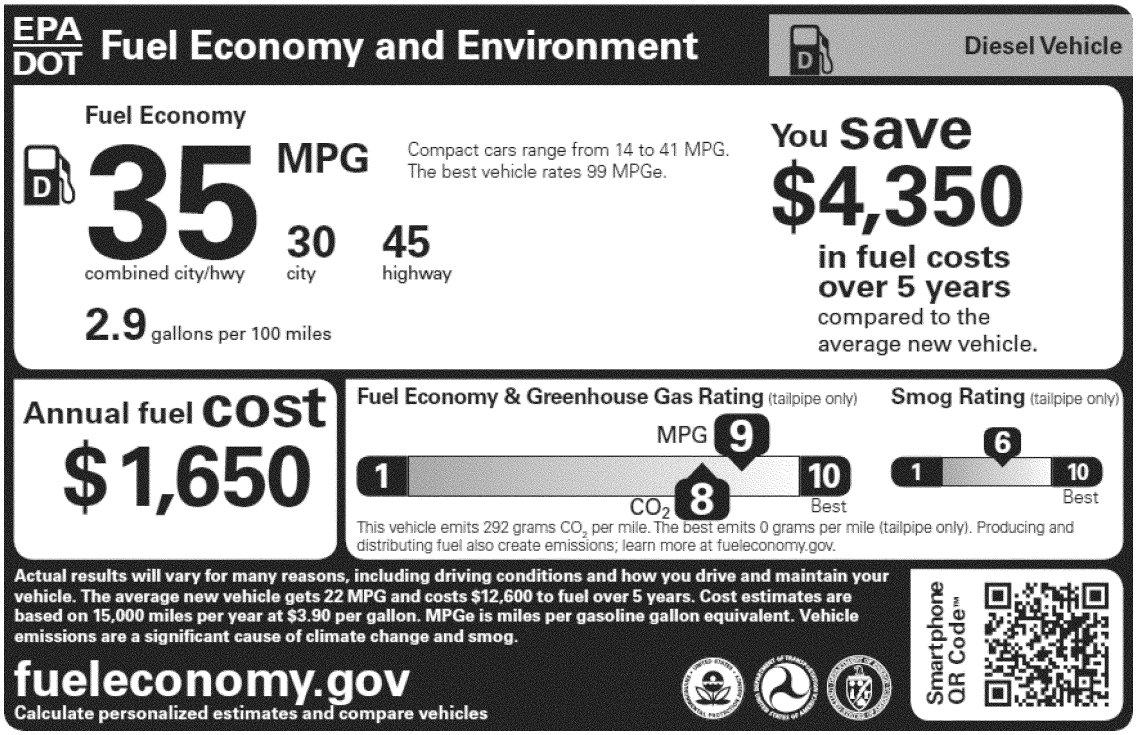
A. Gasoline-Fueled Vehicles, Including Hybrid Gasoline-Electric Vehicles With No Plug-In Capabilities



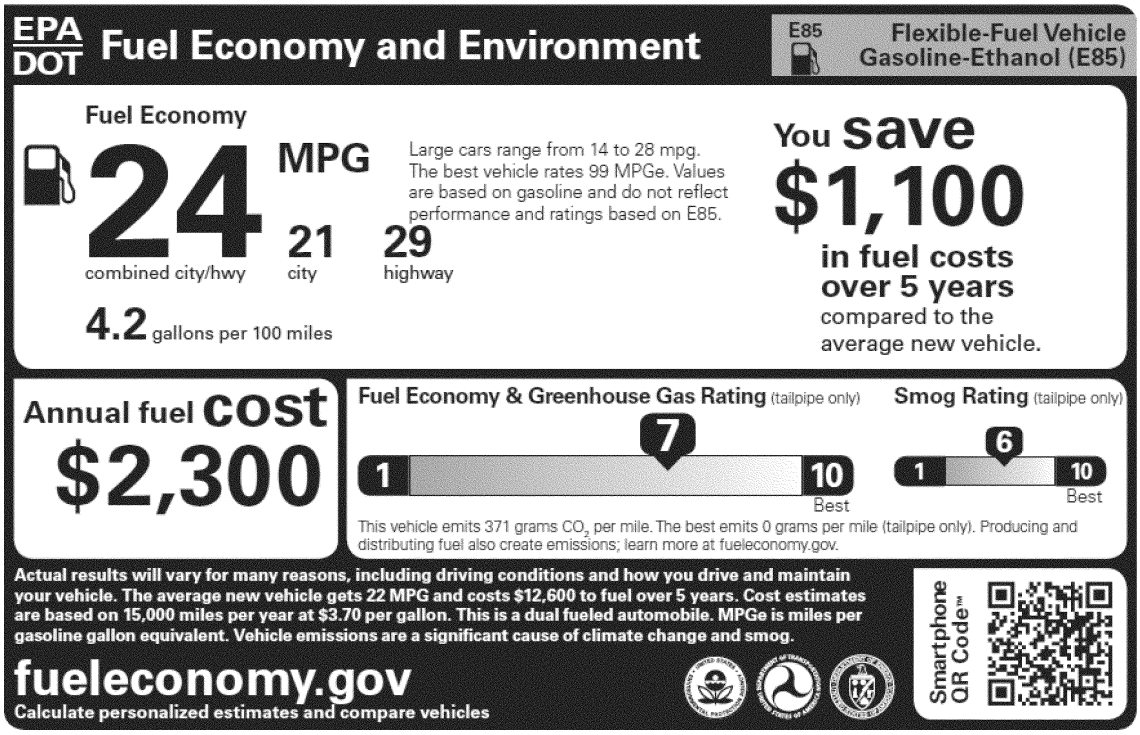
B. Gasoline-Fueled Vehicles, Including Hybrid Gasoline-Electric Vehicles with No Plug-In Capabilities, with Gas Guzzler Tax



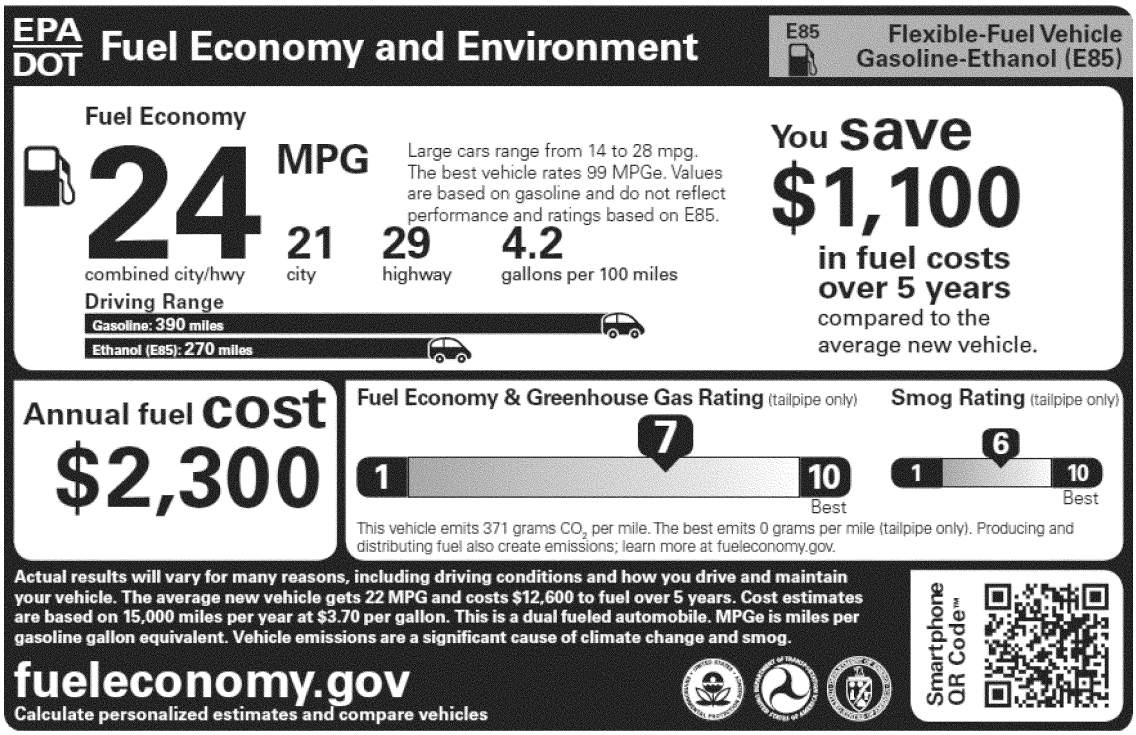
C. Diesel-Fueled Vehicles, Including Hybrid Diesel-Electric Vehicles with No Plug-In Capabilities



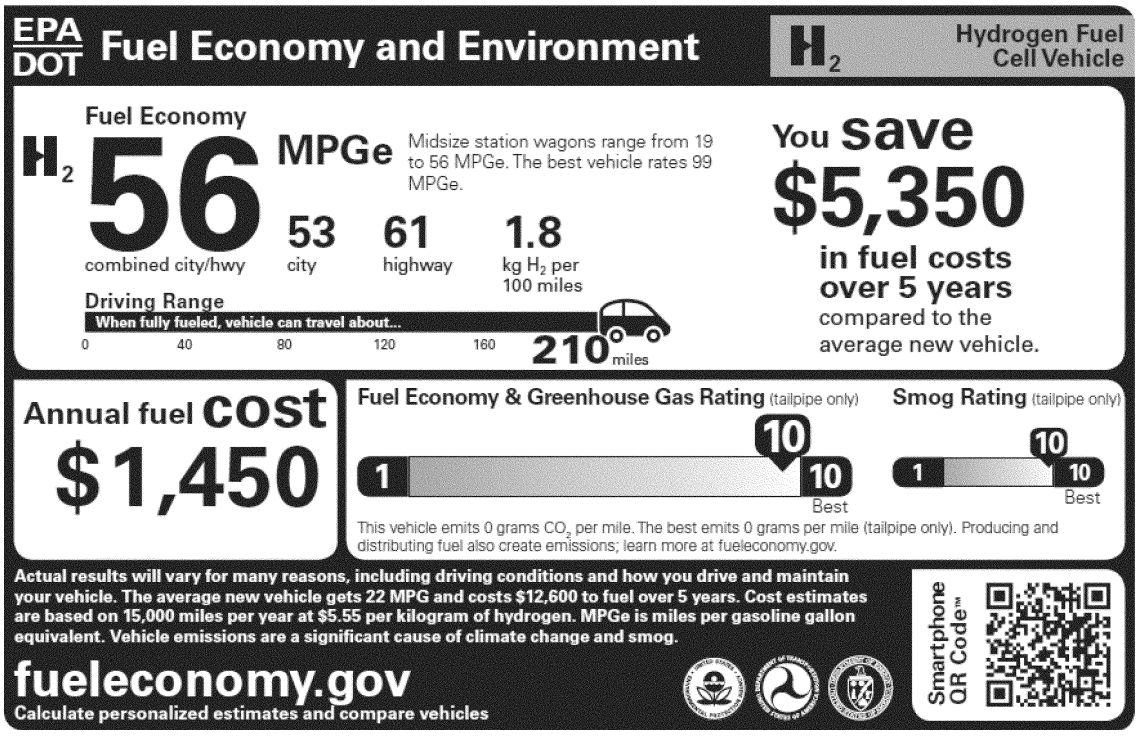
D. Dual Fuel Vehicle Label (Ethanol/ Gasoline)



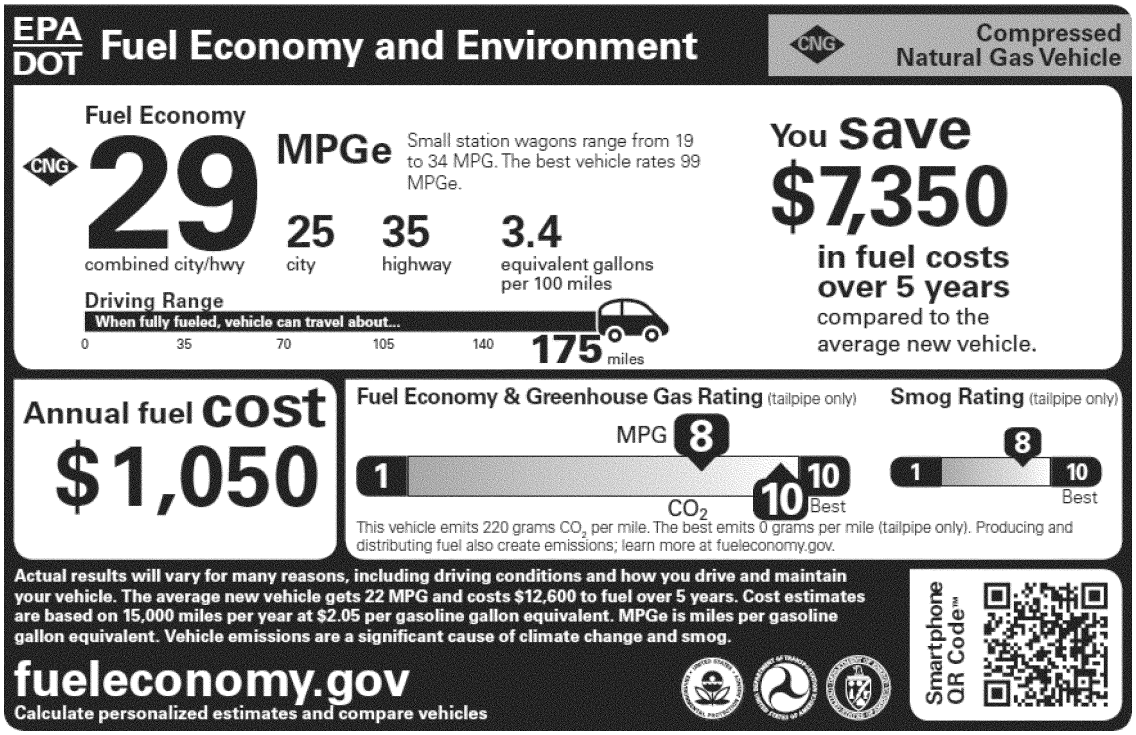
E. Dual Fuel Vehicle Label (Ethanol/ Gasoline) with Optional Display of Driving Range Values



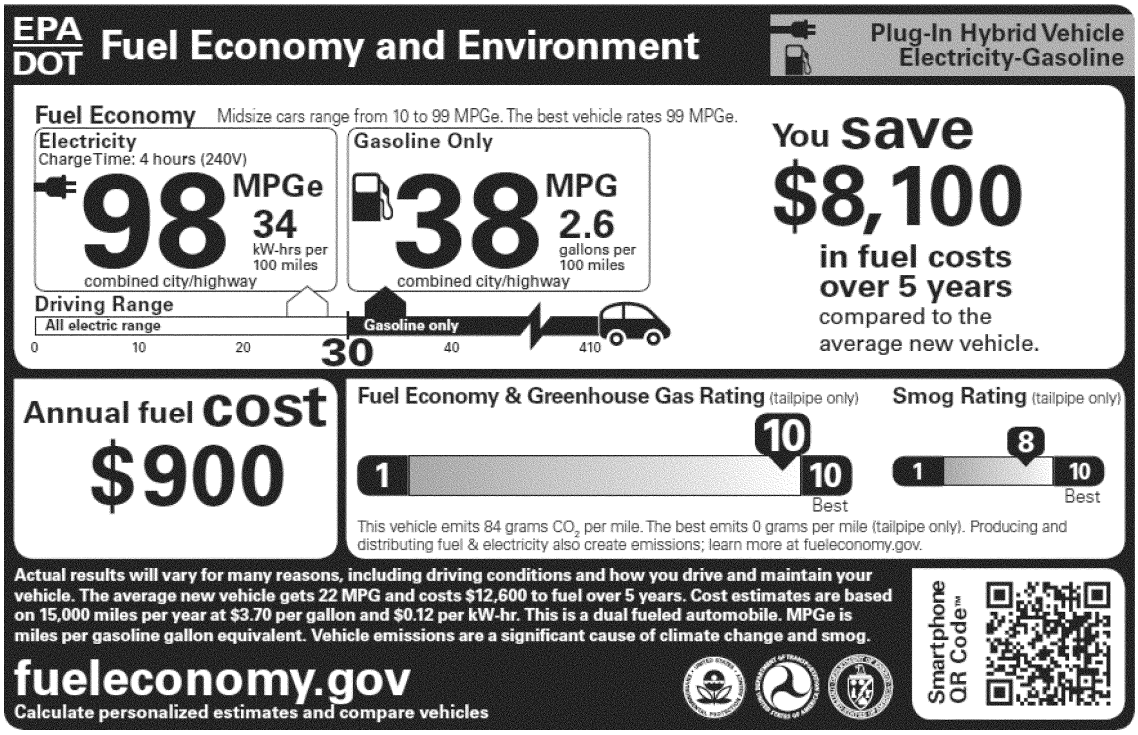
F. Hydrogen Fuel Cell Vehicle Label



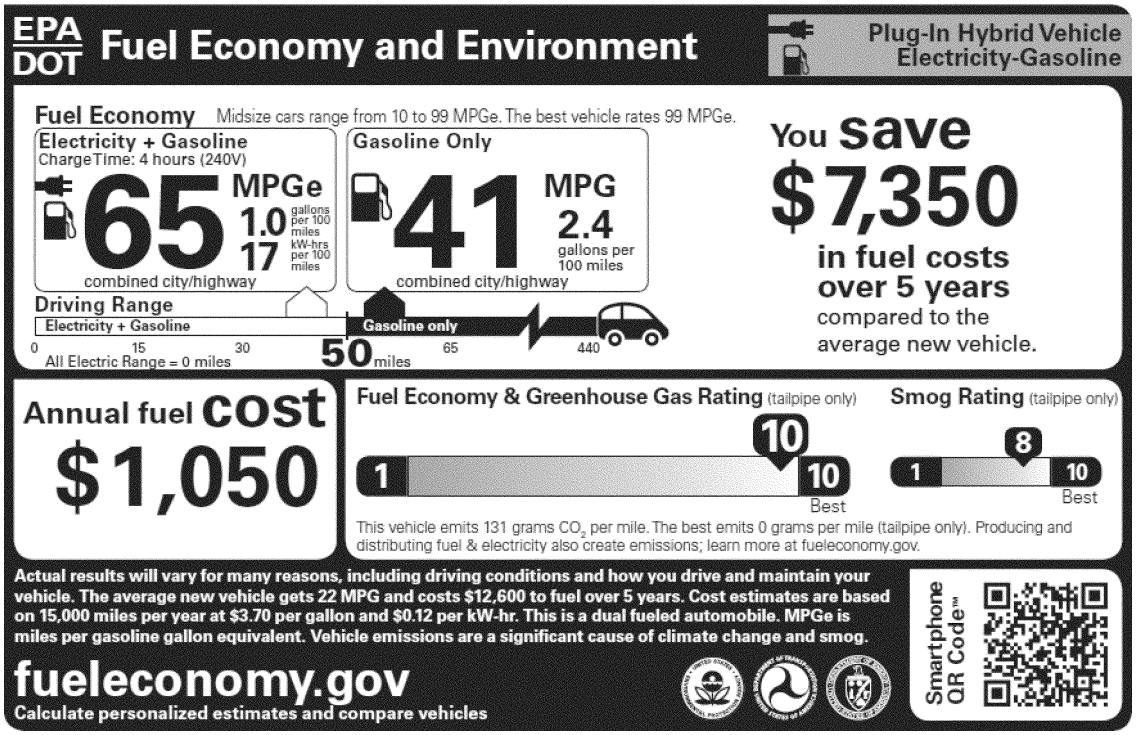
G. Natural Gas Vehicle Label



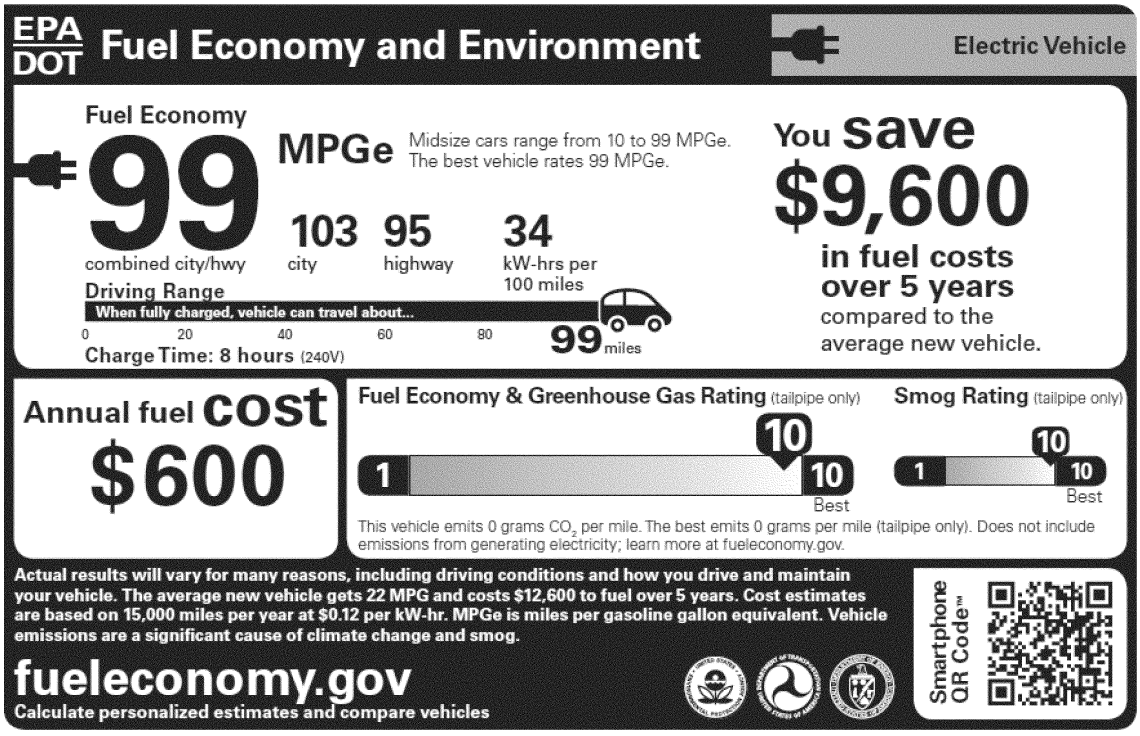
H. Plug-in Hybrid Electric Vehicle Label, Series PHEV



I. Plug-in Hybrid Electric Vehicle Label, Blended PHEV



J. Electric Vehicle Label



K. Style Guidelines

(a) Fuel economy labels must be printed on white or very light paper. Any label markings for which colors are not specified must be in black and white as shown. Some portions of the label must be filled with a blue or blue-shaded color as specified in subpart D of this part. Use the color blue defined in CMYK values of 40c–10m–0y–0k, or it may be specified as Pantone 283.

(b) Use a Univers font from Adobe or another source that properly reproduces the labels as shown in the samples. Use Light (L), Roman (R), Bold (B) or Black (Bl) font weights as noted. Font size is shown in points, followed by leading specifications in points to indicate line spacing (if applicable). Use white characters in black fields; use black characters in all other places. Unless noted otherwise, text is left-justified with a 1.6 millimeter margin. Some type may need tracking adjustments to fit in the designated space.

(c) Use the following conventions for lines and borders:

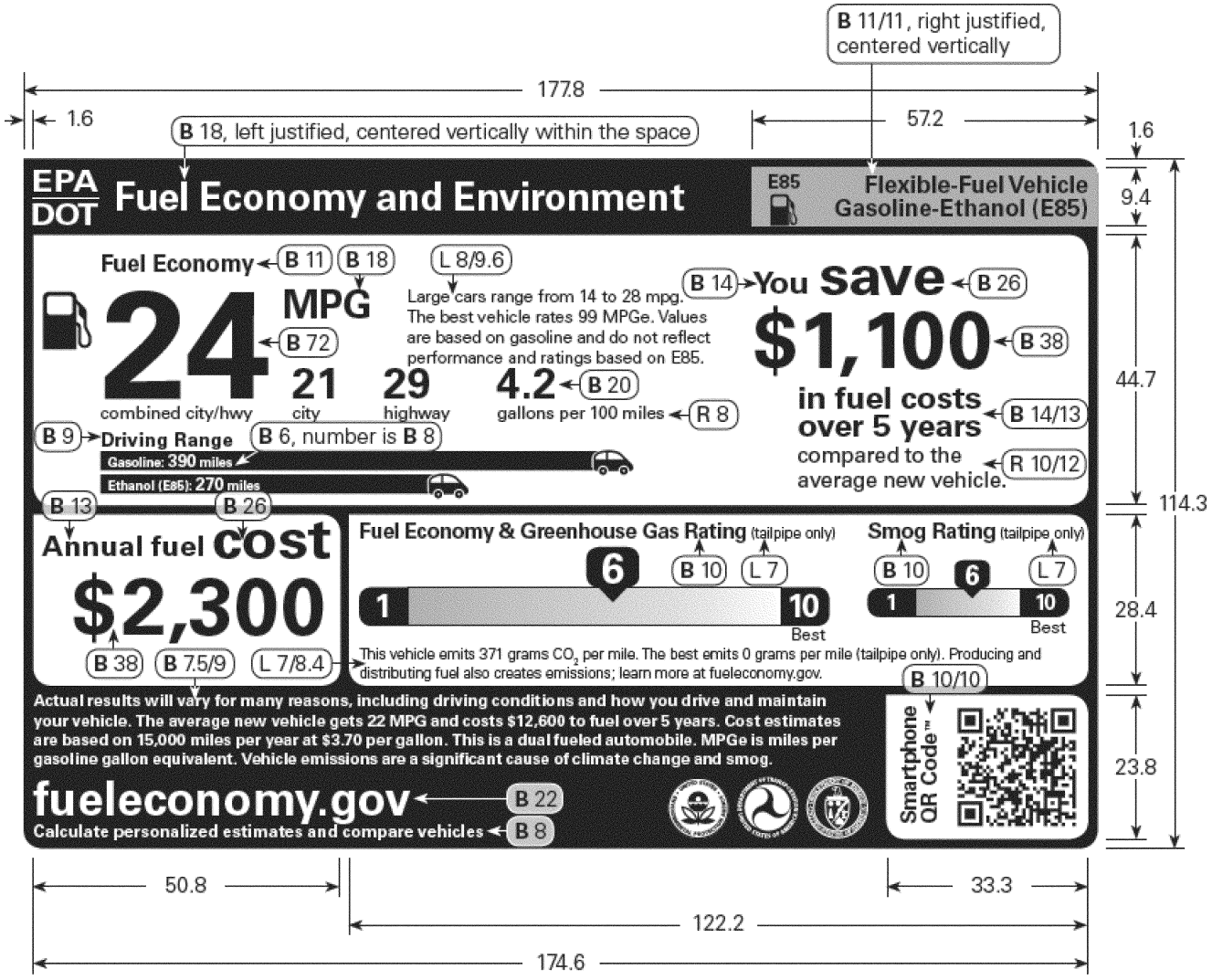
(1) Narrow lines defining the border or separating the main fields are 1.6 millimeter thick.

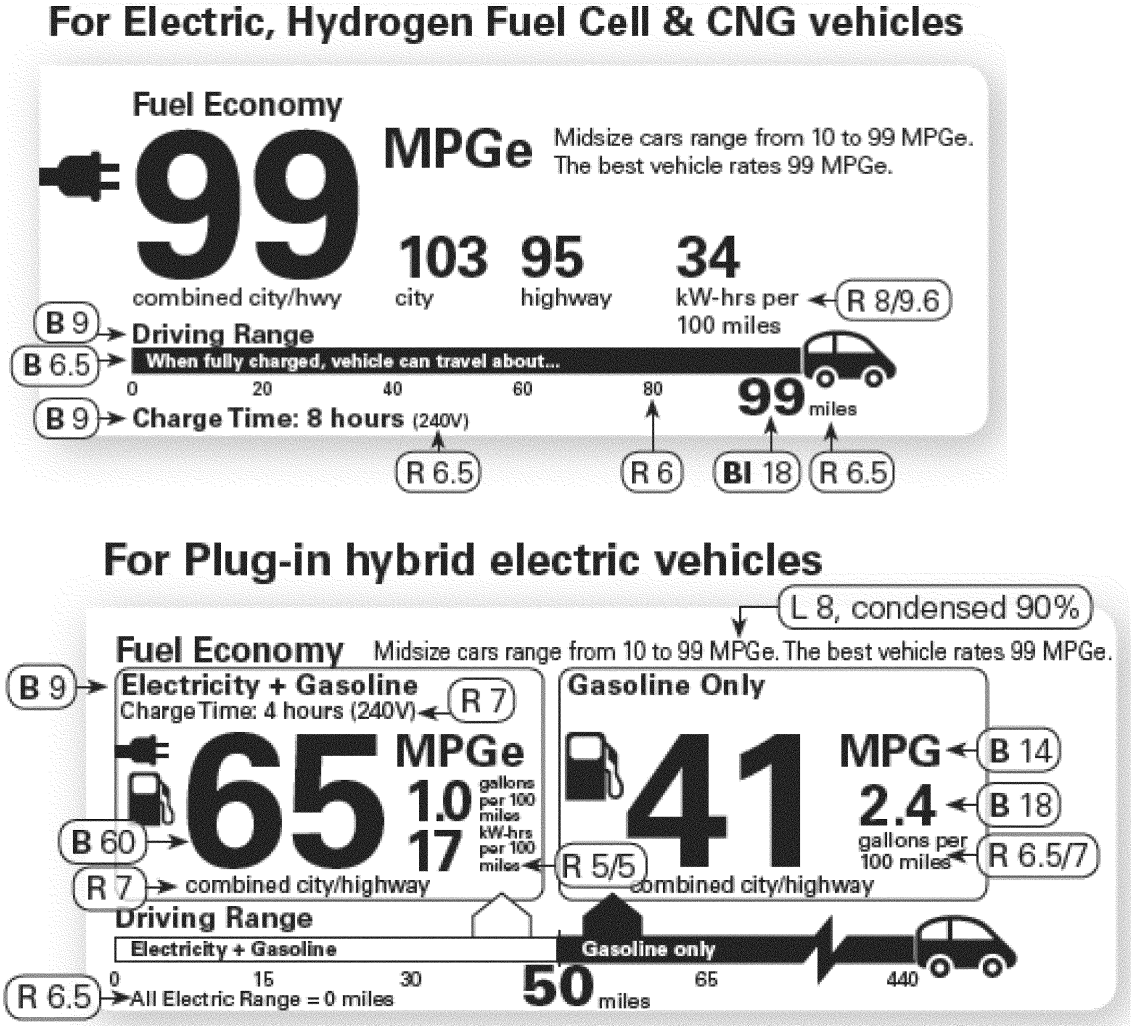
(2) Each rectangular shape or area, including the overall label outline, has an upper left corner that is square (0 radius). All other corners have a 3.2 millimeter radius.

(d) Fuel and vehicle icons, range and slider bars, and agency names and logos are available electronically.

(e) The following figures illustrate the formatting specifications:

BILLING CODE 6560–50–P





BILLING CODE 6560–50–C

Appendix VIII to Part 600—[Removed]

■ 82. Appendix VIII to Part 600 is removed.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Chapter V

In consideration of the foregoing, under the authority of 15 U.S.C. 1232 and 49 U.S.C. 32908 and delegation of authority at 49 CFR 1.50, NHTSA amends 49 CFR Chapter V as follows:

PART 575—CONSUMER INFORMATION

■ 1. The authority citation for part 575 is revised to read as follows:

Authority: 49 U.S.C. 32302, 32304A, 30111, 30115, 30117, 30166, 32908, and 20168, Pub. L. 104–414, 114 Stat. 1800, Pub. L. 109–59, 119 Stat. 1144, 15 U.S.C. 1232(g), Pub. L. 110–140, 121 Stat. 1492; delegation of authority at 49 CFR 1.50.

■ 2. In part 575, Subpart E, consisting of § 575.401, is added to read as follows:

Subpart E—Energy Independence and Security Act; Consumer Information

§ 575.401 Vehicle labeling of fuel economy, greenhouse gas, and other pollutant emissions information.

(a) *Purpose and scope.* The purpose of this section is to aid potential purchasers in the selection of new passenger cars and light trucks by providing them with information about vehicles' performance in terms of fuel economy, greenhouse gas (GHG), and other air pollutant emissions. Manufacturers of passenger cars and light trucks are required to include this information on the label described in this section. Although this information will also be available through means such as postings at *http://www.fueleconomy.gov,* the additional label information is intended to provide consumers with this information at the point of sale, and to help them compare between vehicles.

(b) *Application.* This section applies to passenger cars and light trucks manufactured in model year 2013 and later. Manufacturers may optionally comply with this section during model year 2012.

(c) *Definitions.*

(1) *Data element* means a piece of information required or permitted to be included on the fuel economy and environment label.

(2) *Fuel economy and environment label* means the label with information about automobile performance in terms of fuel economy, greenhouse gases, and other emissions and with rating systems for fuel economy, greenhouse gases, and other emissions that also indicate the automobile(s) with the highest fuel economy and lowest greenhouse gas emissions, as specified at 49 U.S.C. 32908(g).

(3) *Miles per gasoline gallon equivalent (MPGe)* is a measure of distance traveled per unit of energy consumed, and functions as a recognizable equivalent to, *e.g.,* kilowatt-hours per mile (kW-hr/mile).

(4) *Monroney label* means the label placed on new automobiles with the manufacturer's suggested retail price and other consumer information, as specified at 15 U.S.C. 1231–1233 (also known as the ''Automobile Information Disclosure Act label'').

(5) *Other air pollutants* or *other emissions* means those tailpipe emissions, other than carbon dioxide (CO_2), for which manufacturers must provide EPA with emissions rates for all new light duty vehicles each model year under EPA's Tier 2 light duty vehicle emissions standards requirements (40 CFR Part 86, Subpart S) or the parallel requirements for those vehicles certified instead to the California emissions standards. These air pollutants include non-methane organic gases (NMOG), nitrogen oxides (NO_X), particulate matter (PM), carbon monoxide (CO), and formaldehyde (HCHO).

(6) *Slider bar* means a horizontal rating scale with a minimum value at one end and a maximum value at the other end that can accommodate a designation of a specific value between those values with a box or arrow. The actual rating value would be printed (displayed) at the proper position on the scale representing the vehicle's actual rating value relative to the two end values.

(d) *Required label.* Prior to being offered for sale, each manufacturer must affix or cause to be affixed and each dealer must maintain or cause to be maintained on each passenger car or light truck a label that meets the requirements specified in this section, and conforms in content, format, and sequence to the sample labels depicted in the appendix to this section. The manufacturer must have the fuel economy label affixed in such a manner that appearance and legibility are maintained until after the vehicle is delivered to the ultimate consumer.

(e) *Required label information and format—general provisions*—(1) *Location.* It is preferable that the fuel economy and environment label information be incorporated into the Monroney label, provided that the prominence and legibility of the fuel economy and environment label is maintained. If the fuel economy and environment label is incorporated into the Monroney label, it must be placed on a separate section in the Monroney label and must not be intermixed with that label information, except for vehicle descriptions as noted in 40 CFR 600.302–08(d)(1). If the fuel economy and environment label is not incorporated into the Monroney label, it must be located on a side window, and as close as possible to the Monroney label. If the window is not large enough to accommodate both the Monroney label and the fuel economy and environment label, the latter must be located on another window as close as physically possible to the Monroney label.

(2) *Size and legibility.* The fuel economy and environment label must be readily visible from the exterior of the vehicle and presented in a legible and prominent fashion. The label must be rectangular in shape with a minimum height of 4.5 inches (114 mm) and a minimum length of 7.0 inches (177 mm) as specified in the appendix to this section.

(3) *Basic appearance.* Fuel economy and environment labels must be printed on white or very light paper with the color specified in this section; any label markings for which a color is not specified here must be in black and white. The label can be divided into three separate fields outlined by a continuous border, as described in the appendix to this section. Manufacturers must make a good faith effort to conform to the formats illustrated in the appendix to this section. Label templates are available for download at *http://www.nhtsa.gov/fuel-economy/.*

(4) *Border.* Create a continuous black border to outline the label and separate the three information fields. Include the following information in the upper and lower portions of the border:

(i) *Upper border, label name.* (A) In the left portion of the upper border, the words ''EPA'' and ''DOT'' must be in boldface, capital letters that are light in color and left-justified, with a horizontal line in between them as shown in the appendix to this section.

(B) Immediately to the right of the agency names, the heading ''Fuel Economy and Environment'' must be in boldface letters that are light in color.

(ii) *Upper border, vehicle fuel type.* In the right portion of the upper border, identify the vehicle's fuel type in black font on a blue-colored field as follows:

(A) For vehicles designed to operate on a single fuel, identify the appropriate fuel. For example, identify the vehicle with the words ''Gasoline Vehicle,'' ''Diesel Vehicle,'' ''Compressed Natural Gas Vehicle,'' ''Hydrogen Fuel Cell Vehicle,'' etc. This includes hybrid electric vehicles that do not have plug-in capability. Include a logo corresponding to the fuel to the left of this designation as follows:

(*1*) For gasoline, include a fuel pump logo.

(*2*) For diesel fuel, include a fuel pump logo with a ''D'' inscribed in the base of the fuel pump.

(*3*) For natural gas, include the established CNG logo.

(*4*) For hydrogen fuel cells, include the expression ''H_2.''

(B) Identify dual-fueled (''flexible-fueled'') vehicles with the words ''Flexible-Fuel Vehicle Gasoline-Ethanol (E85),'' ''Flexible-Fuel Vehicle Diesel-Natural Gas,'' etc. Include a fuel pump logo or a combination of logos to the left of this designation as appropriate. For example, for vehicles that operate on gasoline or ethanol, include a fuel pump logo and the designation ''E85,'' as shown in the appendix to this section.

(C) Identify plug-in hybrid electric vehicles with the words ''Plug-In Hybrid Vehicle Electricity-Gasoline'' or ''Plug-In Hybrid Vehicle Electricity-Diesel.'' Include a fuel pump logo to the lower left of this designation and an electric plug logo to the upper left of this designation.

(D) Identify electric vehicles with the words ''Electric Vehicle.'' Include an electric plug logo to the left of this designation.

(iii) *Lower border, left side:* (A) In the upper left portion of the lower border, include the statement ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per gallon. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.'' For the value of *a,* insert the average new vehicle combined MPG value for that model year established by EPA. For the value of *b,* insert the estimated five year fuel cost value established by EPA for the average new vehicle in that model year. For the value of *c,* insert the annual mileage rate established by EPA. For the value of *d,* insert the estimated cost per gallon established by EPA for gasoline or diesel fuel, as appropriate. See paragraphs (f) through (j) below for alternate statements that apply for vehicles that use a fuel other than gasoline or diesel fuel.

(B) In the lower left portion of the lower border, include the Web site reference, ''fueleconomy.gov,'' and include the following statement: ''Calculate personalized estimates and compare vehicles'' beneath it.

(iv) *Lower border, right side:* Include a field in the right-most portion of the lower border to allow for accessing interactive information with mobile electronic devices as set forth in 40 CFR 600.302–12(b)(6).

(v) *Lower border, center:* Along the lower edge of the lower border, to the

left of the field described in paragraph (e)(4)(iv) of this section, include the logos for the Environmental Protection Agency, the Department of Transportation, and the Department of Energy as shown in the appendix to this section.

(5) *Fuel economy performance and fuel cost values.* To the left side in the white field at the top of the label, include the following elements for vehicles that run on gasoline or diesel fuel with no plug-in capability:

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) The vehicle's combined fuel economy determined as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(iii) A fuel pump logo to the left of the combined fuel economy value (for diesel fuel, include a fuel pump logo with a ''D'' inscribed in the base of the fuel pump).

(iv) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(A) Include the word ''MPG'' to the upper right of the combined fuel economy value.

(B) Include the value for the city and highway fuel economy determined as set forth in 40 CFR 600.210–12(a) and (b) to the right of the combined fuel economy value in smaller font, and below the word ''MPG.'' Include the expression ''city'' in smaller font below the city fuel economy value, and the expression ''highway'' in smaller font below the highway fuel economy value.

(v) Below the fuel economy performance values set forth in paragraphs (e)(5)(ii) and (iv) of this section, include the value for the fuel consumption rate required by EPA and determined as set forth in 40 CFR 600.302–12(c)(1).

(vi) To the right of the word ''MPG'' described in paragraph (e)(5)(iv)(A) of this section, include the information about the range of fuel economy of comparable vehicles as required by EPA and set forth in 40 CFR 600.302–12(c)(2) and below that information, include the expression ''The best vehicle rates 99 MPGe.''

(6) *Comparative five-year fuel costs/savings.* To the right side in the white field at the top of the label, include the information required by EPA at 40 CFR 600.302–12(c)(3).

(7) *Annual fuel cost value.* In the field in the lower left portion of the label, include the information on annual fuel cost as required by EPA and set forth in 40 CFR 600.302–12(d).

(8) *Fuel economy and environment slider bar ratings.* In the field in the lower right portion of the label,

(i) Include the heading ''Fuel Economy & Greenhouse Gas Rating (tailpipe only)'' in the top left corner of the field.

(ii) Include a slider bar in the left portion of the field as shown in the appendix to this section to characterize the vehicle's fuel economy and CO_2 emission rating relative to the range of fuel economy and CO_2 emission rates for all vehicles. Position a black box with a downward-pointing wedge above the slider bar positioned to show where that vehicle's fuel economy and CO_2 emission rating falls relative to the total range. Include the vehicle's fuel economy and CO_2 emission rating determined as set forth in 40 CFR 600.311–12(d) inside the box in white text. If the fuel economy and CO_2 emission ratings are different, the black box with a downward-pointing wedge above the slider bar must contain the fuel economy rating, with a second upward-pointing wedge below the slider bar containing the CO_2 emission rating. Include the number ''1'' in white text in the black border at the left end of the slider bar, and include the number ''10'' in white text in the black border at the right end of the slider bar, with the expression ''Best'' in black text under the slider bar directly below the ''10.'' Add color to the slider bar such that it is blue at the left end of the range, white at the right end of the range, and shaded continuously across the range.

(iii) Include the heading ''Smog Rating (tailpipe only)'' in the top right corner of the field.

(iv) Include a slider bar in the right portion of the field to characterize the vehicle's level of emission control for other air pollutants relative to that of all vehicles. Position a black box with a downward-pointing wedge above the slider bar positioned to show where that vehicle's emission rating falls relative to the total range. Include the vehicle's emission rating determined as set forth in 40 CFR 600.311–12(g) inside the box in white text. Include the number ''1'' in white text in the black border at the left end of the slider bar, and include the number ''10'' in white text in the black border at the right end of the slider bar, with the expression ''Best'' in black text under the slider bar directly below the ''10.'' Add color to the slider bar such that it is blue at the left end of the range, white at the right end of the range, and shaded continuously across the range.

(v) Below the slider bars described in paragraphs (e)(8)(ii) and (e)(8)(iv) to this section, include the statement, ''This vehicle emits *e* grams CO_2 per mile. The best emits 0 grams per mile (tailpipe only). Producing and distributing fuel also creates emissions; learn more at fueleconomy.gov.'' For the value of *e,* insert the vehicle's specific tailpipe CO_2 emission rating determined as set forth in 40 CFR 600.210–12(d).

(9) *Rounding.* Round all numerical values identified in this section to the nearest whole number unless otherwise specified.

(10) *Other label information required by EPA.* Manufacturers must include any additional labeling information required by EPA at 40 CFR 600.302–12 on the fuel economy and environment label.

(f) *Required label information and format—flexible-fuel vehicles.* (1) Fuel economy and environment labels for flexible-fuel vehicles must meet the specifications described in paragraph (e) of this section, with the exceptions and additional specifications described in this paragraph (f). This section describes how to label vehicles with gasoline engines. If the vehicle has a diesel engine, all the references to ''gas'' or ''gasoline'' in this section are understood to refer to ''diesel'' or ''diesel fuel,'' respectively.

(2) For qualifying vehicles, include the following additional expression in the statement identified in paragraph (e)(iv)(3)(A) of this section as shown in the appendix to this section: ''This is a dual fueled automobile.''

(3) Include the following elements instead of the information identified in paragraph (e)(5) of this section:

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) The vehicle's combined fuel economy as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(iii) A fuel pump logo and other logos as specified in paragraph (e)(4)(ii)(A) of this section to the left of the combined fuel economy value.

(iv) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(A) Include the word ''MPG'' to the upper right of the combined fuel economy value.

(B) Include the value for the city and highway fuel economy determined as set forth in 40 CFR 600.210–12(a) and (b) to the right of the combined fuel economy value in smaller font, and below the word ''MPG.'' Include the expression ''city'' in smaller font below the city fuel economy value, and the expression ''highway'' in smaller font below the highway fuel economy value.

(v) Below the fuel economy performance value set forth in paragraph (f)(iii)(2) of this section, include the value for the fuel consumption rate required by EPA and determined as set forth in 40 CFR 600.302–12(c)(1).

(vi) To the right of the word ''MPG'' described in paragraph (e)(5)(iv)(A) of this section, include the information about the range of fuel economy of comparable vehicles as required by EPA and set forth in 40 CFR 600.302–12(c)(2), and below that information, include the expression ''The best vehicle rates 99 MPGe. Values are based on gasoline and do not reflect performance and ratings based on E85.'' Adjust this statement as appropriate for vehicles designed to operate on different fuels.

(vii) Below the combined fuel economy value, the manufacturer may include information on the vehicle's driving range as shown in the appendix to this section, with the sub-heading ''Driving Range,'' and with range bars below this sub-heading as required by EPA and set forth in 40 CFR 600.303–12(b)(6).

(g) *Required label information and format—special requirements for hydrogen fuel cell vehicles.* (1) Fuel economy and environment labels for hydrogen fuel cell vehicles must meet the specifications set forth in paragraph (e) of this section, with the exceptions and additional specifications described in this paragraph (g).

(2) Include the following statement in the upper left portion of the lower border instead of the statement specified in paragraph (e)(4)(iii)(A) of this section: ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per kilogram of hydrogen. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.'' For the value of *a,* insert the average new vehicle combined MPG value for that model year established by EPA. For the value of *b,* insert the estimated five year fuel cost value established by EPA for the average new vehicle in that model year. For the value of *c,* insert the annual mileage rate established by EPA. For the value of *d,* insert the estimated cost per kilogram established by EPA for hydrogen.

(3) Include the following elements instead of the information identified above in paragraph (e)(5) of this section:

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) The vehicle's combined fuel economy determined as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(iii) The ''H_2'' logo as specified in paragraph (e)(4)(ii)(A) of this section to the left of the combined fuel economy value.

(iv) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(A) Include the word ''MPGe'' to the upper right of the combined fuel economy value.

(B) Include the value for the city and highway fuel economy determined as set forth in 40 CFR 600.311–12(a) and (b) to the right of the combined fuel economy value in smaller font, and below the word ''MPG.'' Include the expression ''city'' in smaller font below the city fuel economy value, and the expression ''highway'' in smaller font below the highway fuel economy value.

(v) To the right of the fuel economy performance values set forth in paragraph (iv)(B) of this section, include the value for the fuel consumption rate required by EPA and determined as set forth in 40 CFR 600.302–12(c)(1).

(vi) To the right of the word ''MPGe'' described in paragraph (g)(3)(iv)(A) of this section, include the information about the range of fuel economy of comparable vehicles as required by EPA and set forth in 40 CFR 600.302–12(c)(2) and below that information, include the expression ''The best vehicle rates 99 MPGe.''

(vii) Below the combined fuel economy value, include information on the vehicle's driving range as shown in the appendix to this section, as required by EPA and set forth in 40 CFR 600.304–12(b)(6)

(h) *Required label information and format—special requirements for compressed natural gas vehicles.* (1) Fuel economy and environment labels for compressed natural gas vehicles must meet the specifications described in paragraph (e) of this section, with the exceptions and additional specifications described in this paragraph (h).

(2) Include the following statement in the upper left portion of the lower border instead of the statement specified in paragraph (e)(4)(iii)(A) of this section: ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per gasoline gallon equivalent. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.'' For the value of *a,* insert the average new vehicle combined MPG value for that model year established by EPA. For the value of *b,* insert the estimated five year fuel cost value established by EPA for the average new vehicle in that model year. For the value of *c,* insert the annual mileage rate established by EPA. For the value of *d,* insert the estimated cost per gasoline gallon equivalent established by EPA for natural gas.

(3) Include the following elements instead of the information identified in paragraph (e)(5) of this section:

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) The vehicle's combined fuel economy determined as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(iii) The compressed natural gas logo as specified in paragraph (e)(4)(ii)(A) of this section to the left of the combined fuel economy value.

(iv) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(A) Include the word ''MPGe'' to the upper right of the combined fuel economy value.

(B) Include the value for the city and highway fuel economy determined as set forth in 40 CFR 600.311–12(a) and (b) to the right of the combined fuel economy value in smaller font, and below the word ''MPGe.'' Include the expression ''city'' in smaller font below the city fuel economy value, and the expression ''highway'' in smaller font below the highway fuel economy value.

(v) To the right of the fuel economy performance values described in paragraph (h)(3)(iv)(B) of this section, include the value for the fuel consumption rate required by EPA and determined as set forth in 40 CFR 600.302–12(c)(1).

(vi) To the right of the word ''MPGe'' described in paragraph (g)(3)(iv)(A) of this section, include the information about the range of fuel economy of comparable vehicles as required by EPA and set forth in 40 CFR 600.302–12(c)(2), and below that information, include the expression ''The best vehicle rates 99 MPGe.''

(vii) Below the combined fuel economy value, include information on the vehicle's driving range as shown in the appendix to this section, as required by EPA and set forth in 40 CFR 600.306–12(b)(6).

(i) *Required label information and format—special requirements for plug-in hybrid electric vehicles.* (1) Fuel

economy and environment labels for plug-in hybrid electric vehicles must meet the specifications described in paragraph (e) of this section, with the exceptions and additional specifications described in this paragraph (i). This paragraph (i) describes how to label vehicles equipped with gasoline engines. If a vehicle has a diesel engine, all the references to ''gas'' or ''gasoline'' in this section are understood to refer to ''diesel'' or ''diesel fuel,'' respectively.

(2) Include the following statement in the upper left portion of the lower border instead of the statement specified in paragraph (e)(4)(iii)(A) of this section: ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*d* per gallon and $*e* per kW-hr. This is a dual fueled automobile. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.'' For the value of *a,* insert the average new vehicle combined MPG value for that model year established by EPA. For the value of *b,* insert the estimated five year fuel cost value established by EPA for the average new vehicle in that model year. For the value of *c,* insert the annual mileage rate established by EPA. For the value of *d,* insert the estimated cost per gallon established by EPA for gasoline. For the value of *e,* insert the estimated cost per kW-hr of electricity established by EPA.

(3) Include the following elements instead of the information identified above in paragraph (e)(5):

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) An outlined box below the heading with the following information:

(A) The sub-heading ''Electricity'' if the vehicle's engine starts only after the battery is fully discharged, or the sub-heading ''Electricity + Gasoline'' if the vehicle uses combined power from the battery and the engine before the battery is fully discharged.

(B) The expression ''Charge Time: x hours (240 V),'' as required by EPA and as set forth in 40 CFR 600.308–12(b)(2)(ii).

(C) The vehicle's combined fuel economy determined as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(D) An electric plug logo as specified in paragraph (e)(4)(ii)(A) of this section to the left of the combined fuel economy value. For vehicles that use combined power from the battery and the engine before the battery is fully discharged, also include the fuel pump logo as shown in the appendix to this section.

(E) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(*1*) Include the word ''MPGe'' to the upper right of the combined fuel economy value.

(*2*) If the vehicle's engine starts only after the battery is fully discharged, identify the vehicle's electricity consumption rate as required by EPA and determined as set forth in set forth in 40 CFR 600.308–12(b)(2)(v).

(*3*) If the vehicle uses combined power from the battery and the engine before the battery is fully discharged, identify the vehicle's gasoline and electricity consumption rates as required by EPA and determined as set forth in 40 CFR 600.308–12(b)(2)(v).

(iii) A second outlined box to the right of the box described in paragraph (i)(3)(ii) of this section with the following information:

(A) The sub-heading ''Gasoline Only.''

(B) The vehicle's combined fuel economy determined as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(C) A fuel pump logo to the left of the combined fuel economy value.

(D) The units identifier and consumption values to the right of the combined fuel economy value as follows:

(*1*) Include the word ''MPGe'' to the upper right of the combined fuel economy value.

(*2*) Identify the vehicle's gasoline consumption rate required by EPA and determined as set forth in 40 CFR 600.308–12(b)(3).

(iv) Below the boxes specified in paragraphs (i)(3)(ii) and (iii) of this section, include information on the vehicle's driving range as shown in the appendix to this section, as required by EPA and as set forth in 40 CFR 600.308–12(b)(4).

(v) To the right of the heading ''Fuel Economy'' described in paragraph (i)(3)(i) of this section, include the information about the range of fuel economy of comparable vehicles as required by EPA and set forth in 40 CFR 600.302–12(c)(2) and to the right of that information, include the expression ''The best vehicle rates 99 MPGe.''

(4) Include the following statement instead of the statement identified in paragraph (e)(8)(v) of this section: ''This vehicle emits *f* grams CO_2 per mile. The best emits 0 grams per mile (tailpipe only). Producing and distributing fuel & electricity also creates emissions; learn more at fueleconomy.gov.'' For the value of *f,* insert the vehicle's specific tailpipe CO_2 emission rating determined as set forth in 40 CFR 600.210–12(d).

(j) *Required label information and format—special requirements for electric vehicles.* (1) Fuel economy and environment labels for electric vehicles must meet the specifications described in paragraph (e) of this section, with the exceptions and additional specifications described in this section.

(2) Include the following statement in the upper left portion of the lower border instead of the statement specified above in paragraph (e)(4)(iii)(A) of this section: ''Actual results will vary for many reasons, including driving conditions and how you drive and maintain your vehicle. The average new vehicle gets *a* MPG and costs $*b* to fuel over 5 years. Cost estimates are based on *c* miles per year at $*e* per kW-hr. MPGe is miles per gasoline gallon equivalent. Vehicle emissions are a significant cause of climate change and smog.'' For the value of *a,* insert the average new vehicle combined MPG value for that model year established by EPA. For the value of *b,* insert the estimated five year fuel cost value established by EPA for the average new vehicle in that model year. For the value of *c,* insert the annual mileage rate established by EPA. For the value of *e,* insert the estimated cost per kW-hr of electricity established by EPA.

(3) Include the following elements instead of the information identified in paragraph (e)(5) of this section:

(i) The heading ''Fuel Economy'' near the top left corner of the field.

(ii) The vehicle's combined fuel economy determined as set forth in 40 CFR 600.210–12(c) in large font, with the words ''combined city/hwy'' below the number in smaller font.

(iii) The electric plug logo as specified in paragraph (e)(4)(ii)(A) of this section to the left of the combined fuel economy value.

(iv) The units identifier and specific fuel economy values to the right of the combined fuel economy value as follows:

(A) Include the word ''MPGe'' to the upper right of the combined fuel economy value.

(B) Include the value for the city and highway fuel economy determined as set forth in 40 CFR 600.311–12(a) and (b) to the right of the combined fuel economy value in smaller font, and below the word ''MPGe.'' Include the expression ''city'' in smaller font below the city fuel economy value, and the expression ''highway'' in smaller font below the highway fuel economy value.

(v) To the right of the fuel economy performance values described in

paragraph (iv)(B) of this section, include the value for the fuel consumption rate required by EPA and determined as set forth in 40 CFR 600.310–12(b)(5).

(vi) Below the combined fuel economy value, include information on the vehicle's driving range as shown in the appendix to this section, as required by EPA and as set forth in 40 CFR 600.310–12(b)(6).

(vii) Below the driving range information and left-justified, include information on the vehicle's charge time, as required by EPA and as set forth in 40 CFR 600.310–12(b)(7).

(4) Include the following statement instead of the statement identified in paragraph (e)(8)(v) of this section: ''This vehicle emits 0 grams CO_2 per mile. The best emits 0 grams per mile (tailpipe only). Does not include emissions from generating electricity; learn more at fueleconomy.gov.''

Appendix to § 575.401

Figure 1. Gasoline-fueled vehicles, including hybrid gasoline-electric vehicles with no plug-in capabilities.

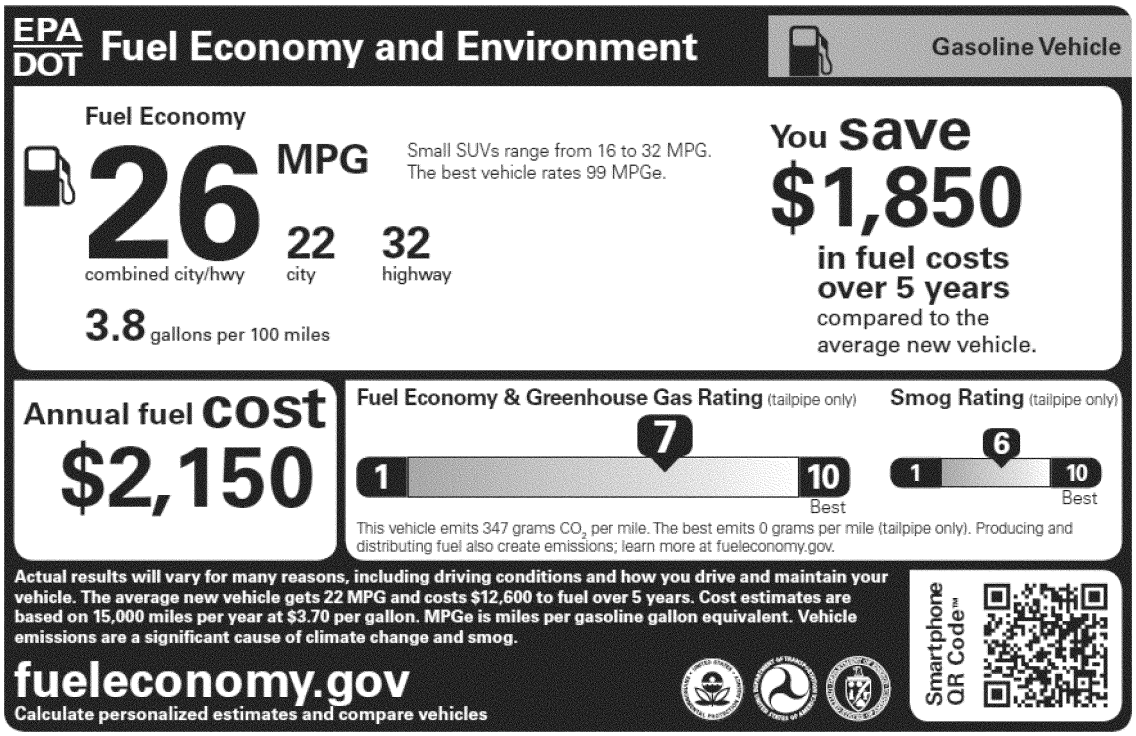


Figure 2. Gasoline-fueled vehicles, including hybrid gasoline-electric vehicles with no plug-in capabilities, with Gas Guzzler Tax.

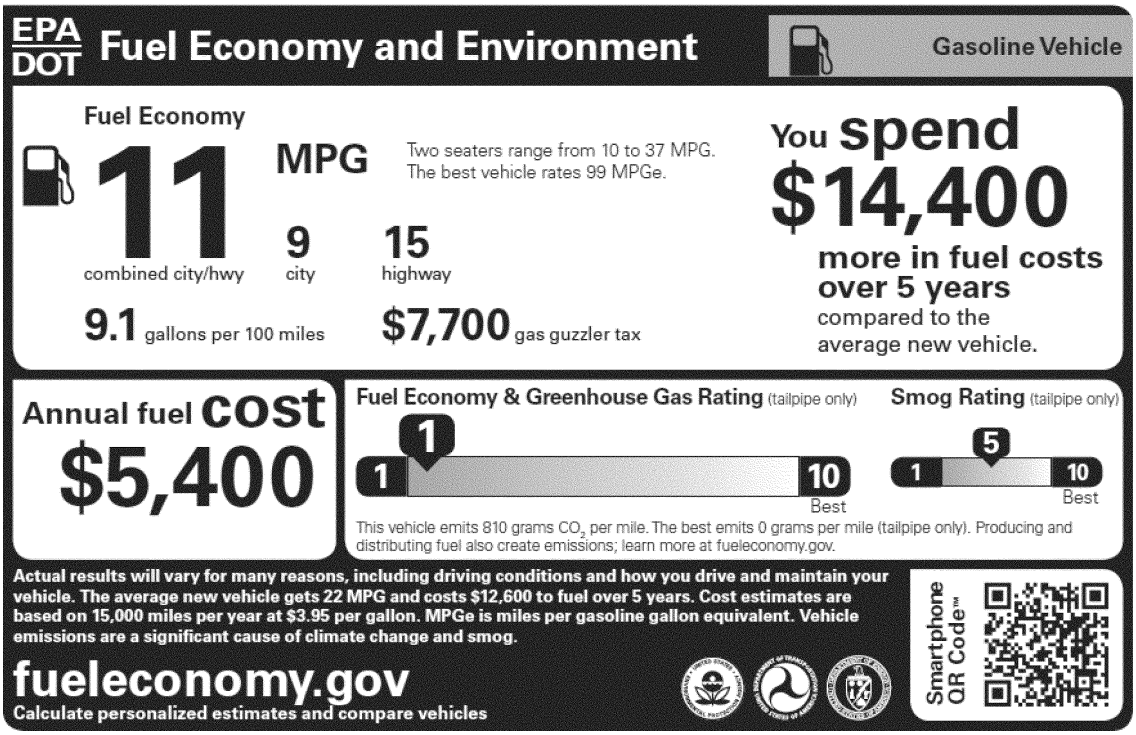


Figure 3. Diesel-fueled vehicles, including hybrid diesel-electric vehicles with no plug-in capabilities.

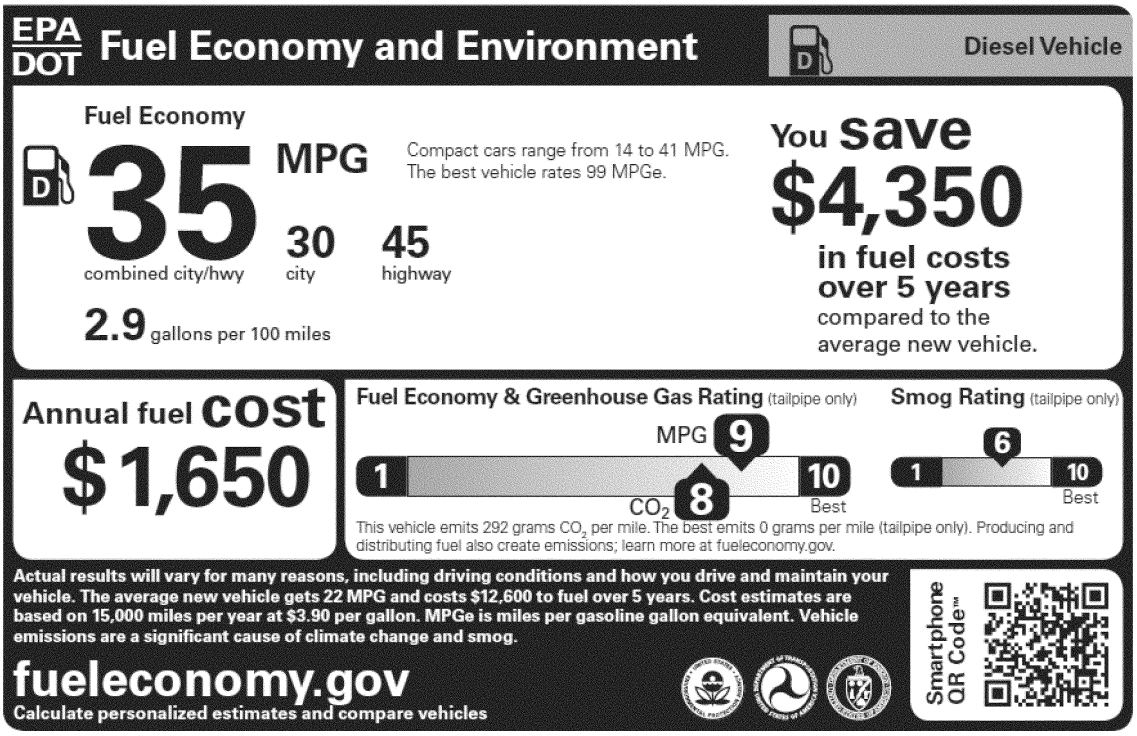


Figure 4. Dual Fuel Vehicle Label (Ethanol/Gasoline)

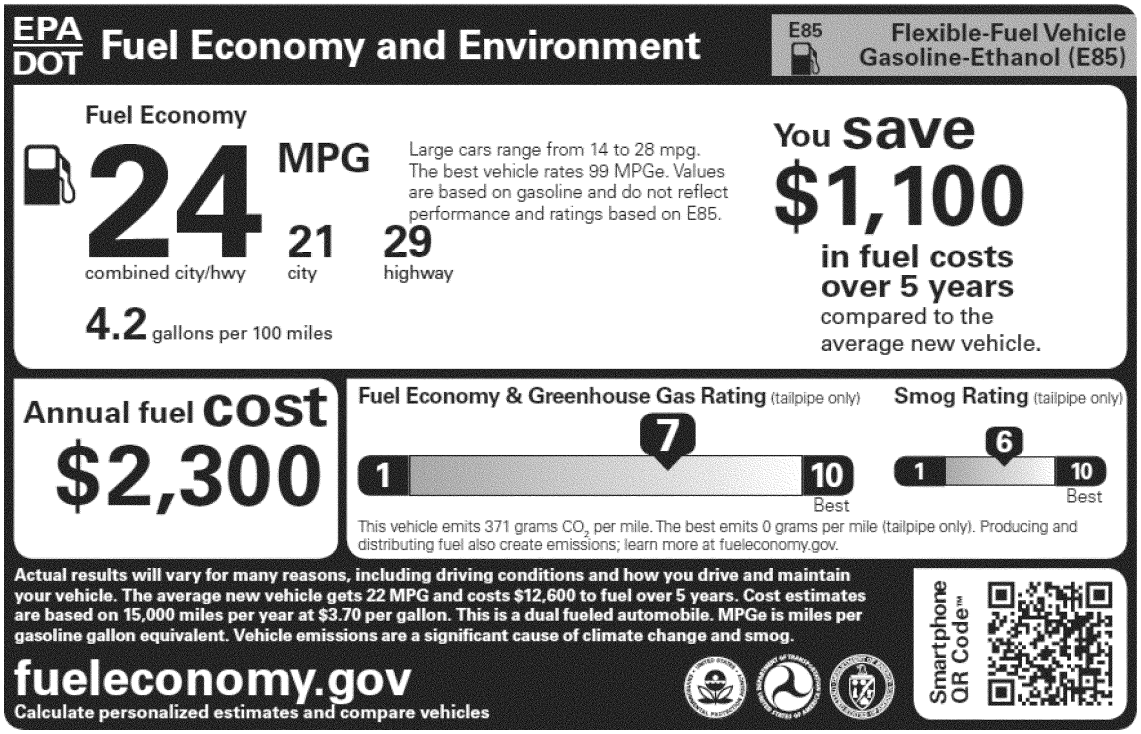


Figure 5. Dual Fuel Vehicle Label (Ethanol/Gasoline) with optional display of driving range values

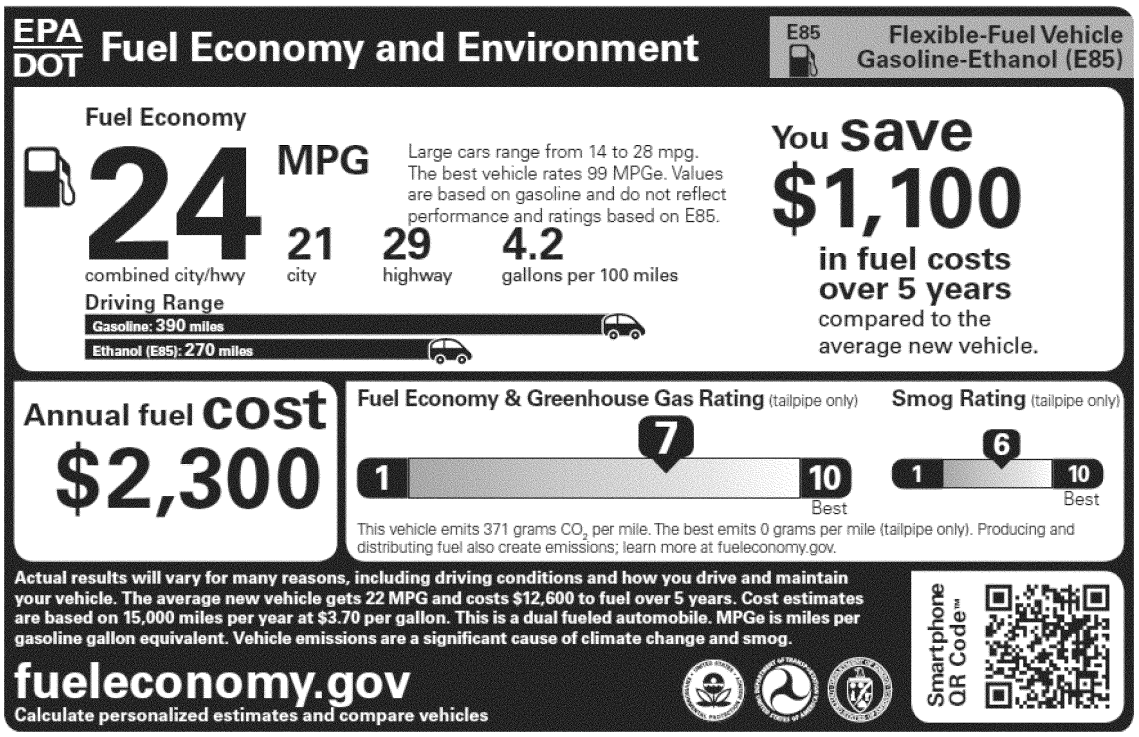


Figure 6. Hydrogen Fuel Cell Vehicle Label

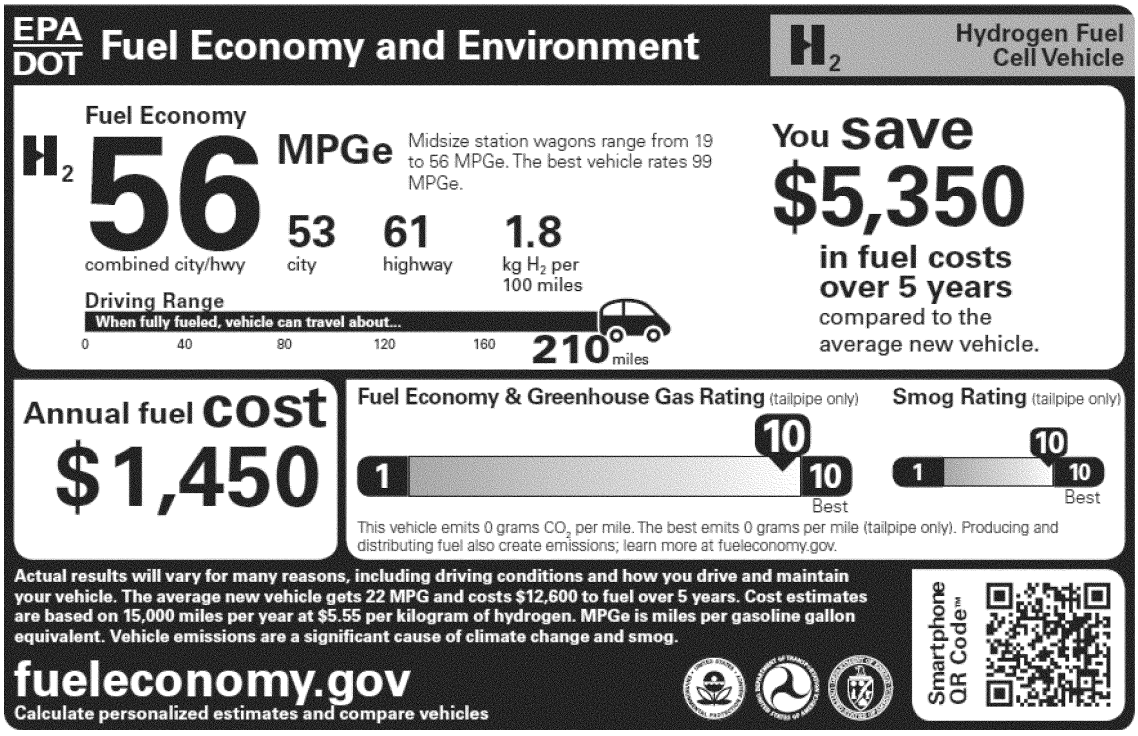


Figure 7. Natural Gas Vehicle Label

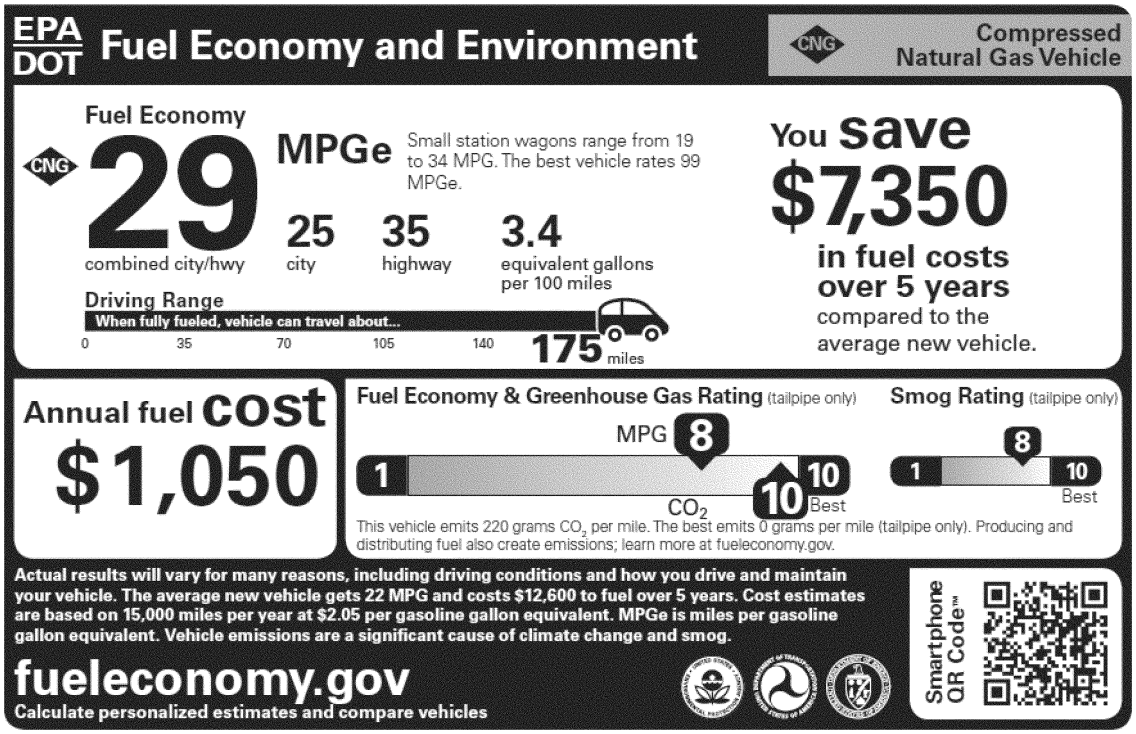


Figure 8. Plug-in Hybrid Electric Vehicle Label, Series PHEV

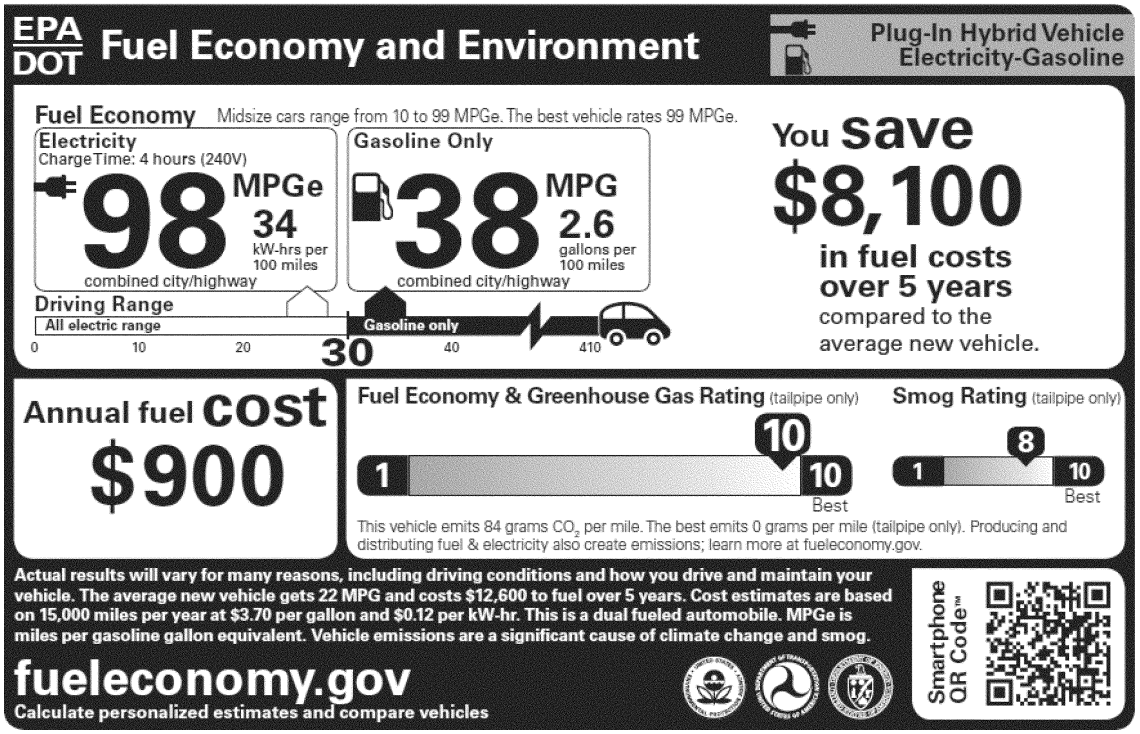


Figure 9. Plug-in Hybrid Electric Vehicle Label, Blended PHEV

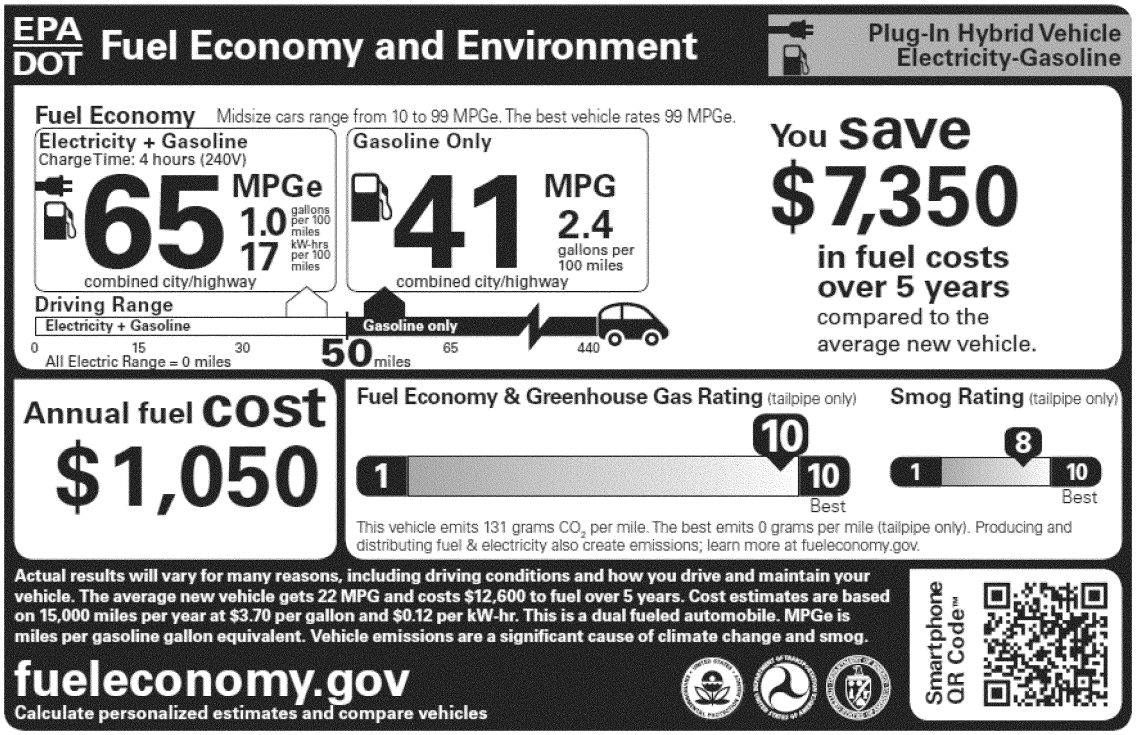
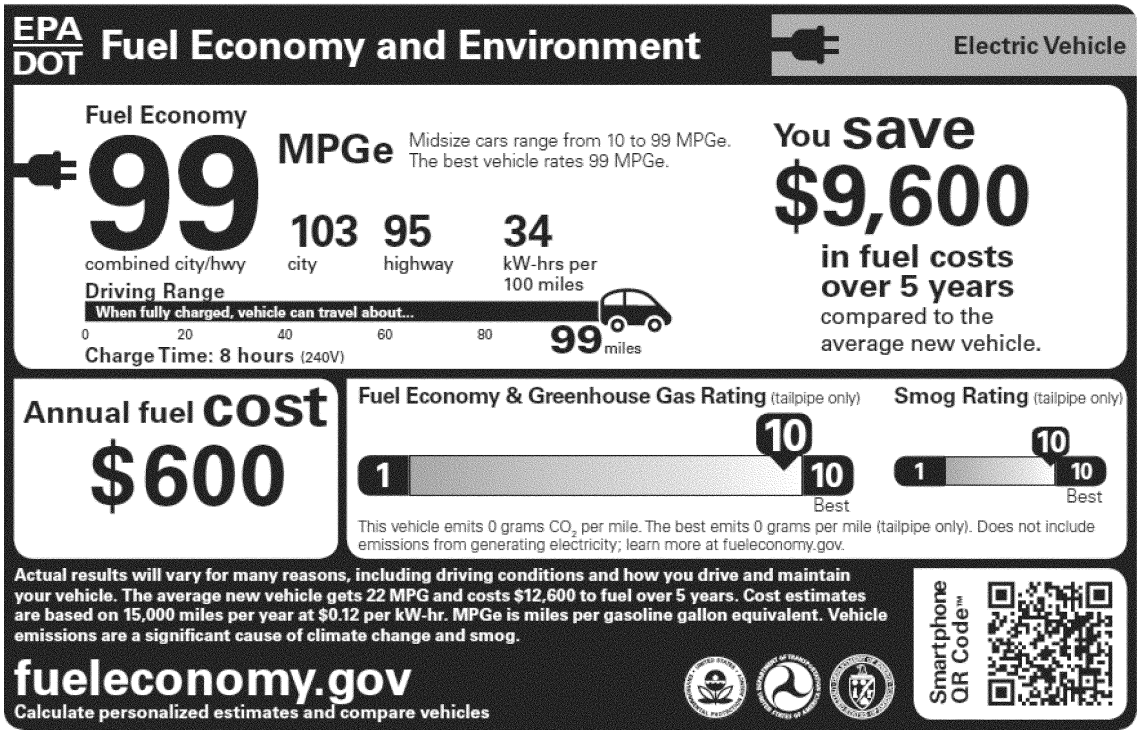


Figure 10. Electric Vehicle Label



BILLING CODE 6560–50–C

Dated: May 25, 2011.

Ray LaHood,

Secretary, Department of Transportation.

Dated: May 25, 2011.

Lisa P. Jackson,

Administrator, Environmental Protection Agency.

[FR Doc. 2011–14291 Filed 7–5–11; 8:45 am]

BILLING CODE 6560–50–P

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Part III

Department of Education

Promise Neighborhoods Program; Implementation Grant Competition Applications for New Awards; Planning Grant Competition; Notices

DEPARTMENT OF EDUCATION

RIN 1855–ZA07

[CFDA: 84.215P]

Promise Neighborhoods Program

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice of final priorities, requirements, definitions, and selection criteria.

SUMMARY: The Secretary of Education (Secretary) announces priorities, requirements, definitions, and selection criteria under the legislative authority of the Fund for the Improvement of Education Program (FIE), title V, part D, subpart 1, sections 5411 through 5413 of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The Secretary may use one or more of these priorities, requirements, definitions, and selection criteria for Promise Neighborhoods competitions for fiscal year (FY) 2011 and later years.

We take this action to focus Federal assistance on projects that are designed to create a comprehensive continuum of solutions, including education programs and family and community supports, with great schools at the center. The continuum of solutions must be designed to significantly improve the educational and developmental outcomes of children and youth, from birth through college and to a career. We intend that these projects support organizations that focus on serving high-need neighborhoods, have a strategy to build a continuum of solutions, and have the capacity to achieve results.

DATES: *Effective Date:* These priorities, requirements, definitions, and selection criteria are effective August 5, 2011.

FOR FURTHER INFORMATION CONTACT: Jane Hodgdon, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W220, Washington, DC 20202. Telephone: (202) 453–6615 or by e-mail: *pn2011@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: *Purpose of Program:* The Promise Neighborhoods program is carried out under the legislative authority of the FIE, title V, part D, subpart 1, sections 5411 through 5413 of the ESEA (20 U.S.C. 7243–7243b). FIE supports nationally significant programs to improve the quality of elementary and secondary education at the State and local levels and to help all children meet challenging State academic content and student academic achievement standards.

The purpose of the Promise Neighborhoods program is to significantly improve the educational and developmental outcomes of children and youth in our most distressed communities, and to transform those communities by—

(1) Identifying and increasing the capacity of eligible organizations (as defined in this notice) that are focused on achieving results for children and youth throughout an entire neighborhood;

(2) Building a complete continuum of cradle-through-college-to-career solutions (continuum of solutions) (as defined in this notice) of both educational programs and family and community supports (both as defined in this notice), with great schools at the center. All solutions in the continuum of solutions must be accessible to children with disabilities (CWD) (as defined in this notice) and English learners (ELs) (as defined in this notice).

(3) Integrating programs and breaking down agency ''silos'' so that solutions are implemented effectively and efficiently across agencies;

(4) Developing the local infrastructure of systems and resources needed to sustain and scale up proven, effective solutions across the broader region beyond the initial neighborhood; and

(5) Learning about the overall impact of the Promise Neighborhoods program and about the relationship between particular strategies in Promise Neighborhoods and student outcomes, including through a rigorous evaluation of the program.

Applicable Program Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

We published a notice of proposed priorities, requirements, definitions, and selection criteria in the **Federal Register** on March 10, 2011 (76 FR 13152) (NPP). That notice contained background information and our reasons for proposing the particular priorities, requirements, definitions, and selection criteria.

There are differences between the proposed priorities, requirements, definitions, and selection criteria in the NPP and these final priorities, requirements, definitions, and selection criteria, as discussed in the *Analysis of Comments and Changes* section elsewhere in this notice. *Public Comment:* In response to our invitation in the NPP, 37 parties submitted comments on the proposed priorities, requirements, definitions, and selection criteria.

Generally, we do not address technical and other minor changes. In addition, we do not address general comments that raised concerns not directly related to the proposed priorities, requirements, definitions, and selection criteria.

Analysis of Comments and Changes: An analysis of the comments and of any changes in the proposed priorities, requirements, definitions, and selection criteria since publication of the NPP follows.

Note about General Comments and Comments Outside the Scope of the NPP: We received many comments expressing general support or making general recommendations for this program. In most cases, these general comments and recommendations were similar to the comments that supported specific provisions or made specific recommendations for the program's proposed priorities, requirements, definitions, or selection criteria, which we discuss in the sections that follow. We, therefore, do not include a separate discussion of the general comments and recommendations.

We also received a number of comments relating to issues that may have been discussed in communications from the Department or in the application and review process for the FY 2010 Promise Neighborhoods competition, but were not proposed as part of the NPP. These issues include: The length of discretionary grant periods, the application process, and technical assistance for applicants. We do not address comments on these issues here. We note, however, that information on these issues will be made available through other Department documents, including the notice inviting applications for this program.

General

Comment: Two commenters made recommendations and requested clarification regarding whether implementation grantees must use funds for developing the administrative capacity of the eligible organization or whether they could use the funds to provide solutions for children and youth in the neighborhood. One commenter recommended that the Department provide maximum flexibility for applicants to determine how the funds are to be used and not require that funds be used to develop administrative capacity. Another commenter requested greater clarification about the percentage of implementation grant funds that could be used to develop administrative capacity, on the one hand, and to

provide solutions for children and youth, on the other.

Discussion: The Department expects implementation grantees to use grant funds for two primary purposes: (1) To develop the administrative capacity necessary to successfully implement a continuum of solutions; and (2) to provide solutions within the continuum of solutions to children and youth in the neighborhood. We anticipate that a majority of implementation grant funds would be used to develop a grantee's administrative capacity and that other public and private sources would be used to provide solutions. However, we believe that each applicant is best positioned to determine the allocation of funds between the two purposes given its needs assessment and plans to build its organizational capacity.

Changes: None.

Comment: None.

Discussion: The Department seeks to clarify that Promise Neighborhoods planning and implementation grantees must take into consideration the unique needs of CWD, ELs, and their families in designing the planning process, conducting the needs assessment, identifying the continuum of services, and developing the implementation plan for Promise Neighborhoods.

Changes: The Department has revised language throughout the notice of final priorities to highlight the importance of considering the unique needs of CWD, ELs, and their families in the planning for and implementation of a continuum of services designed to improve academic outcomes for all children and youth. References can be found in paragraph (4) of Final Planning Priority 1 and Final Implementation Priority 1, Final Planning Priority 4 and Final Implementation Priority 4, and the definition of *education programs.* In addition, we have added definitions for both *children with disabilities* and *English learners* to the Final Definitions section of this notice. These definitions are consistent with how the terms are defined in the Individuals with Disabilities Education Act (IDEA), the ESEA, and section 504 of the Rehabilitation Act.

Priorities

Priorities—General for Final Planning Priorities and Final Implementation Priorities

Comment: Several commenters recommended that the Department not designate any priorities as competitive preference priorities. Two commenters recommended that if the Department designates priorities as competitive preference priorities, the number of competitive preference priorities to which an applicant may apply should be limited, or the competitive preference priorities should be used as tie breakers. Two of the commenters recommended designating priorities 4 through 8 as invitational priorities. Another commenter recommended eliminating priorities 4 through 8 altogether.

Discussion: The Promise Neighborhoods program encourages a comprehensive continuum of solutions that are designed to dramatically improve academic and developmental outcomes for all children and youth, in our country's most distressed communities, and to transform those communities. Because we believe that the following components of a comprehensive continuum of solutions can significantly improve academic and developmental outcomes, we have included them as priorities: Provision of high-quality comprehensive local early learning networks, quality internet connectivity, access to the arts and humanities, availability of quality affordable housing, and family engagement in learning through adult education. In a given competition, we may use one or more of these priorities to focus Federal funds on components most in need of support. The decision to use these priorities as absolute, competitive preference or invitational will be made on a competition-by-competition basis. We announce these designations and the scoring methodology in the notice inviting applications.

Changes: None.

Comment: Two commenters asked whether an applicant must meet Absolute Priority 1, Absolute Priority 2, or Absolute Priority 3, or whether an applicant could focus on only one priority among Priorities 4 through 8.

Discussion: Under 34 CFR 75.105(c)(3) we consider only applications that meet either Absolute Priority 1, Absolute Priority 2, or Absolute Priority 3. In order to be considered for funding under the Promise Neighborhoods program, an applicant must meet all of the requirements in the absolute priority that it chooses to address. We announce designations for other priorities in notices inviting applications.

Changes: None.

Comment: Two commenters expressed concerns that the absolute priorities for rural and tribal communities would disadvantage suburban communities. Another commenter recommended adding an absolute priority for small towns and mid-sized cities stating that these communities may have access to fewer resources than more urban areas.

Discussion: We included Absolute Priorities 2 and 3 to focus on rural areas and Indian tribes because of the unique and daunting challenges faced by these communities. In 2004, more than one-fifth of the Nation's nearly 2,000 ''dropout factories,'' in which the graduation rate is less than 60 percent, were located in rural areas (Balfanz, R., and Letgers, N., Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts? Johns Hopkins University, 2004.)

Compared to white students, American Indian students have poorer academic outcomes and higher poverty rates (Institute for Education Sciences. Status and Trends in the Education of American Indians and Alaska Natives, 2008). American Indian and Alaska Native students, who could be among those served under Absolute Priority 3, have a graduation rate of less than 50 percent nationally (The Civil Rights Project. The Dropout/Graduation Crisis Among American Indian and Alaska Native Students: Failure to Respond Places the Future of Native Peoples at Risk, 2010). While we recognize the challenges faced by small towns and mid-sized cities, we decline to add an absolute priority focused on these communities because their challenges are not as severe as the challenges faced by students in rural and tribal communities.

Changes: None.

Final Planning Priority 1 and Final Implementation Priority 1

Geographic Area and Need

Comment: One commenter recommended that the Department require a neighborhood to have a child poverty rate of 50 percent or more in order to be eligible for a Promise Neighborhood grant. The commenter stated that this threshold would demonstrate the severity of need in the neighborhood.

Discussion: We agree with the commenter that a child poverty rate of 50 percent or more is an indicator of tremendous need in a neighborhood. However, poverty is only one indicator of need. Significant achievement gaps, the percentage of children with preventable health conditions, and the crime rate in a neighborhood could also be indicators of tremendous need. Applicants are in the best position to provide the information that is most relevant to establishing the need of the particular neighborhood that they propose to serve, and comprehensive information about indicators of need

will allow us to make thoughtful and informed grant decisions in light of the level of distress in the neighborhood.

Changes: None.

Final Planning Priority 1 and Final Implementation Priority 1

Promise Neighborhood Plan

Comment: One commenter expressed concerns about the severity of the specific types of interventions required for applicants proposing to work with persistently lowest-achieving and low-performing schools, especially the turnaround interventions required by the Race to the Top (RTT) program.

Discussion: We require an applicant proposing to work with a persistently lowest-achieving school to include as part of its strategy one of the four school intervention models (turnaround model, restart model, school closure, or transformation model) described in Appendix C of the RTT notice inviting applications for new awards for FY 2010 that was published in the **Federal Register** on November 18, 2009 (74 FR 59836, 59866). While applicants working with low-performing schools may implement one of these four school intervention models, these applicants are not required to do so. They have the flexibility to implement any interventions that are sufficiently ambitious, rigorous, and comprehensive to significantly improve academic and other outcomes for all students.

We believe that the comprehensive education programs that Promise Neighborhoods grantees implement should be consistent with efforts to reform these schools carried out under other programs supported by the Department, such as the RTT and School Improvement Grants (SIG) programs.

Final Planning Priority 1 and Final Implementation Priority 1 provide for a structured yet flexible approach that is consistent with these programs.

Changes: None.

Comment: Two commenters expressed concerns and requested clarification regarding the entity that must implement school interventions. One commenter asked whether an applicant must implement the school interventions or whether another organization could implement the school interventions on its behalf. One commenter expressed concern that some charter schools may have difficulty forming partnerships with low-performing traditional public schools, and recommended that the Department eliminate the requirement that grantees serve at least one low-performing school or persistently lowest-achieving school.

Discussion: Promise Neighborhoods grantees are required to develop a complete continuum of cradle-through-college-to-career solutions over time in a neighborhood, and few if any single organization could directly implement all of the expected solutions within a complete continuum. For this reason, the program is designed to support applicants that partner with other organizations to provide this continuum of solutions. To clarify this, we are revising both Final Planning Priority 1 and Final Implementation Priority 1 to state that school interventions may be implemented by the applicant or one or more of its partners.

With regard to the comment recommending that the Department eliminate the requirement that grantees serve at least one low-performing school or persistently lowest-achieving school, we decline to make this change because we believe that Promise Neighborhoods must play an important role in turning around persistently-lowest achieving schools and improving low-performing schools.

Changes: We have revised both Final Planning Priority 1 and Final Implementation Priority 1, paragraph (2)(b) to clarify that the school interventions in the strategy or plan to build a continuum of solutions may be implemented by the applicant or one of its partners. We added ''(or one or more of its partners)'' to both Final Planning Priority 1 and Final Implementation Priority 1, paragraph (2)(b) in reference to the entity that must implement the school interventions.

Comment: One commenter recommended requiring the use of digital, multi-platform (*e.g.,* public television, web-based, etc.) delivery models for early learning programs in the continuum of solutions.

Discussion: We believe that applicants are best positioned to determine the specific solutions and the implementation of those solutions that most effectively address neighborhood needs, and therefore, decline to require that all grantees use digital, multi-platform delivery models for early learning, as recommended by the commenter.

Changes: None.

Comment: One commenter recommended adding a new requirement within the education component of the continuum of solutions that focuses on family-school partnerships and family engagement in learning.

Discussion: Family and community support for learning is a critical component of Promise Neighborhoods. For example, as specified in Tables 1 and 2 in both Final Planning Priority 1 and Final Implementation Priority 1, family and community member support for learning is one of the 10 core program results in a Promise Neighborhood, and Priority 8 focuses on family engagement in learning through adult education. For this reason, we believe adding the requirement recommended by the commenter is unnecessary and therefore decline to add it.

Changes: None.

Comment: One commenter requested clarification regarding whether applicants are required to focus on children attending a target school or on all children in a neighborhood. The applicant asked whether students who attend a target school in the Promise Neighborhood, but live outside the neighborhood, could be served by a Promise Neighborhood project.

Discussion: We agree that clarification about the students who can receive the complete continuum of solutions under a Promise Neighborhoods grant would be helpful, especially in light of the variations in attendance zone and school choice policies in many communities. Therefore, we are revising both Final Planning Priority 1 and Final Implementation Priority 1 to clarify that the continuum of solutions must be designed to ensure that over time, (1) Children and youth in the neighborhood who attend the target school or schools have access to a complete continuum of solutions, and (2) as appropriate, children and youth in the neighborhood who do not attend the target school or schools have access to solutions within the continuum of solutions.

Changes: We have revised paragraph (2) in both Final Planning Priority 1 and Final Implementation Priority 1 to clarify that the plan or strategy must ensure that, over time, a greater proportion of children and youth in the neighborhood who attend the target school or schools have access to a complete continuum of solutions, and ensure that over time, a greater proportion of children in the neighborhood who do not attend the target school or schools have access to solutions within the continuum of solutions. The plan or strategy must also ensure that students not living in the neighborhood who do attend the target school or schools have access to solutions within the continuum of solutions.

Final Planning Priority 1 and Final Implementation Priority 1

Needs Assessment, Segmentation Analysis, and Indicators

Comment: A number of commenters recommended that we require additional results and indicators that focus on areas such as the arts, life-long learning opportunities, out-of-school learning activities, discipline referrals, access to learning materials, volunteer and community service, age-appropriate functioning for four-year-olds, regular school attendance, and access to primary care providers; or populations such as high school graduates who need remediation and students who participate in the child welfare system. One commenter asked the Department to clarify whether applicants have flexibility to substitute required indicators.

Discussion: Regarding the request that we require additional results and indicators on specific topics, grantees, in addition to being required to collect data for the needs assessment that includes education and family and community support program indicators prescribed by the Department, may also develop their own family and community support project indicators. These grantee-developed project indicators may focus on the areas and populations mentioned by the commenters. In addition, eligible applicants may use intermediate variables that are strongly correlated with the required program and project indicators. These intermediate variables may also include variables on the areas and populations mentioned by the commenters (*e.g.,* immunization rates could be an intermediate variable with regard to the result that students are healthy). While we recognize the importance of the topics mentioned by the commenters, we believe providing flexibility to grantees to select indicators is more appropriate than requiring additional specific indicators. In response to the request for clarification, applicants are not allowed to substitute required indicators for this program. Our framework allows for flexibility and ensures that Promise Neighborhood projects across the country are comprehensive in their approach and can be evaluated in a consistent manner by using the set of required indicators.

Changes: None.

Comment: Two commenters recommended changing one of the indicators related to family and community support of learning. Specifically, the commenters recommended that the indicator regarding the number and percent of parents or family members who report that they read to their child three or more times a week begin at the birth of the child, not when the child turns six months, to encourage good habits from the very beginning of a child's life.

Discussion: We agree with the commenter about the importance of reading to children very early in their lives and, therefore, are revising the indicator to focus on children from birth to kindergarten entry, instead of six months to kindergarten entry.

Changes: In both Final Planning Priority 1 and Final Implementation Priority 1, in the indicators found in Table 2, which measures the number and percent of family members who report that they read to their child three or more times a week, we have replaced ''six months to kindergarten entry'' with ''birth to kindergarten entry.''

Comment: One commenter recommended changing the indicator related to students who are healthy. Specifically, the commenter recommended separating the indicator into an indicator for the number and percent of children who participate in at least 60 minutes of exercise and an indicator for the number and percent of children who consume five or more servings of fruits and vegetables daily. According to the commenter, this would allow grantees to demonstrate progress in achieving changes in diet, exercise, or both.

Discussion: We agree with the commenter that disaggregating the data for this indicator would provide more valuable data for the grantees and the community. We, therefore, are revising the indicator accordingly.

Changes: In both Final Planning Priority 1 and Final Implementation Priority 1, we have revised the indicator related to students who are healthy by creating two separate indicators: (1) The number and percent of children who participate in at least 60 minutes of moderate to physical activity daily, and (2) the number and percent of children who consume five or more servings of fruits and vegetables daily.

Comment: Three commenters requested clarification and additional information regarding how the Department defines specific terms used in the indicators. One commenter asked how the Department defines ''access to broadband internet.'' Another commenter asked for clarification regarding the frequency and ''dosage'' of several indicators, including the indicator for parents encouraging their children to read books. A third commenter requested additional information about the definition of ''medical home,'' as it relates to the ''students are healthy'' result.

Discussion: We agree with the commenters that greater clarification and specificity regarding some of the terms used in the indicators could ensure more consistent data collection across the Promise Neighborhoods grantees. The Department anticipates contracting with a national evaluator or other entity to provide technical assistance to Promise Neighborhoods grantees for data collection and to develop data definitions. It is our goal, at a minimum, to make that technical assistance available on the Promise Neighborhoods program Web site for use by grantees, applicants, and other organizations.

Changes: None.

Final Planning Priority 1 and Final Implementation Priority 1

Experience, Lessons Learned, Capacity Building, and Data System

Comment: Several commenters recommended adding more explicit references to the inclusion of parents and family members in applicants' descriptions of their experiences and lessons learned, and how applicants will build capacity, including in collecting, analyzing, and using data. Some commenters recommended requiring applicants to describe their experiences and plans to work with the neighborhood and its residents, including parents and families. The commenters recommended that applicants describe their experience and plans to make Promise Neighborhoods data accessible to parents, families, and community residents, in addition to program partners, researchers, and evaluators.

Discussion: We agree that systemic family and community engagement is a critical component of school reform and neighborhood revitalization in Promise Neighborhoods. Therefore, we are adding more specific references to family and community involvement in the planning and implementation process to elevate their role in the program.

Changes: We have revised paragraph (4)(a) and (b)(ii) of Final Planning Priority 1 and Final Implementation Priority 1 to require applicants to describe their experience and plans to work with parents and families, including families with children or other family members with disabilities or ELs, during planning and implementation, as well as to share data with parents and families.

Comment: Two commenters recommended adding specific

individuals and entities as required partners and members of the governing or advisory board for a Promise Neighborhoods project. One commenter recommended requiring applicants to work in partnership with community organizations, local businesses, and other entities that have the capacity to contribute to a partnership and that have a proven track record as a partner. Another commenter recommended requiring the involvement of parents and families on the Promise Neighborhoods governing board or advisory board.

Discussion: The individuals and entities described by the commenters may very well be appropriate partners or board members for a Promise Neighborhoods project. We believe that the requirements for board membership and partners are sufficiently prescriptive to foster a successful Promise Neighborhood project, but broad enough to allow applicants, who are best positioned to select their partners and board members, the flexibility to choose the board members and partners that they believe can best meet the needs of the neighborhood they propose to serve.

Changes: None.

Comment: One commenter requested clarification regarding whether a partner's financial and programmatic commitments, as described in the memorandum of understanding, may include in-kind commitments. The commenter noted that some partners, such as schools, would not be able to contribute resources other than in-kind supports.

Discussion: A partner's financial and programmatic commitments may include in-kind commitments. Additional information on matching funds, including in-kind contributions, can be found under the cost-sharing and matching section of this notice, and in the Department's regulations at 34 CFR 74.23 and 80.24.

Changes: None.

Comment: One commenter recommended that the Department require solutions that are culturally appropriate for residents in the neighborhood.

Discussion: As included in the background section of the NPP, one of the activities for planning grantees is to develop a plan and build community support for and involvement in the development of the plan. In addition, significant community involvement is required with regard to the governing board's or advisory board's decision-making and is integral to the planning and implementation process, as shown by the focus on *family and community supports.* Moreover, we define *developmentally appropriate early learning measures* to mean, in part, that the measures are designed and validated for use with children whose ages, cultures, languages spoken at home, socioeconomic status, abilities and disabilities, and other characteristics are similar to those of the children with whom the assessments will be used. We believe these provisions help to ensure that the continuum of solutions in a Promise Neighborhood meet the needs of and are linguistically and culturally appropriate for neighborhood residents, including ELs and CWD. In addition, we believe increasing the emphasis on community involvement in the development of the plan will increase the assurance that solutions are culturally appropriate and relevant for neighborhood residents.

Changes: We have revised paragraph (2) of Final Planning Priority 1 and Final Implementation Priority 1 to clarify that one of the required activities during the planning phase is to build community support for and involvement in the development of the plan.

Final Planning Priority 1 and Final Implementation Priority 1

Evaluation

Comment: Several commenters requested clarification and made recommendations regarding the evaluation process. One commenter asked for information about the process the Department will use in selecting a national evaluator and the timing of that selection. Three commenters requested clarification and made recommendations regarding components of the evaluation, including the use of comparison groups. A final commenter requested clarification regarding whether Promise Neighborhood grant funds could be used to conduct the evaluation and needs assessments, including for the early learning indicators.

Discussion: The Department anticipates contracting with a national evaluator or other entity to provide technical assistance to Promise Neighborhoods grantees for data collection and to create the conditions for a rigorous national evaluation. We expect grantees to work with the Department and with the national evaluator or other entity to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods program and are adding this as a requirement in Final Planning Priority 1 and Final Implementation Priority 1. The Department expects to award a contract for this work through a process that is separate from the awarding of planning and implementation grants. The timing and design of the evaluation is currently under development. With regard to the comment about the use of Promise Neighborhoods grant funds, activities conducted by grantees related to evaluations and needs assessments are allowable uses of Promise Neighborhoods grant funds.

Changes: We have revised paragraph (5) of both the Final Planning Priority 1 and Final Implementation Priority 1 to clarify that applicants must describe their commitment to work with the Department and with a national evaluator for Promise Neighborhoods or another entity designated by the Department.

Comment: One commenter recommended that the Department require Promise Neighborhoods applicants to describe how they will engage institutions of higher education (IHEs) in research and evaluation.

Discussion: While IHEs may bring tremendous resources to a Promise Neighborhoods project, including in the areas of research and evaluation, we do not believe the recommended change is needed in order for IHEs to become involved in a Promise Neighborhoods project. IHEs are eligible, on their own, to apply for a Promise Neighborhood grant. Moreover, beyond requiring an applicant to coordinate with a public elementary and secondary school located in the geographic area it proposes to serve, we believe that applicants are best positioned to determine their partners.

Changes: None.

Final Planning Priority 4 and Final Implementation Priority 4

Comprehensive Local Early Learning Network

Comment: Several commenters made recommendations and expressed concerns about references to specific early learning settings in both Final Planning Priority 4 and Final Implementation Priority 4—Comprehensive Local Early Learning Network. One commenter recommended that we add a separate competitive preference priority to encourage formal coordination between Promise Neighborhoods and the Head Start and Early Head Start programs. Another commenter recommended explicitly including private child care providers in Final Planning Priority 4 and Final Implementation Priority 4. Yet another commenter expressed concern that the

requirement to integrate formal early education and care in a Promise Neighborhoods project may not be realistic given cutbacks in funding for early education at the Federal and State levels.

Discussion: Final Planning Priority 4 and Final Implementation Priority 4 encourage proposals and plans that include Head Start and Early Head Start. We do not believe that a separate priority is necessary to coordinate with Head Start because the priorities already include Head Start programs as one of the early learning services. The Department continues to work with other Federal agencies, including the Department of Health and Human Services, to identify additional opportunities to align programs, including through the Race to the Top—Early Learning Challenge program.

With regard to the recommendation to include private child care providers in Priority 4, we agree that private child care providers should be included in both Final Planning Priority 4 and Final Implementation Priority 4 and are making this change accordingly.

Although the Department recognizes that the current fiscal climate may constrain Federal, State, and local financial support for early learning, we expect applicants to propose early learning networks that work across existing funded programs in a variety of early learning settings, including formal care (school-based or private providers) and family, friend, or neighbor care that is currently operating in the neighborhood. This important work to improve quality in existing programs has the potential to improve short-term and long-term educational and developmental outcomes for students.

Changes: We have revised both Final Planning Priority 4 and Final Implementation Priority 4 to include ''child care providers licensed by the State, including public and private providers and center-based care'' among the list of early learning services and programs that applicants can propose to coordinate in its Promise Neighborhood.

Comment: None.

Discussion: After internal review, we determined that the requirement that proposals include various early learning services and programs should be clarified to increase the emphasis on service and program integration focused on enhancing quality.

Changes: We have revised the language in Final Planning Priority 4 and Final Implementation Priority 4 to clarify that proposals integrate various early learning services and programs to enhance the quality of those services and programs.

Comment: Two commenters recommended requiring applicants who address Priority 4 to focus on early literacy and numeracy skills for young people.

Discussion: We agree that early literacy and numeracy are critical areas of cognitive development for young children. Paragraph (2)(a) of Final Planning Priority 1 and paragraph (2)(a)(i) of Final Implementation Priority 1 require applicants to include in their continuum of solutions high-quality learning programs and services designed to improve outcomes across multiple domains of early learning. Although we define multiple domains of learning to include language and literacy development, as well as cognition and general knowledge, including mathematical knowledge, we believe Final Planning Priority 4 and Final Implementation Priority 4 should more explicitly reference the multiple domains of early learning and are changing the language in Priority 4 accordingly.

Changes: We have revised the second sentence in Final Planning Priority 4 and Final Implementation Priority 4 for both planning and implementation grants, which relates to an applicant's plan for a comprehensive local learning network, to focus on improving outcomes across multiple domains of early learning. As defined in this notice, the term ''multiple domains of early learning'' includes early literacy and numeracy.

Comment: One commenter recommended expanding Final Planning Priority 4 and Final Implementation Priority 4 to ensure that the early learning network includes innovative digital programs available on multiple platforms (*e.g.,* public television, web-based) and in multiple locations (*e.g.,* at home, at school, and at other community locations).

Discussion: The Department believes that early learning programs offer a significant opportunity to provide accessible, digital programming to young children and their families and that we should reference such opportunities in Final Planning Priority 4 and Final Implementation Priority 4 to create an incentive for applicants to innovate in this area. We, therefore, are revising the priorities to require that an applicant's proposal or plan for a comprehensive early learning network describe how the project will provide, to the extent practicable, early learning opportunities on multiple platforms and in multiple locations (*e.g.,* at home, at school, and at other community locations). These early learning opportunities must be fully accessible to individuals with disabilities, including individuals who are blind or have low vision; otherwise, the plans must describe how accommodations or modifications will be provided to ensure that the benefits of the early learning opportunities are provided to individuals with disabilities in an equally effective and equally integrated manner.

Changes: We have added language to Final Planning Priority 4 and Final Implementation Priority 4 to clarify that the plan must describe how the project will provide, to the extent practicable, accessible early learning opportunities on multiple platforms (*e.g.,* public television, web-based) and in multiple locations (*e.g.,* at home, at school, and at other community locations).

Comment: One commenter recommended that the Department acknowledge the two distinct time periods within the early learning portion of the continuum—birth to preschool and kindergarten through the third grade. The commenter recommended that we give applicants addressing Final Planning Priority 4 and Final Implementation Priority 4 the flexibility to address the early learning continuum in stages, rather than all at once.

Discussion: We believe that it is important to maintain the focus on a comprehensive and continuous early learning network from birth through third grade rather than distinguishing two separate periods. Without a comprehensive focus on early learning, there is a risk of fragmentation of work and results. However, as we discuss in the response to comments related to Planning Grant Priority 1, we are revising paragraph (2) in both Planning Priority 1 and Implementation Priority 1 to require applicants to describe how they will plan to ensure that the children have, over time, access to the complete continuum of solutions.

Changes: None.

Comment: Two commenters noted that the qualifications for early learning personnel vary by State and requested clarification about the necessary qualifications for the individual responsible for overseeing and coordinating the early learning initiatives.

Discussion: Considering the variation in State early learning certifications, we do not believe additional specificity about the types of certification is appropriate in this program.

Changes: None.

Comment: None.

Discussion: After internal review, we determined that the requirement that the applicant designate an individual to

oversee and coordinate the early learning initiatives and provide applicable documentation should be clarified to ensure that the individual has experience with ''high-quality'' programs and services.

Changes: We have revised the language in Final Planning Priority 4 and Final Implementation Priority 4 to clarify that the documentation the applicant provides must demonstrate that the individual designated to oversee the early learning initiatives or the individual hired to carry out those responsibilities possesses the appropriate State certification and has experience and expertise in managing and administering high-quality early learning programs, including in coordinating across various high-quality early learning programs and services.

Final Planning Priority 5 and Final Implementation Priority 5

Quality Internet Connectivity

Comment: One commenter recommended that the Department create an absolute priority focused on developing programs that promote student engagement, learning, and digital literacy, as well as neighborhood communication and networking, via access to broadband internet and digital television.

Discussion: Broadband internet access is a critical learning tool to prepare students for college and careers in the digital age, which is why we included it as a priority. We believe this priority will create an incentive for applicants to expand access to broadband internet, which will create the conditions for engagement, learning, and digital literacy, as well as neighborhood communication and networking. The decision to use this priority as absolute, competitive preference or invitational will be made on a competition-by-competition basis. For each competition, we announce these designations in the notice inviting applications.

Since June 13, 2009, all full-power U.S. stations have broadcast digital–only signals; we do not believe further incentive is needed to encourage use of digital television. Therefore, we did not include digital television as part of Final Planning Priority 5 or Final Implementation Priority 5.

Changes: None.

Final Planning Priority 7 and Final Implementation Priority 7

Quality Affordable Housing

Comment: Two commenters recommended that the Department expand Final Planning Priority 7 and Final Implementation Priority 7 to include applicants that have submitted an application through Choice Neighborhoods or Hope VI, or that are working on affordable housing generally, rather than restricting the priority to applicants that have been awarded grants under the Choice Neighborhoods or HOPE VI program by the U.S. Department of Housing and Urban Development.

Discussion: Applicants that were the subject of an affordable housing transformation pursuant to a Choice Neighborhoods or HOPE VI grant awarded by the U.S. Department of Housing and Urban Development during FY 2009 or later years may address Final Planning Priority 7 and Final Implementation Priority 7. We are limiting the priority to applicants that have undergone or are undergoing this affordable housing transformation supported by Choice Neighborhoods or a HOPE VI grant because these applicants have met evidence-based criteria as determined by HUD and will be ready to integrate quality, affordable housing into their Promise Neighborhood. Moreover, focusing the priority in this manner supports the goal of Promise Neighborhoods to break down agency ''silos'' at the Federal and local levels, by aligning investments from the Promise Neighborhoods and Choice Neighborhoods or HOPE VI programs. While we decline to expand the priority 7 to include applicants who have applied for but not received a Choice Neighborhoods or Hope VI grant, we want to point out that applicants working on affordable housing generally in their neighborhood may also identify a housing solution to address the ''students live in stable communities'' result described in Final Planning Priority 1 and Final Implementation Priority 1, so long as the solution otherwise meets the requirements in this notice.

Changes: None.

Final Planning Priority 8 and Final Implementation Priority 8

Family Engagement in Learning Through Adult Education

Comment: One commenter recommended that the Department be more explicit about the connection between adult education and family engagement in Final Planning Priority 8 and Final Implementation Priority 8. Specifically, the commenter recommended that these priorities be revised to put a greater emphasis on parent and family partnerships to support improving educational outcomes.

Discussion: The Department acknowledges the importance of family engagement in education and learning. We believe that Final Planning Priority 8 and Final Implementation Priority 8 sufficiently address this issue by focusing on coordinated services, which may include programs that provide training and opportunities for family members to support student learning.

Changes: None.

Implementation Grant Priority 1

Continuum of Solutions

Comment: Several commenters made recommendations and requested guidance regarding the timeline for developing the continuum of solutions. Another commenter requested guidance about how many solutions should be implemented in year one and over time. Two commenters recommended that the Department require applicants for implementation grants to provide information on their startup and ''phasing'' strategy to build the continuum of solutions.

Discussion: Because implementation grantees will build a complete continuum over time, we agree that we should be more explicit about requiring an implementation applicant to include in its proposal its strategy for developing the continuum. We are adding language in Implementation Priority 1 to make this clear. We believe that applicants are best positioned to determine the timing of the phasing strategy to build the continuum of solutions, and therefore, decline to provide guidance on how many solutions should be implemented in year one and over time.

Changes: We have revised Implementation Priority 1 to require applicants to describe in an appendix to the application how and when during the implementation process the solution will be made available to children and youth in the geographic area to be served.

Comment: Several commenters requested clarification and expressed concerns about the expected ''penetration rate'' of solutions, that is, the percentage of all children of the same group within the neighborhood proposed to be served by each solution. Another commenter requested clarification and guidance about setting benchmarks for penetration rates. One commenter expressed concern regarding the requirement that implementation applicants ensure that each child in the neighborhood receives appropriate services. The commenter recommended that applicants be encouraged to

emphasize their plans for growth in the penetration rate over time.

Discussion: Based on the needs assessment and segmentation analysis, an applicant may determine that not every child in the neighborhood needs every solution in its continuum of solutions. Moreover, a 100 percent penetration rate for children and youth in the neighborhood receiving solutions is difficult, if not impossible, to achieve, especially in year one of implementation. We believe that applicants will be best positioned to determine the penetration rate of solutions and, therefore, decline to provide guidance on benchmarks for the penetration rate of solutions. However, we believe it would be helpful to require applicants for implementation grants to describe their annual goals for increasing the penetration rate over time and are changing Final Implementation Priority 1 accordingly.

Changes: We have revised paragraph (3) of Final Implementation Priority 1 to clarify that implementation applicants must describe how they will ensure that children in the neighborhood receive the appropriate services. While not necessarily every child will receive services, specific groups of children (*i.e.,* CWD and ELs) must not be excluded from the plan. We have also revised paragraph (2) of Final Implementation Priority 1 to require implementation applicants to describe their goals to increase the penetration rate over time.

Comment: Two commenters recommended that the Department acknowledge the long-term nature of the work required to transform neighborhoods. Specifically, they stated that the ultimate success of Promise Neighborhoods will require the use of both short-term and long-term goals to measure progress.

Discussion: We agree that the difficult work of dramatically improving the quality of education and transforming distressed neighborhoods demand both a sense of urgency and sufficient time to implement change properly. Given this reality, it is important to measure success using short-term and long-term goals.

Changes: We have revised paragraph (2) of Final Implementation Priority 1 to acknowledge that, considering the time and urgency required to dramatically improve outcomes of children and youth in our most distressed neighborhoods and to transform those neighborhoods, an applicant must establish both short-term and long-term goals against which it will measure its progress.

Comment: One applicant expressed concern that reviewers would use per-child cost estimates for providing solutions to make comparisons among applicants and to make scoring decisions.

Discussion: The Department directs peer reviewers to score applications against the established selection criteria and not to make comparisons among and between applications.

Changes: None.

Comment: One commenter expressed concern with the requirement that implementation applicants establish annual goals for improving systems, such as changes in policies, environments, or organizations that affect children and youth in the neighborhood. The commenter stated that setting annual goals for improving systems can be distracting to the short-term work that must happen in the neighborhood.

Discussion: Changes in the neighborhood and systems change may happen concurrently. Alignment of the Promise Neighborhoods strategy with a local educational agency's (LEA) school turnaround effort supported by SIG funds in neighborhood schools is an example of an annual goal for improving systems that may directly support short-term work that must happen in the neighborhood.

Changes: None.

Implementation Grant Priority 1

Needs Assessment, Segmentation Analysis, and Indicators

Comment: None

Discussion: After internal review, we noted that the NPP encouraged, but did not require implementation applicants to describe how they collected data for educational and family and community support indicators. We intend to require applicants to describe their data collection process because data collection is a critical component of a successful Promise Neighborhood.

Changes: We changed ''should'' to ''must'' to specify that an applicant for an implementation grant is required to describe how it collected data for educational and family and community support indicators.

Comment: One commenter recommended that we require applicants to describe how the implementation of solutions will work at the individual level. The commenter also recommended that the Department require applicants to describe how they will help children, youth, and families navigate multiple public systems and obtain the full benefits of the continuum of solutions.

Discussion: An implementation applicant will be required to describe how it is using its needs assessment and segmentation analysis to ensure that children in the neighborhood receive appropriate services from the continuum of solutions. An effective needs assessment and segmentation analysis will create the conditions for effective targeting and service delivery that meet the individual needs of residents, and thus reduce the need for the residents to navigate multiple public systems. Therefore, we do not believe it is necessary to include the additional requirement recommended by the commenter.

Changes: None.

Comment: One commenter recommended that implementation applicants be required only to demonstrate that they have collected data on a majority of the indicators and that they be allowed to identify indicators for which they will have the data in hand by the end of the planning or early implementation phase. Another commenter expressed concerns about the financial and time costs of collecting the required data.

Discussion: Implementation applicants are required to describe how they collected data on the indicators described in Table 1 and Table 2 in Final Implementation Priority 1 for the needs assessment. Paragraph (3) of Final Implementation Priority 1 requires applicants to describe how the data were used to ensure that children receive the appropriate services from the continuum of solutions. Implementation applicants must accurately describe their needs assessment and segmentation analysis process. Under the design of the Promise Neighborhoods program, applicants are expected to complete a rigorous needs assessment during the planning phase and collect baseline data during the first year of implementation. Data collection and management is a critical component of Final Implementation Priority 1, and we decline to loosen our requirements in this area as requested by the commenter.

While we appreciate the costs associated with the required data collection, activities associated with data collection and management are eligible uses of Promise Neighborhoods grant funds. Moreover, we believe that the costs and time involved in the required data collection and management activities are necessary to the overall success of Promise Neighborhoods.

Changes: None.

Implementation Priority 1

Experience, Lessons Learned, Capacity Building, and Data System

Comment: Two commenters recommended that implementation applicants describe the progress they have made on developing their longitudinal data systems and linking their systems to school-based, LEA, and State data systems. One of the commenters recommended that the Department support the implementation of longitudinal data systems that build on existing systems, rather than the creation of new systems. In light of the challenges in integrating student-level data from multiple sources, especially while abiding by privacy laws and requirements, another commenter recommended that applicants explain their progress in integrating student-level data from multiple sources. One commenter requested information regarding the Department's expectations for having the applicant's longitudinal data system in operation at the time the application is submitted or a grant is awarded.

Discussion: We expect that the data systems managed by implementation applicants will be at different stages of development. We agree with the commenters that applicants should have the flexibility to build upon an existing data system or create a new system, and are changing paragraph (4)(b) in the Implementation Priority 1 accordingly. We also believe that each implementation applicant should describe its progress in implementing its longitudinal data system, including the progress it has made in linking its system to school-based, LEA, and State data systems, and integrating student-level data from multiple sources. We will revise Implementation Priority 1 accordingly.

Changes: We have added language to paragraph (4)(b)(i) in Implementation Priority 1 to require an implementation applicant to describe progress toward developing and implementing its data system and in integrating student-level data from multiple sources. We also have added language to paragraph (4)(b)(ii) of this priority to require each implementation applicant to describe how it has linked or made progress to link its longitudinal data system to school-based, LEA, and State data systems.

Final Implementation Priority 4

Comprehensive Local Early Learning Network

Comment: None.

Discussion: After internal review, we noted that the NPP encouraged, but did not require the implementation plan for a high-quality and comprehensive local early learning network to reflect input from a broad range of stakeholders. We intend to require the plan to reflect such input because we believe that diverse viewpoints will strengthen the final product.

Changes: We changed ''should'' to ''must'' to specify that the implementation plan for a high-quality and comprehensive local early learning network is required to reflect input from a broad range of stakeholders.

Implementation Optional Supplemental Funding Opportunity

Comment: Several commenters expressed their support for the Optional Supplemental Funding Opportunity from the Department of Justice (DOJ) and recommended that the Department require similar alignment with other programs and initiatives, both within the Department of Education and with other Federal agencies.

Discussion: We agree with the commenters that it is important to create opportunities for alignment and funding opportunities among multiple programs and Federal agencies and will continue pursuing such opportunities in the future. Moreover, paragraph (4)(e) in the Planning Priority 1 and Implementation Priority 1 require applicants to describe their experience integrating funding streams from multiple sources. We believe this approach better supports organizations pursuing comprehensive, cradle-through-college-to-career strategies to revitalize neighborhoods.

Changes: None.

Comment: One commenter recommended that we revise the Optional Supplemental Funding Opportunity to provide more flexibility in an implementation applicant's public safety plans. Specifically, the commenter recommended allowing applicants to pursue public safety strategies that include prevention, intervention, enforcement, or a focus on the reentry of offenders, instead of the Department requiring all of these four strategies.

Discussion: The Department anticipates providing additional details regarding the Optional Supplemental Funding Opportunity in the NIA. The NIA will likely include further direction to applicants regarding the areas to be addressed in and the uses of funds to pursue a comprehensive public safety strategy, including whether or not an applicant must address all four strategies.

Changes: None.

Requirements

Planning and Implementation Grants Requirements

Eligible Applicants

Comment: One commenter recommended that the Department allow all eligible entities, not only FY 2010 Promise Neighborhoods planning grantees, to submit applications for implementation grants.

Discussion: Eligible applicants for implementation grants are not restricted to grantees that received FY 2010 Promise Neighborhoods planning grants. Applicants that did not compete for or receive a planning grant may compete for an implementation grant alongside FY 2010 planning grantees. While all eligible entities will be able to apply for implementation grants, communities that have effectively carried out the planning activities described in the FY 2010 notice inviting applications, whether independently or through a Promise Neighborhoods planning grant, are likely to be well-positioned with the plan, commitments, data, and demonstrated organizational leadership and capacity necessary to develop a quality application for an implementation grant.

Changes: None.

Other Requirements

Comment: One commenter recommended limiting the indirect cost rates that Promise Neighborhoods grantees can include in their budgets to 20 percent or less of the grant amount.

Discussion: The Department does not believe it is necessary to adopt the commenters' suggestion because it is not aware of any evidence that there is a link between indirect cost rates that are 20 percent or higher and problems with grantee performance for the Promise Neighborhoods program, or any other discretionary grant program administered by this agency. Federal agencies, including the Department, carefully negotiate indirect cost rates with grantees and believe that the negotiated rates are appropriate. Thus, grantees are allowed to spend up to that negotiated amount.

Changes: None.

Matching

Planning and Implementation Grants Matching

Comment: One commenter requested that the Department provide more information about potential match sources, including eligible and ineligible sources.

Discussion: Additional information on matching funds, including in-kind

contributions, can be found in the Department's regulations at 34 CFR 74.23 and 80.24. In addition, the Department expects to issue a ''frequently asked questions'' guidance document that will provide information on requirements, such as the matching funds requirement.

Changes: None.

Implementation Grants Matching

Comment: One commenter requested that the Department reduce the private match requirement for implementation applicants proposing to serve rural and tribal communities from 10 percent to 5 percent.

Discussion: The Department's decision that implementation applicants demonstrate a private-sector match of at least 10 percent of the total amount of Federal funds requested is based on the determination that this amount of private support is a strong indicator of the potential for sustaining the proposed project over time. However, the Department understands the concerns raised by the commenters and points out that we will permit applicants to count in-kind contributions towards the 10 percent private sector matching requirement and to request a waiver of the matching requirement in the most exceptional circumstances. In addition, rural and tribal implementation applicants are only required to provide half the amount of total matching funds (50 percent versus 100 percent).

Changes: None.

Comment: One commenter suggested that the Department reconsider the 100 percent match requirement for implementation grants and instead consider a scaled approach that would increase the matching percentage required over time.

Discussion: The implementation grant match may include resources (cash or in-kind donations) from Federal, State, and local public agencies, philanthropic organizations, private businesses, or individuals. The Department believes that this allows sufficient flexibility for applicants to secure the full 100 percent match. We also note that rural and tribal applicants for implementation grants are only required to obtain a 50 percent match.

Changes: None.

Definitions

Planning and Implementation Grants Definitions

Education Programs

Comment: None.

Discussion: After internal review, we believe the Department must be more explicit about the requirement that the standards with which high-quality early learning programs must align are ''State early learning and development'' standards, as appropriate, to provide clarity and consistency for grantees.

Changes: We are revising paragraph (1) of the definition of education programs to clarify that high-quality early learning programs must align with ''State early learning and development'' standards, as appropriate.

Comment: One commenter recommended that the Department require applicants to describe how solutions will help young people through college and into their career.

Discussion: We agree with the commenter that the end of the cradle-through-college-to-career solutions is a critical area of focus for Promise Neighborhoods. This is especially true considering the challenges faced by many first-generation college students from distressed neighborhoods and in light of the Administration's goal that the United States lead the world in the proportion of college graduates by 2020. Therefore, we are revising the definition of *education programs* to focus on the transition through college and into the workforce.

Changes: We have added a new paragraph (f) in the definition of *education programs* that specifies that education programs include programs that support college students, including CWD and ELs, from the neighborhood to transition to college, persist in their academic studies, graduate, and transition into the workforce.

Family and Community Supports

Comment: Several commenters recommended changing the definition of *family and community supports* to ensure that there is a more extensive and systemic role for family and community engagement in education.

Discussion: We agree that strategies for family and community engagement in education must be integrated throughout the work of Promise Neighborhoods and, therefore, are revising the definition of *family and community supports* to make this clear.

Changes: We have revised paragraph (4) in the definition of *family and community supports* by adding language stating that family and community supports includes family and community engagement programs that are systemic, integrated, sustainable, and continue through a student's transition from K–12 school to college and career. In addition, we have added language to specify that these programs also include programs that support the engagement of families in early learning programs and services; programs that provide guidance on how to navigate through a complex school system and advocacy for more and improved learning opportunities; and programs that promote collaboration with educators and community organizations to improve opportunities for healthy development and learning.

Comment: One commenter recommended that applicants partner with organizations, such as television and radio stations that are able to distribute information about solutions through the Promise Neighborhoods.

Discussion: The definition of *family and community supports* includes programs that provide for the use of such community resources as libraries, museums, and local businesses to support improved student education outcomes. We agree with the commenter and will include television and radio stations as additional examples of community resources that can be used to support and distribute information about the Promise Neighborhood efforts and are making this change to the definition of *family and community supports.*

Changes: We have revised the definition of *family and community supports* to include local television and radio stations as additional examples of community resources that can support and align with family and community engagement programs.

Indian Tribe

Comment: One commenter recommended that the Department expand the definition of Indian tribe to include additional Alaskan ''tribes.''

Discussion: In the NPP, the Department proposed to define the term *Indian tribe* to include any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe, 25 U.S.C. 479a and 479a–1. This proposed definition was consistent with the definition we used in the 2010 Promise Neighborhoods competition. However, we agree with the commenter that this definition should include Alaskan tribes and, for this reason, are revising the definition to include any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601.

Changes: We have changed the definition of *Indian tribe* to include: Any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, et seq., that is recognized as eligible for the special programs and

services provided by the United States to Indians because of their status as Indians. Also, we now specify in the definition of *Indian tribe* that the term ''Indian'' means a member of an Indian tribe.

Neighborhood

Comment: One commenter recommended that the Department expand a Promise Neighborhood to include ''affinity groups.''

Discussion: The Promise Neighborhoods program is focused on geographically defined areas. Although we provide flexibility in how applicants define geographically-defined areas, which may be noncontiguous, geographical proximity and the need to serve a high percentage of children and youth within the geographic areas are important components of the program. Affinity groups, which we interpret to mean a group of people having a common interest or goal or acting together for a specific purpose, may not always be geographically-defined.

Changes: None.

Neighborhood Assets

Comment: One commenter recommended that the Department revise the definition of *neighborhood assets* so that the reference to ''social assets'' specifically includes parents and families.

Discussion: The Department agrees that parents and families are important neighborhood assets. We did not intend to exclude them but merely implied their inclusion in ''community.'' However, we believe that specifically including parents and families in this definition will emphasize their importance as examples of social assets and are making this change in the definition of *neighborhood assets.*

Changes: We have revised paragraph (5) in the definition of *neighborhood assets* to include ''partnerships with youth, parents, and families'' as an example of social assets that establish well-functioning social interactions.

Persistently Lowest-Achieving Schools

Comment: One commenter recommended that the Department broaden the definition of *persistently lowest-achieving schools* to include the bottom 10 percent of lowest-performing schools.

Discussion: The definition of *persistently lowest achieving schools* is consistent with the definition used in the Department's RTT and SIG programs. We believe that using the same definition across these programs ensures that the comprehensive education programs implemented in Promise Neighborhoods are consistent with efforts to reform low-performing schools under other programs supported by the Department. Additionally, an applicant may also propose to serve, through a Promise Neighborhoods grant, low-performing schools (as defined in the notice) that are not also persistently lowest-achieving schools, which could include a school in the neighborhood that is in the bottom 10 percent of lowest performing schools in the State.

Changes: None.

School Climate Needs Assessment

Comment: One commenter recommended that the Department modify the definition of *school climate needs assessment* to include one or more needs assessment tools. In particular the commenter requested that we revise the definition to explicitly require the needs assessment to assess the needs of different stakeholders, including students, staff, parents, families, and the community.

Discussion: The Department recognizes the potential difficulty in obtaining the views of multiple stakeholders regarding school climate using a single tool. However, we believe that requiring applicants to include students, staff, parents, families, and the community in its needs assessment, as recommended by the commenter, would significantly increase implementation costs. This increase in costs would result from additional costs associated with ensuring consistency in the use of the tool across Promise Neighborhoods sites. Applicants may choose to add stakeholders and tools to perform the school climate needs assessment, but at a minimum must use an evaluation tool that measures the extent to which the school setting promotes or inhibits academic performance by collecting perception data from individuals, which could include students, staff, or families.

Changes: None.

Strong Evidence

Comment: One commenter expressed support for the definitions of *strong evidence* and *moderate evidence,* as well as the reference to best available evidence.

Discussion: The tiered levels of evidence reflect the Department's efforts to balance the need to cultivate new programs with support for existing programs that have proven to be effective.

Changes: None.

Selection Criteria

General—Selection Criteria

Comment: One commenter recommended that we reorganize the selection criteria categories to include project design, schools, neighborhood experience, data and indicators, funding, and project significance.

Discussion: Each Promise Neighborhood project must have several core features: Significant need in the neighborhood for the grant services, a strategy to build a continuum of solutions with strong schools at the center, and the capacity to achieve results. We believe the selection criteria are best organized to align with these core features. Thus, the ''need for project'' criterion aligns with the absolute priority requirement that applicants describe the need in the neighborhood. The ''quality of project design'' and ''quality of project services'' criteria align with the absolute priority requirement that applicants describe a strategy to build a continuum of solutions with strong schools at the center. The ''quality of the management plan'' criterion aligns with the absolute priority requirement that applicants describe their capacity to achieve results.

Changes: None.

Planning and Implementation Grants Selection Criterion

Planning and Implementation Grants Selection Criterion 4—Quality of Management Plan

Comment: One commenter recommended that the quality of management plan criterion be revised to require applicants to describe how the applicant will hold partners accountable for outcomes.

Discussion: We agree that holding partners accountable for performance is critical to realizing the program's vision that all children and youth growing up in Promise Neighborhoods have access to great schools and strong systems of family and community support that will prepare them to attain an excellent education and successfully transition to college and a career. Therefore, we are changing the criterion accordingly.

Changes: We have revised the quality of management plan selection criterion paragraph (b)(iii) for planning and implementation applicants to require applicants to describe in their memorandum of understanding ''a system for holding partners accountable.'' A similar change was made in paragraph (4)(d) of Final Planning Priority 1 and Final Implementation Priority 1.

Implementation Grants Selection Criteria

Implementation Grants Selection Criterion 2—Quality of Project Design

Comment: Two commenters recommended that the selection criteria emphasize the quality and likely success of the plan, including how an applicant included neighborhood residents in its development.

Discussion: The selection criteria for implementation grants address the quality and success of the planning process, which includes resident engagement. Specifically, peer reviewers will use selection criterion (2)(b)(iv), quality of the project design, to judge applicants' experiences in integrating high-quality programs into the continuum of solutions, including during the planning process. In addition, peer reviewers will use selection criterion (4)(b)(i), quality of the management plan, to judge the applicants' work with neighborhood residents. Therefore, we do not believe a change in the selection criteria, as recommended by the commenters, is necessary.

Changes: None.

Implementation Grants Selection Criterion 3—Quality of Project Services

Comment: Two commenters recommended that implementation applicants describe their goals for improvement, as measured by the indicators.

Discussion: We agree that Promise Neighborhoods should establish goals for improving outcomes for children and youth over time and are revising the selection criterion for quality of project services, as well as Implementation Grant Priority 1 so that there is a clear focus on an applicant's improvement in achieving results as measured by the required indicators.

Changes: We have revised paragraph (3)(b)(iii) in the quality of project services selection criterion by replacing the word ''changes'' with the word ''improvement.'' Under paragraph (3)(b)(iii) we measure the extent to which the applicant describes clear, annual goals for growth on indicators. We also have revised Implementation Grant Priority 1, paragraph (3)(c) to require applicants to describe how it will collect clear, annual goals for growth on indicators.

Implementation Grants Selection Criterion 4—Quality of Management Plan

Comment: One commenter requested clarification about how an applicant's efforts to sustain and scale-up its program will be evaluated under the selection criteria.

Discussion: Applicants are required to describe their experience, lessons learned, and a plan to build capacity in several areas, including creating and strengthening formal and informal partnerships to sustain and scale up what works. Peer reviewers will consider an applicant's description of its partnerships to sustain and scale up as part of the quality of the management plan under paragraph (4)(b)(iii) of the selection criteria.

Changes: None.

Final Priorities

Final Planning Grant Priority 1 (Absolute): Proposal To Develop a Promise Neighborhood Plan

To meet this priority, an applicant must submit a proposal for how it will plan to create a Promise Neighborhood. This proposal must describe the need in the neighborhood, a strategy to build a continuum of solutions, and the applicant's capacity to achieve results. Specifically, an applicant must—

(1) Describe the geographically defined area [1] (neighborhood) to be served and the level of distress in that area based on indicators of need and other relevant indicators. Applicants may propose to serve multiple, non-contiguous geographically defined areas. In cases where target areas are not contiguous, the applicant must explain its rationale for including non-contiguous areas;

(2) Describe how it will plan to build a continuum of solutions based on the best available evidence including, where available, strong or moderate evidence (as defined in this notice) designed to significantly improve educational outcomes and to support the healthy development and well-being of children and youth in the neighborhood. The applicant must also describe how it will build community support for and involvement in the development of the plan. The plan must be designed to ensure that over time, children and youth in the neighborhood who attend the target school or schools have access to a complete continuum of solutions, and ensure, as appropriate, that children and youth in the neighborhood who do not attend the target school or schools have access to solutions within the continuum of solutions. The plan must also ensure that students not living in the neighborhood who attend the target school or schools have access to solutions within the continuum of solutions.

The success of the applicant's strategy to build a continuum of solutions will be based on the results of the project, as measured against the project indicators defined in this notice and described in Table 1 and Table 2. In its strategy, the applicant must describe how it will determine which solutions within the continuum of solutions to implement, and must include—

(a) High-quality early learning programs and services designed to improve outcomes across multiple domains of early learning (as defined in this notice) for children from birth through third grade;

(b) Ambitious, rigorous, and comprehensive education reforms that are linked to improved educational outcomes for children and youth in preschool through the 12th grade. Public schools served through the grant may include persistently lowest-achieving schools (as defined in this notice) or low-performing schools (as defined in this notice) that are not also persistently lowest-achieving schools. An applicant (or one or more of its partners) may serve an effective school or schools (as defined in this notice) but only if the applicant (or one or more of its partners) also serves at least one low-performing school (as defined in this notice) or persistently lowest-achieving school (as defined in this notice). An applicant must identify in its application the public school or schools that would be served and the current status of reforms in the school or schools, including, if applicable, the type of intervention model being implemented. In cases where an applicant operates a school or partners with a school that does not serve all students in the neighborhood, the applicant must partner with at least one additional school or schools that also serves students in the neighborhood. An applicant proposing to work with a persistently lowest-achieving school must include as part of its strategy one of the four school intervention models (turnaround model, restart model, school closure, or transformation model) described in Appendix C of the Race to the Top (RTT) notice inviting applications for new awards for FY 2010 that was published in the **Federal Register** on November 18, 2009 (74 FR 59836, 59866).

An applicant proposing to work with a low-performing school must include, as part of its strategy, ambitious, rigorous, and comprehensive interventions to assist, augment, or replace schools, which may include implementing one of the four school

[1] For the purposes of this notice, the Department uses the terms ''geographic area'' and ''neighborhood'' interchangeably.

intervention models, or may include another model of sufficient ambition, rigor, and comprehensiveness to significantly improve academic and other outcomes for students. An applicant proposing to work with a low-performing school must include an intervention that addresses the effectiveness of teachers and leaders and the school's use of time and resources, which may include increased learning time (as defined in this notice);

Note regarding school reform strategies: So as not to penalize an applicant for proposing to work with an LEA that has implemented rigorous reform strategies prior to the publication of this notice, an applicant is not required to propose a new reform strategy in place of an existing reform strategy in order to be eligible for a Promise Neighborhoods planning grant. For example, an LEA might have begun to implement improvement activities that meet many, but not all, of the elements of a transformation model of school intervention. In this case, the applicant could propose, as part of its Promise Neighborhood strategy, to work with the LEA as the LEA continues with its reforms.

(c) Programs that prepare students to be college- and career-ready; and

(d) Family and community supports (as defined in this notice).

To the extent feasible and appropriate, the applicant must describe, in its plan, how the applicant and its partners will leverage and integrate high-quality programs, related public and private investments, and existing neighborhood assets into the continuum of solutions.

An applicant must also describe in its plan how it will identify Federal, State, or local policies, regulations, or other requirements that would impede its ability to achieve its goals and how it will report on those impediments to the Department and other relevant agencies.

As part of the description of how it will plan to build a continuum of solutions, the applicant must describe how it will participate in, organize, or facilitate, as appropriate, communities of practice (as defined in this notice) for Promise Neighborhoods.

(3) Specify how it will conduct a comprehensive needs assessment and segmentation analysis of children and youth in the neighborhood during the planning grant project period and explain how it will use this needs assessment and segmentation analysis to determine the children with the highest needs and ensure that those children receive the appropriate services from the continuum of solutions. In this explanation of how it will use the needs assessment and segmentation analysis, the applicant must identify and describe in the application both the educational indicators and the family and community support indicators that the applicant will use in conducting the needs assessment during the planning year. During the planning year, the applicant must—

(a) Collect data for the educational indicators listed in Table 1 and use them as both program and project indicators;

(b) Collect data for the family and community support indicators in Table 2 and use them as program indicators; and

(c) Collect data for unique family and community support indicators, developed by the applicant, that align with the goals and objectives of projects and use them as project indicators or use the indicators in Table 2 as project indicators.

Note: Planning grant applicants are not required to propose solutions in their applications; however, they are required to describe how they will identify solutions, including the use of available evidence, during the planning year that will result in improvements on the project indicators.

TABLE 1—EDUCATION INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# and % of children birth to kindergarten entry who have a place where they usually go, other than an emergency room, when they are sick or in need of advice about their health.	Children enter kindergarten ready to succeed in school.
—# and % of three-year-olds and children in kindergarten who demonstrate at the beginning of the program or school year age-appropriate functioning across multiple domains of early learning (as defined in this notice) as determined using developmentally appropriate early learning measures (as defined in this notice).	
—# & % of children, from birth to kindergarten entry, participating in center-based or formal home-based early learning settings or programs, which may include Early Head Start, Head Start, child care, or preschool.	
—# & % of students at or above grade level according to State mathematics and reading or language arts assessments in at least the grades required by the ESEA (3rd through 8th and once in high school).	Students are proficient in core academic subjects.
—Attendance rate of students in 6th, 7th, 8th, and 9th grade	Students successfully transition from middle school grades to high school.
—Graduation rate (as defined in this notice)	Youth graduate from high school.
—# & % of Promise Neighborhood students who graduate with a regular high school diploma, as defined in 34 CFR 200.19(b)(1)(iv), and obtain postsecondary degrees, vocational certificates, or other industry-recognized certifications or credentials without the need for remediation.	High school graduates obtain a postsecondary degree, certification, or credential.

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE:

Indicator	Result
—# & % of children who participate in at least 60 minutes of moderate to vigorous physical activity daily; and.	Students are healthy.
—# & % of children who consume five or more servings of fruits and vegetables daily; or	
—possible third indicator, to be determined (TBD) by applicant.	
—# & % of students who feel safe at school and traveling to and from school, as measured by a school climate needs assessment (as defined in this notice); or.	Students feel safe at school and in their community.
—possible second indicator, TBD by applicant.	
—Student mobility rate (as defined in this notice); or	Students live in stable communities.
—possible second indicator, TBD by applicant.	

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE:—Continued

Indicator	Result
—For children birth to kindergarten entry, the # and % of parents or family members who report that they read to their child three or more times a week; —For children in kindergarten through the eighth grade, the # and % of parents or family members who report encouraging their child to read books outside of school; and —For children in the ninth through twelfth grades, the # and % of parents or family members who report talking with their child about the importance of college and career; or —possible fourth indicator TBD by applicant.	Families and community members support learning in Promise Neighborhood schools.
—# & % of students who have school and home access (and % of the day they have access) to broadband internet (as defined in this notice) and a connected computing device; or —possible second indicator TBD by applicant.	Students have access to 21st century learning tools.

Note: The indicators in Table 1 and Table 2 are not intended to limit an applicant from collecting and using data for additional indicators. Examples of additional indicators are—

(i) The # and % of children who participate in high-quality learning activities during out-of-school hours or in the hours after the traditional school day ends;

(ii) The # and % of children who are suspended or receive discipline referrals during the school year;

(iii) The share of housing stock in the geographically defined area that is rent-protected, publicly assisted, or targeted for redevelopment with local, State, or Federal funds; and

(iv) The # and % of children who are homeless or in foster care and who have an assigned adult advocate.

Note: While the Department believes there are many programmatic benefits of collecting data on every child in the proposed neighborhood, the Department will consider requests to collect data on only a sample of the children in the neighborhood for some indicators so long as the applicant describes in its application how it would ensure the sample would be representative of the children in the neighborhood.

(4) Describe the experience and lessons learned, and describe how the applicant will build the capacity of its management team and project director in all of the following areas:

(a) Working with the neighborhood and its residents, including parents and families that have children or other family members with disabilities or ELs, as well as with the school(s) described in paragraph (2) of this priority; the LEA in which the school or schools are located; Federal, State, and local government leaders; and other service providers.

(b) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability. The applicant must describe—

(i) Its proposal to plan to build, adapt, or expand a longitudinal data system that integrates student-level data from multiple sources in order to measure progress on educational and family and community support indicators for all children in the neighborhood, disaggregated by the subgroups listed in section 1111(b)(3)(C)(xiii) of the ESEA;

(ii) How the applicant will link the longitudinal data system to school-based, LEA, and State data systems; make the data accessible to parents, families, community residents, program partners, researchers, and evaluators while abiding by Federal, State, and other privacy laws and requirements; and manage and maintain the system;

(iii) How the applicant will use rapid-time (as defined in this notice) data both in the planning year and, once the Promise Neighborhood strategy is implemented, for continuous program improvement; and

(iv) How the applicant will document the planning process, including by describing lessons learned and best practices;

(c) Creating formal and informal partnerships, for such purposes as providing solutions along the continuum of solutions and attaining resources to sustain and scale up what works. An applicant, as part of its application, must submit a preliminary memorandum of understanding, signed by each organization or agency with which it would partner in planning the proposed Promise Neighborhood. The preliminary memorandum of understanding must describe—

(i) Each partner's financial and programmatic commitment; and

(ii) How each partner's existing vision, theory of change (as defined in this notice), theory of action (as defined in this notice), and existing activities align with those of the proposed Promise Neighborhood strategy;

(d) The governance structure proposed for the Promise Neighborhood, including a system for holding partners accountable, how the eligible entity's governing board or advisory board is representative of the geographic area proposed to be served (as defined in this notice), and how residents of the geographic area would have an active role in the organization's decision-making; and

(e) Securing and integrating funding streams from multiple public and private sources from the Federal, State, and local level. Examples of public funds include Federal resources from the U.S. Department of Education, such as the 21st Century Community Learning Centers program and title I of the ESEA, and from other Federal agencies, such as the U.S. Departments of Health and Human Services, Housing and Urban Development, Justice, Labor, and Treasury.

(5) Describe the applicant's commitment to work with the Department, and with a national evaluator for Promise Neighborhoods or another entity designated by the Department, to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods program and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(a) Ensuring that, through memoranda of understanding with appropriate entities, the national evaluator and the Department have access to relevant program and project data (*e.g.,* administrative data and program and project indicator data), including data on a quarterly basis if requested by the Department;

(b) Developing, in consultation with the national evaluator, an evaluation strategy, including identifying a credible comparison group; and

(c) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for both program participants and a designated comparison group of non-participants.

Final Planning Grant Priority 2 (Absolute): Promise Neighborhoods in Rural Communities

To meet this priority, an applicant must propose to develop a plan for

implementing a Promise Neighborhood strategy that (1) meets all of the requirements in *Absolute Priority 1;* and (2) proposes to serve one or more rural communities only.

Final Planning Grant Priority 3 (Absolute): Promise Neighborhoods in Tribal Communities

To meet this priority, an applicant must propose to develop a plan for implementing a Promise Neighborhood strategy that (1) meets all of the requirements in *Absolute Priority 1;* and (2) proposes to serve one or more Indian tribes (as defined in this notice).

Final Planning Grant Priority 4: Comprehensive Local Early Learning Network

To meet this priority, an applicant must propose to develop a plan to expand, enhance, or modify an existing network of early learning programs and services to ensure that they are high-quality and comprehensive for children from birth through the third grade. The plan must also ensure that the network establishes a high standard of quality across early learning settings and is designed to improve outcomes across multiple domains of early learning. Distinct from the early learning solutions described in paragraph (2) of *Absolute Priority 1,* this priority supports proposals to develop plans that integrate various early learning services and programs in the neighborhood in order to enhance the quality of such services and programs, *i.e.,* school-based early learning programs; locally- or State-funded preschool programs; Early Head Start and Head Start; the local child care resource and referral agency, if applicable; Individuals with Disabilities Education Act (IDEA) services and programs; services through private providers; home visiting programs; public and private child care providers that are licensed by the State, including public and private providers and center-based care; and family, friend, or neighbor care in the Promise Neighborhood.

The local early learning network must address or incorporate ongoing State-level efforts regarding the major components of high-quality early learning programs and services, such as State early learning and development standards, program quality standards, comprehensive assessment systems, workforce and professional development systems, health promotion, family and community engagement, a coordinated data infrastructure, and a method of measuring, monitoring, evaluating, and improving program quality. For example, an applicant might address how the Promise Neighborhoods project will use the State's early learning standards, as applicable, and the Head Start Child Development and Early Learning Framework (Framework), as applicable, to define the expectations of what children should know and be able to do before entering kindergarten. The Framework is available on the Office of Head Start's Web site at: *http://eclkc.ohs.acf.hhs.gov/hslc/ecdh/eecd/Assessment/Child%20Outcomes/HS_Revised_Child_Outcomes_Framework.pdf.* Similarly, an applicant that addresses this priority must discuss, where applicable, how it would align with the State's Quality Rating and Improvement System (QRIS), as applicable, professional development and workforce infrastructure, and other appropriate State efforts. In addition, the proposal must describe how the project will provide, to the extent practicable, early learning opportunities on multiple platforms (*e.g.,* public television, web-based) and in multiple locations (*e.g.,* at home, at school, and at other community locations.)

Note regarding accessibility of early learning programs and services: These early learning opportunities must be fully accessible to individuals with disabilities, including individuals who are blind or have low vision; otherwise, the plans must describe how accommodations or modifications will be provided to ensure that the benefits of the early learning opportunities are provided to children and youth with disabilities in an equally effective and equally integrated manner.

The proposal to develop a plan for a high-quality and comprehensive local early learning network must describe the governance structure and how the applicant will use the planning year to plan solutions that address the major components of high-quality early learning programs and services as well as establish goals, strategies, and benchmarks to provide early learning programs and services that result in improved outcomes across multiple domains of early learning (as defined in this notice). An applicant addressing this priority must designate an individual responsible for overseeing and integrating the early learning initiatives and must include a resume or position description and other supporting documentation to demonstrate that the individual designated, or individual hired to carry out those responsibilities, possesses the appropriate State certification, and has experience and expertise in managing and administering high-quality early learning programs, including in coordinating across various high-quality early learning programs and services.

Final Planning Grant Priority 5: Quality Internet Connectivity

To meet this priority, an applicant must propose to develop a plan to ensure that almost all students in the geographic area proposed to be served have broadband Internet access (as defined in this notice) at home and at school, the knowledge and skills to use broadband Internet access effectively, and a connected computing device to support schoolwork.

Final Planning Grant Priority 6: Arts and Humanities

To meet this priority, an applicant must propose to develop a plan to include opportunities for children and youth to experience and participate actively in the arts and humanities in their community so as to broaden, enrich, and enliven the educational, cultural, and civic experiences available in the neighborhood. Applicants may propose to develop plans for offering these activities in school and in out-of-school settings and at any time during the calendar year.

Final Planning Grant Priority 7: Quality Affordable Housing

To meet this priority, an applicant must propose to serve geographic areas that were the subject of an affordable housing transformation pursuant to a Choice Neighborhoods or HOPE VI grant awarded by the U.S. Department of Housing and Urban Development during FY 2009 or later years. To be eligible under this priority, the applicant must either (1) be able to demonstrate that it has received a Choice Neighborhoods or HOPE VI grant or (2) provide, in its application, a memorandum of understanding between it and a partner that is a recipient of Choice Neighborhoods or HOPE VI grant. The memorandum must indicate a commitment on the part of the applicant and partner to coordinate planning and align resources to the greatest extent practicable.

Final Planning Grant Priority 8: Family Engagement in Learning Through Adult Education

To meet this priority, an applicant must propose to develop a plan that is coordinated with adult education providers serving neighborhood residents, such as those funded through the Adult Education and Family Literacy Act, as amended. Coordinated services may include adult basic and secondary education and programs that provide training and opportunities for

family members and other members of the community to support student learning and establish high expectations for student educational achievement. Examples of services and programs include preparation for the General Education Development (GED) test; English literacy, family literacy, and work-based literacy training; or other training that prepares adults for postsecondary education and careers or supports adult engagement in the educational success of children and youth in the neighborhood.

Final Implementation Grant Priorities

Final Implementation Grant Priority 1 (Absolute): Submission of Promise Neighborhood Plan

To meet this priority, an applicant must submit a plan to create a Promise Neighborhood. The plan must describe the need in the neighborhood, a strategy to build a continuum of solutions, and the applicant's capacity to achieve results. Specifically, an applicant must—

(1) Describe the geographically defined area [2] (neighborhood) to be served and the level of distress in that area based on indicators of need and other relevant indicators. The statement of need in the neighborhood must be based, in part, on results of a comprehensive needs assessment and segmentation analysis (as defined in this notice). Applicants may propose to serve multiple, non-contiguous geographically defined areas. In cases where target areas are not contiguous, the applicant must explain its rationale for including non-contiguous areas;

(2) Describe the applicant's strategy for building a continuum of solutions over time that addresses neighborhood challenges as identified in the needs assessment and segmentation analysis. The applicant must also describe how it has built community support for and involvement in the development of the plan. The continuum of solutions must be based on the best available evidence including, where available, strong or moderate evidence (as defined in this notice), and be designed to significantly improve educational outcomes and to support the healthy development and well-being of children and youth in the neighborhood. The strategy must be designed to ensure that over time, a greater proportion of children and youth in the neighborhood who attend the target school or schools have access to a complete continuum of solutions, and must ensure that over time, a greater proportion of children and youth in the neighborhood who do not attend the target school or schools have access to solutions within the continuum of solutions. The strategy must also ensure that, over time, students not living in the neighborhood who attend the target school or schools have access to solutions within the continuum of solutions.

The success of the applicant's strategy to build a continuum of solutions will be based on the results of project, as measured against the project indicators as defined in this notice and described in Table 1 and Table 2. In its strategy, the applicant must propose clear and measurable annual goals during the grant period against which improvements will be measured using the indicators. The strategy must—

(a) Identify each solution that the project will implement within the proposed continuum of solutions, and must include—

(i) High-quality early learning programs and services designed to improve outcomes across multiple domains of early learning (as defined in this notice) for children from birth through third grade;

(ii) Ambitious, rigorous, and comprehensive education reforms that are linked to improved educational outcomes for children and youth in preschool through the 12th grade. Public schools served through the grant may include persistently lowest-achieving schools (as defined in this notice) or low-performing schools (as defined in this notice) that are not also persistently lowest-achieving schools. An applicant (or one or more of its partners) may serve an effective school or schools (as defined in this notice) but only if the applicant (or one or more of its partners) also serves at least one low-performing school (as defined in this notice) or persistently lowest-achieving school (as defined in this notice). An applicant must identify in its application the public school or schools it would serve and describe the current status of reforms in the school or schools, including, if applicable, the type of intervention model being implemented. In cases where an applicant operates a school or partners with a school that does not serve all students in the neighborhood, the applicant must partner with at least one additional school that also serves students in the neighborhood. An applicant proposing to work with a persistently lowest-achieving school must include in its strategy one of the four school intervention models (turnaround model, restart model, school closure, or transformation model) described in Appendix C of the Race to the Top (RTT) notice inviting applications for new awards for FY 2010 that was published in the **Federal Register** on November 18, 2009 (74 FR 59836, 59866).

An applicant proposing to work with a low-performing school must include in its strategy ambitious, rigorous, and comprehensive interventions to assist, augment, or replace schools, which may include implementing one of the four school intervention models, or may include another model of sufficient ambition, rigor, and comprehensiveness to significantly improve academic and other outcomes for students. An applicant proposing to work with a low-performing school must include in its strategy an intervention that addresses the effectiveness of teachers and leaders and the school's use of time and resources, which may include increased learning time (as defined in this notice);

Note regarding school reform strategies: So as not to penalize an applicant for proposing to work with an LEA that has implemented rigorous reform strategies prior to the publication of this notice, an applicant is not required to propose a new reform strategy in place of an existing reform strategy in order to be eligible for a Promise Neighborhoods implementation grant. For example, an LEA might have begun to implement improvement activities that meet many, but not all, of the elements of a transformation model of school intervention. In this case, the applicant could propose, as part of its Promise Neighborhood strategy, to work with the LEA as the LEA continues with its reforms.

(iii) Programs that prepare students to be college- and career-ready; and

(iv) Family and community supports (as defined in this notice).

To the extent feasible and appropriate, the applicant must describe, in its plan, how the applicant and its partners will leverage and integrate high-quality programs, related public and private investments, and existing neighborhood assets into the continuum of solutions. An applicant must also include in its application an appendix that summarizes the evidence supporting each proposed solution and describes how the solution is based on the best available evidence, including, where available, strong or moderate evidence (as defined in this notice). An applicant must also describe in the appendix how and when—during the implementation process—the solution will be implemented; the partners that will participate in the implementation of each solution (in any case in which the applicant does not implement the solution directly); the estimated per-child cost, including administrative costs, to implement each solution; the

[2] For the purposes of this notice, the Department uses the terms ''geographic area'' and ''neighborhood'' interchangeably.

estimated number of children, by age, in the neighborhood who will be served by each solution and how a segmentation analysis was used to target the children and youth to be served; and the source of funds that will be used to pay for each solution. In the description of the estimated number of children to be served, the applicant must include the percentage of all children of the same age group within the neighborhood proposed to be served with each solution, and the annual goals required to increase the proportion of children served to reach scale over time.

An applicant must also describe in its plan how it will identify Federal, State, or local policies, regulations, or other requirements that would impede its ability to achieve its goals and how it will report on those impediments to the Department and other relevant agencies.

As appropriate, considering the time and urgency required to dramatically improve outcomes of children and youth in our most distressed neighborhoods and to transform those neighborhoods, applicants must establish both short-term and long-term goals to measure progress.

As part of the description of its strategy to build a continuum of solutions, the applicant must also describe how it will participate in, organize, or facilitate, as appropriate, communities of practice for Promise Neighborhoods;

(b) Establish clear, annual goals for evaluating progress in improving systems, such as changes in policies, environments, or organizations that affect children and youth in the neighborhood. Examples of systems change could include a new school district policy to measure the results of family and community support programs, a new funding resource to support the Promise Neighborhoods strategy, or a cross-sector collaboration at the city level to break down municipal agency ''silos'' and partner with local philanthropic organizations to drive achievement of a set of results; and

(c) Establish clear, annual goals for evaluating progress in leveraging resources, such as the amount of monetary or in-kind investments from public or private organizations to support the Promise Neighborhoods strategy. Examples of leveraging resources are securing new or existing dollars to sustain and scale up what works in the Promise Neighborhood or integrating high-quality programs in the continuum of solutions. Applicants may consider, as part of their plans to scale up their Promise Neighborhood strategy, serving a larger geographic area by partnering with other applicants to the Promise Neighborhoods program from the same city or region;

(3) Explain how it used its needs assessment and segmentation analysis to determine the children with the highest needs and explain how it will ensure that children in the neighborhood receive the appropriate services from the continuum of solutions. In this explanation of how it used the needs assessment and segmentation analysis, the applicant must identify and describe in its application the educational indicators and family and community support indicators that the applicant used to conduct the needs assessment. Whether or not the implementation grant applicant received a Promise Neighborhoods planning grant, the applicant must describe how it—

(a) Collected data for the educational indicators listed in Table 1 and used them as both program and project indicators;

(b) Collected data for the family and community support indicators in Table 2 and used them as program indicators; and

(c) Collected data for unique family and community support indicators, developed by the applicant, that align with the goals and objectives of the project and used them as project indicators or used the indicators in Table 2 as project indicators.

An applicant must also describe how it will collect at least annual data on the indicators in Tables 1 and 2; establish clear, annual goals for growth on indicators; and report those data to the Department.

TABLE 1—EDUCATION INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# and % of children birth to kindergarten entry who have a place where they usually go, other than an emergency room, when they are sick or in need of advice about their health.	Children enter kindergarten ready to succeed in school.
—# and % of three-year-olds and children in kindergarten who demonstrate at the beginning of the program or school year age-appropriate functioning across multiple domains of early learning (as defined in this notice) as determined using developmentally appropriate early learning measures (as defined in this notice).	
—# & % of children, from birth to kindergarten entry, participating in center-based or formal home-based early learning settings or programs, which may include Early Head Start, Head Start, child care, or preschool.	
—# & % of students at or above grade level according to State mathematics and reading or language arts assessments in at least the grades required by the ESEA (3rd through 8th and once in high school).	Students are proficient in core academic subjects.
—Attendance rate of students in 6th, 7th, 8th, and 9th grade.	Students successfully transition from middle school grades to high school.
—Graduation rate (as defined in this notice).	Youth graduate from high school.
—# & % of Promise Neighborhood students who graduate with a regular high school diploma, as defined in 34 CFR 200.19(b)(1)(iv), and obtain postsecondary degrees, vocational certificates, or other industry-recognized certifications or credentials without the need for remediation.	High school graduates obtain a postsecondary degree, certification, or credential.

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# & % of children who participate in at least 60 minutes of moderate to vigorous physical activity daily; and	Students are healthy.
—# & % of children who consume five or more servings of fruits and vegetables daily; or	
—possible third indicator, to be determined (TBD) by applicant..	

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE—Continued

Indicator	Result
—# & % of students who feel safe at school and traveling to and from school, as measured by a school climate needs assessment (as defined in this notice); or —possible second indicator, TBD by applicant.	Students feel safe at school and in their community.
—Student mobility rate (as defined in this notice); or —possible second indicator, TBD by applicant.	Students live in stable communities.
—For children birth to kindergarten entry, the # and % of parents or family members who report that they read to their child three or more times a week; —For children in the kindergarten through eighth grades, the # and % of parents or family members who report encouraging their child to read books outside of school; and —For children in the ninth through twelfth grades, the # and % of parents or family members who report talking with their child about the importance of college and career; or —possible fourth indicator TBD by applicant.	Families and community members support learning in Promise Neighborhood schools.
—# & % of students who have school and home access (and % of the day they have access) to broadband internet (as defined in this notice) and a connected computing device; or —possible second indicator TBD by applicant.	Students have access to 21st century learning tools.

Note: The indicators in Table 1 and Table 2 are not intended to limit an applicant from collecting and using data for additional indicators. Examples of additional indicators are—

(i) The # and % of children who participate in high-quality learning activities during out-of-school hours or in the hours after the traditional school day ends;

(ii) The # and % of students who are suspended or receive discipline referrals during the year;

(iii) The share of housing stock in the geographically defined area that is rent-protected, publicly assisted, or targeted for redevelopment with local, State, or Federal funds; and

(iv) The # and % of children who are homeless or in foster care and who have an assigned adult advocate.

Note: While the Department believes there are many programmatic benefits of collecting data on every child in the proposed neighborhood, the Department will consider requests to collect data on only a sample of the children in the neighborhood for some indicators so long as the applicant describes in its application how it would ensure the sample would be representative of the children in the neighborhood;

(4) Describe the experience and lessons learned, and describe how the applicant will build the capacity of its management team and project director in all of the following areas:

(a) Working with the neighborhood and its residents, including parents and families that have children or other members with disabilities or ELs, as well as with the schools described in paragraph (2) of this priority; the LEA in which the school or schools are located; Federal, State, and local government leaders; and other service providers.

(b) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability. The applicant must describe—

(i) Progress towards developing, launching, and implementing a longitudinal data system that integrates student-level data from multiple sources in order to measure progress on educational and family and community support indicators for all children in the neighborhood, disaggregated by the subgroups listed in section 1111(b)(3)(C)(xiii) of the ESEA;

(ii) How the applicant has linked or made progress to link the longitudinal data system to school-based, LEA, and State data systems; made the data accessible to parents, families, community residents, program partners, researchers, and evaluators while abiding by Federal, State, and other privacy laws and requirements; and managed and maintained the system;

(iii) How the applicant has used rapid-time (as defined in this notice) data in prior years and, how it will continue to use those data once the Promise Neighborhood strategy is implemented, for continuous program improvement; and

(iv) How the applicant will document the implementation process, including by describing lessons learned and best practices.

(c) Creating and strengthening formal and informal partnerships, for such purposes as providing solutions along the continuum of solutions and committing resources to sustaining and scaling up what works. Each applicant must submit, as part of its application, a memorandum of understanding, signed by each organization or agency with which it would partner in implementing the proposed Promise Neighborhood. The memorandum of understanding must describe—

(i) Each partner's financial and programmatic commitment; and

(ii) How each partner's existing vision, theory of change (as defined in this notice), theory of action (as defined in this notice), and current activities align with those of the proposed Promise Neighborhood;

(d) The governance structure proposed for the Promise Neighborhood, including a system for holding partners accountable, how the eligible entity's governing board or advisory board is representative of the geographic area proposed to be served (as defined in this notice), and how residents of the geographic area would have an active role in the organization's decision-making.

(e) Integrating funding streams from multiple public and private sources from the Federal, State, and local level. Examples of public funds include Federal resources from the U.S. Department of Education, such as the 21st Century Community Learning Centers program and title I of the ESEA, and from other Federal agencies, such as the U.S. Departments of Health and Human Services, Housing and Urban Development, Justice, Labor, and Treasury.

(5) Describe the applicant's commitment to work with the Department, and with a national evaluator for Promise Neighborhoods or another entity designated by the Department, to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods program and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(a) Ensuring that, through memoranda of understanding with appropriate entities, the national evaluator and the Department have access to relevant program and project data sources (*e.g.,* administrative data and program and project indicator data), including data on a quarterly basis if requested by the Department;

(b) Developing, in consultation with the national evaluator, an evaluation strategy, including identifying a credible comparison group (as defined in this notice); and

(c) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for both program participants and a designated comparison group of non-participants.

Final Implementation Grant Priority 2 (Absolute): Promise Neighborhoods in Rural Communities

To meet this priority, an applicant must propose to implement a Promise Neighborhood strategy that (1) meets all of the requirements in Absolute Priority 1; and (2) serves one or more rural communities only.

Final Implementation Grant Priority 3 (Absolute): Promise Neighborhoods in Tribal Communities

To meet this priority, an applicant must propose to implement a Promise Neighborhood strategy that (1) meets all of the requirements in Absolute Priority 1; and (2) serves one or more Indian tribes (as defined in this notice).

Final Implementation Grant Priority 4: Comprehensive Local Early Learning Network

To meet this priority, applications must include plans that propose to expand, enhance, or modify an existing network of early learning programs and services to ensure that they are high-quality and comprehensive for children from birth through the third grade. The plan must also ensure that the network establishes a high standard of quality across early learning settings and is designed to improve outcomes across multiple domains of early learning. Distinct from the early learning solutions described in paragraph (2) of Absolute Priority 1, this priority supports implementation plans that integrate various early learning services and programs in the neighborhood, *i.e.,* school-based early learning programs in order to enhance the quality of such services and programs; locally- or State-funded preschool programs; Early Head Start and Head Start programs; the local child care resource and referral agency, if applicable; IDEA services and programs; services through private providers; home visiting programs; child care providers licensed by the State, including public and private providers and center-based care; and family, friend, or neighbor care in the Promise Neighborhood.

The early learning network must address or incorporate ongoing State-level efforts regarding the major components of high-quality early learning programs and services, such as State early learning and development standards, program quality standards, comprehensive assessment systems, workforce and professional development systems, health promotion, family and community engagement, a coordinated data infrastructure, and a method of measuring, monitoring, evaluating, and improving program quality. For example, an applicant might address how the Promise Neighborhoods project will use the State's early learning standards, as applicable, and the Head Start Child Development and Early Learning Framework (Framework), as applicable, to define the expectations of what children should know and be able to do before entering kindergarten. The Framework is available on the Office of Head Start's Web site at: *http://eclkc.ohs.acf.hhs.gov/hslc/ecdh/eecd/Assessment/Child%20Outcomes/HS_Revised_Child_Outcomes_Framework.pdf.* Similarly, an applicant that addresses this priority must discuss, where applicable, how it would align with the State's Quality Rating and Improvement System (QRIS), as applicable, professional development and workforce infrastructure, and other appropriate State efforts. In addition, the plan must include, to the extent practicable, early learning opportunities on multiple platforms (*e.g.,* public television, web-based, etc.) and in multiple locations (*e.g.,* at home, at school, and at other community locations).

Note regarding accessibility of early learning programs and services: These early learning opportunities must be fully accessible to individuals with disabilities, including individuals who are blind or have low vision; otherwise, the plans must describe how accommodations or modifications will be provided to ensure that the benefits of the early learning opportunities are provided to children and youth with disabilities in an equally effective and equally integrated manner.

The implementation plan for a high-quality and comprehensive local early learning network must describe the governance structure and the major components of high-quality early learning programs and services as well as include goals, strategies, and benchmarks to provide early learning programs and services that result in improvements across multiple domains of early learning. The plan must result from a needs assessment and segmentation analysis (as defined in this notice) and must reflect input from a broad range of stakeholders. An application addressing this priority must designate an individual responsible for overseeing and coordinating the early learning initiatives and must include a resume or position description and other supporting documentation to demonstrate that the individual designated, or individual hired to carry out those responsibilities, possesses the appropriate State certification, and has experience and expertise in managing and administering high-quality early learning programs, including in coordinating across various high-quality early learning programs and services.

Final Implementation Grant Priority 5: Quality Internet Connectivity

To meet this priority, an applicant must ensure that almost all students in the geographic area proposed to be served have broadband internet access (as defined in this notice) at home and at school, the knowledge and skills to use broadband internet access effectively, and a connected computing device to support schoolwork.

Final Implementation Grant Priority 6: Arts and Humanities

To meet this priority, an applicant must include in its plan opportunities for children and youth to experience and participate actively in the arts and humanities in their community so as to broaden, enrich, and enliven the educational, cultural, and civic experiences available in the neighborhood. Applicants may include plans for offering these activities in school and in out-of-school settings and at any time during the calendar year.

Final Implementation Grant Priority 7: Quality Affordable Housing

To meet this priority, an applicant must propose to serve geographic areas that were the subject of an affordable housing transformation pursuant to a Choice Neighborhoods or HOPE VI grant awarded by the U.S. Department of Housing and Urban Development during FY 2009 or later years. To be eligible under this priority, the applicant must either (1) be able to demonstrate that it has received a Choice Neighborhoods or HOPE VI grant or (2) provide, in its application, a memorandum of understanding between it and a partner that is a recipient of a Choice Neighborhoods or HOPE VI grant. The memorandum must indicate a commitment on the part of the applicant and partner to coordinate implementation and align resources to the greatest extent practicable.

Final Implementation Grant Priority 8: Family Engagement in Learning Through Adult Education

To meet this priority, an applicant must include plans that are coordinated with adult education providers serving neighborhood residents, such as those funded through the Adult Education and Family Literacy Act, as amended. Coordinated services may include adult basic and secondary education and programs that provide training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement. Examples of services and programs include preparation for the General Education Development (GED) test; English literacy, family literacy, and work-based literacy training; or other training that prepares adults for postsecondary education and careers, or supports adult engagement in the educational success of children and youth in the neighborhood.

Optional Supplemental Funding Opportunity

The U.S. Department of Justice (DOJ) intends to provide an optional, supplemental funding opportunity for Promise Neighborhoods implementation grantees with plans that propose to analyze and resolve public safety concerns associated with violence, gangs, and illegal drugs utilizing strategies that include prevention, intervention, enforcement, and reentry of offenders back into communities upon release from prison and jail. Under this opportunity, DOJ, through an interagency agreement with the Department of Education, would provide additional funds to some Promise Neighborhoods implementation grantees. Specifically, DOJ would consider supporting Promise Neighborhoods grantees with plans that align with local leadership in implementing and sustaining innovative solutions that incorporate evidence and research into local program and policy decisions to address and reduce persistent crime. Additional information about this optional funding opportunity will be provided to Promise Neighborhoods implementation grantees after grant awards are announced.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Final Requirements

The Department establishes the following eligibility requirements for the Promise Neighborhoods program. We may apply one or more of these requirements in any year in which we conduct a competition for this program.

1. *Eligible Applicants:* To be eligible for a grant under this competition, an applicant must be an eligible organization (as defined in this notice). For purposes of *Absolute Priority 3: Promise Neighborhoods in Tribal Communities,* an eligible applicant is an eligible organization that partners with an Indian tribe or is an Indian tribe that meets the definition of an eligible organization.

2. *Cost-Sharing or Matching:*

(a) *Planning grants.* To be eligible for a planning grant under this competition, an applicant must demonstrate that it has established a commitment from one or more entities in the public or private sector, which may include Federal, State, and local public agencies, philanthropic organizations, private businesses, or individuals, to provide matching funds for the planning process. An applicant for a planning grant must obtain matching funds or in-kind donations for the planning process equal to at least 50 percent of its grant award, except that an applicant proposing a project that meets *Absolute Priority 2: Promise Neighborhoods in Rural Communities* or *Absolute Priority 3: Promise Neighborhoods in Tribal Communities* must obtain matching funds or in-kind donations equal to at least 25 percent of the grant award.

(b) *Implementation Grants.* To be eligible for an implementation grant under this competition, an applicant must demonstrate that it has established a commitment from one or more entities in the public or private sector, which may include Federal, State, and local public agencies, philanthropic organizations, private businesses, or individuals, to provide matching funds for the implementation process. An applicant for an implementation grant must obtain matching funds or in-kind donations equal to at least 100 percent of its grant award, except that an applicant proposing a project that meets *Absolute Priority 2: Promise Neighborhoods in Rural Communities* or *Absolute Priority 3: Promise Neighborhoods in Tribal Communities* must obtain matching funds or in-kind donations equal to at least 50 percent of the grant award.

Eligible sources of matching include sources of funds used to pay for solutions within the continuum of solutions, such as Head Start programs, initiatives supported by the LEA, or public health services for children in the neighborhood. At least 10 percent of an implementation applicant's total match must be cash or in-kind contributions from the private sector, which may include philanthropic organizations, private businesses, or individuals.

(c) *Planning and Implementation Grants.* Both planning and implementation applicants must demonstrate a commitment of matching funds in the applications. The applicants must specify the source of the funds or contributions and in the case of a third-party in-kind contribution, a description of how the value was determined for the donated or contributed goods or service. Applicants must demonstrate the match commitment by including letters in their applications explaining the type and quantity of the match commitment with original signatures from the executives of organizations or agencies providing the match. The Secretary may consider decreasing the matching requirement in the most exceptional circumstances, on a case-by-case basis.

An applicant that is unable to meet the matching requirement must include in its application a request to the Secretary to reduce the matching requirement, including the amount of the requested reduction, the total remaining match contribution, and a statement of the basis for the request. An applicant should review the Department's cost-sharing and cost-matching regulations, which include specific limitations in 34 CFR 74.23 applicable to non-profit organizations and institutions of higher education and 34 CFR 80.24 applicable to State, local,

and Indian tribal governments, and the Office of Management and Budget (OMB) cost principles regarding donations, capital assets, depreciations and allowable costs. These circulars are available on OMB's Web site at *http://www.whitehouse.gov/omb/circulars/index.html.*

Final Definitions

We establish the following definitions for this program. We may apply one or more of these definitions in any year in which this program is in effect.

Broadband internet access means internet access sufficient to provide community members with the internet available when and where they need it and for the uses they require.

Children with disabilities or *CWD* means individuals who meet the definition of *child with a disability* in 34 CFR 300.8, *infant or toddler with a disability* in 34 CFR 300.25, *handicapped person* in 34 CFR 104.3(j), or disability as it pertains to an individual in 42 U.S.C. 12102.

Community of practice means a group of grantees that agrees to interact regularly to solve a persistent problem or improve practice in an area that is important to them and the success of their projects. Establishment of communities of practice under Promise Neighborhoods will enable grantees to meet, discuss, and collaborate with each other regarding grantee projects.

Continuum of cradle-through-college-to-career solutions or *continuum of solutions* means solutions that—

(1) Include programs, policies, practices, services, systems, and supports that result in improving educational and developmental outcomes for children from cradle through college to career;

(2) Are based on the best available evidence, including, where available, strong or moderate evidence (as defined in this notice);

(3) Are linked and integrated seamlessly (as defined in this notice); and

(4) Include both education programs and family and community supports.

Credible comparison group includes a comparison group formed by matching project participants with non-participants based on key characteristics that are thought to be related to outcomes. These characteristics include, but are not limited to: (1) Prior test scores and other measures of academic achievement (preferably the same measures that will be used to assess the outcomes of the project); (2) demographic characteristics, such as age, disability, gender, English proficiency, ethnicity, poverty level, parents' educational attainment, and single- or two-parent family background; (3) the time period in which the two groups are studied (*e.g.,* the two groups are children entering kindergarten in the same year as opposed to sequential years); and (4) methods used to collect outcome data (*e.g.,* the same test of reading skills administered in the same way to both groups).

Developmentally appropriate early learning measures means a range of assessment instruments that are used in ways consistent with the purposes for which they were designed and validated; appropriate for the ages and other characteristics of the children being assessed; designed and validated for use with children whose ages, cultures, languages spoken at home, socioeconomic status, abilities and disabilities, and other characteristics are similar to those of the children with whom the assessments will be used; and used in compliance with the measurement standards set forth by the American Educational Research Association (AERA), the American Psychological Association (APA), and the National Council for Measurement in Education (NCME) in the 1999 Standards for Educational and Psychological Testing.

Education programs means programs that include, but are not limited to—

(1) High-quality early learning programs or services designed to improve outcomes across multiple domains of early learning for young children. Such programs must be specifically intended to align with appropriate State early learning and development standards, practices, strategies, or activities across as broad an age range as birth through third grade so as to ensure that young children enter kindergarten and progress through the early elementary school grades demonstrating age-appropriate functioning across the multiple domains;

(2) For children in preschool through the 12th grade, programs, inclusive of related policies and personnel, that are linked to improved educational outcomes. The programs—

(a) Must include effective teachers and effective principals;

(b) Must include strategies, practices, or programs that encourage and facilitate the evaluation, analysis, and use of student achievement, student growth (as defined in this notice), and other data by educators, families, and other stakeholders to inform decision-making;

(c) Must include college- and career-ready standards, assessments, and practices, including a well-rounded curriculum, instructional practices, strategies, or programs in, at a minimum, core academic subjects as defined in section 9101(11) of the ESEA, that are aligned with high academic content and achievement standards and with high-quality assessments based on those standards; and

(d) May include creating multiple pathways for students to earn regular high school diplomas (*e.g.,* using schools that serve the needs of over-aged, under-credited, or other students with an exceptional need for flexibility regarding when they attend school or the additional supports they require; awarding credit based on demonstrated evidence of student competency; or offering dual-enrollment options); and

(3) Programs that prepare students for college and career success, which may include programs that—

(a) Create and support partnerships with community colleges, four-year colleges, or universities and that help instill a college-going culture in the neighborhood;

(b) Provide dual-enrollment opportunities for secondary students to gain college credit while in high school;

(c) Provide, through relationships with businesses and other organizations, apprenticeship opportunities to students;

(d) Align curricula in the core academic subjects with requirements for industry-recognized certifications or credentials, particularly in high-growth sectors;

(e) Provide access to career and technical education programs so that individuals can attain the skills and industry-recognized certifications or credentials for success in their careers;

(f) Help college students, including CWD and ELs from the neighborhood to transition to college, persist in their academic studies in college, graduate from college, and transition into the workforce; and

(g) Provide opportunities for all youth (both in and out of school) to achieve academic and employment success by improving educational and skill competencies and providing connections to employers. Such activities may include opportunities for on-going mentoring, supportive services, incentives for recognition and achievement, and opportunities related to leadership, development, decision-making, citizenship, and community service.

Effective school means a school that has—

(1) Significantly closed the achievement gaps between subgroups of students (as identified in section

1111(b)(3)(C)(xiii) of the ESEA) within the school or district; or

(2)(a) Demonstrated success in significantly increasing student academic achievement in the school for all subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) in the school; and (b) made significant improvements in other areas, such as graduation rates (as defined in this notice) or recruitment and placement of effective teachers and effective principals.

Eligible organization means an organization that—

(1) Is representative of the geographic area proposed to be served (as defined in this notice);

(2) Is one of the following:

(a) A nonprofit organization that meets the definition of a nonprofit under 34 CFR 77.1(c), which may include a faith-based nonprofit organization.

(b) An institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, as amended.

(c) An Indian tribe (as defined in this notice);

(3) Currently provides at least one of the solutions from the applicant's proposed continuum of solutions in the geographic area proposed to be served; and

(4) Operates or proposes to work with and involve in carrying out its proposed project, in coordination with the school's LEA, at least one public elementary or secondary school that is located within the identified geographic area that the grant will serve.

English learners or *ELs* means individuals who meet the definition of limited English proficient, as defined in section 9101(25) of the ESEA.

Family and community supports means—

(1) Child and youth health programs, such as physical, mental, behavioral, and emotional health programs (*e.g.,* home visiting programs; Early Head Start; programs to improve nutrition and fitness, reduce childhood obesity, and create healthier communities);

(2) Safety programs, such as programs in school and out of school to prevent, control, and reduce crime, violence, drug and alcohol use, and gang activity; programs that address classroom and school-wide behavior and conduct; programs to prevent child abuse and neglect; programs to prevent truancy and reduce and prevent bullying and harassment; and programs to improve the physical and emotional security of the school setting as perceived, experienced, and created by students, staff, and families;

(3) Community stability programs, such as programs that—

(a) Increase the stability of families in communities by expanding access to quality, affordable housing, providing legal support to help families secure clear legal title to their homes, and providing housing counseling or housing placement services;

(b) Provide adult education and employment opportunities and training to improve educational levels, job skills and readiness in order to decrease unemployment, with a goal of increasing family stability;

(c) Improve families' awareness of, access to, and use of a range of social services, if possible at a single location;

(d) Provide unbiased, outcome-focused, and comprehensive financial education, inside and outside the classroom and at every life stage;

(e) Increase access to traditional financial institutions (*e.g.,* banks and credit unions) rather than alternative financial institutions (*e.g.,* check cashers and payday lenders);

(f) Help families increase their financial literacy, financial assets, and savings; and

(g) Help families access transportation to education and employment opportunities;

(4) Family and community engagement programs that are systemic, integrated, sustainable, and continue through a student's transition from K–12 school to college and career. These programs may include family literacy programs and programs that provide adult education and training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement; mentorship programs that create positive relationships between children and adults; programs that provide for the use of such community resources as libraries, museums, television and radio stations, and local businesses to support improved student educational outcomes; programs that support the engagement of families in early learning programs and services; programs that provide guidance on how to navigate through a complex school system and how to advocate for more and improved learning opportunities; and programs that promote collaboration with educators and community organizations to improve opportunities for healthy development and learning; and

(5) 21st century learning tools, such as technology (*e.g.,* computers and mobile phones) used by students in the classroom and in the community to support their education. This includes programs that help students use the tools to develop knowledge and skills in such areas as reading and writing, mathematics, research, critical thinking, communication, creativity, innovation, and entrepreneurship.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Note: This definition is not meant to prevent a grantee from also collecting information about the reasons why students do not graduate from the target high school, *e.g.,* dropping out or moving outside of the school district for non-academic or academic reasons.

Increased learning time means using a longer school day, week, or year to significantly increase the total number of school hours. This strategy is used to redesign the school's program in a manner that includes additional time for (a) instruction in core academic subjects as defined in section 9101(11) of the ESEA; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

Indian tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe, 25 U.S.C. 479a and 479a–1 or any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, *et seq.,* that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The term ''Indian'' means a member of an Indian tribe.

Indicators of need means currently available data that describe—

(1) Education need, which means—

(a) All or a portion of the neighborhood includes or is within the attendance zone of a low-performing school that is a high school, especially one in which the graduation rate (as defined in this notice) is less than 60 percent or a school that can be characterized as low-performing based on another proxy indicator, such as students' on-time progression from grade to grade; and

(b) Other indicators, such as significant achievement gaps between subgroups of students (as identified in

section 1111(b)(3)(C)(xiii) of the ESEA) within a school or LEA, high teacher and principal turnover, or high student absenteeism; and

(2) Family and community support need, which means—

(a) Percentages of children with preventable chronic health conditions (*e.g.,* asthma, poor nutrition, dental problems, obesity) or avoidable developmental delays;

(b) Immunization rates;

(c) Rates of crime, including violent crime;

(d) Student mobility rates;

(e) Teenage birth rates;

(f) Percentage of children in single-parent or no-parent families;

(g) Rates of vacant or substandard homes, including distressed public and assisted housing; or

(h) Percentage of the residents living at or below the Federal poverty threshold.

Linked and integrated seamlessly, with respect to the continuum of solutions, means solutions that have common outcomes, focus on similar milestones, support transitional time periods (*e.g.,* the beginning of kindergarten, the middle grades, or graduation from high school) along the cradle-through-college-to-career continuum, and address time and resource gaps that create obstacles for students in making academic progress.

Low-performing schools means schools receiving assistance through title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), that are in corrective action or restructuring in the State, as determined under section 1116 of the ESEA, and the secondary schools (both middle and high schools) in the State that are equally as low-achieving as these Title I schools and are eligible for, but do not receive, Title I funds.

Moderate evidence means evidence from previous studies with designs that can support causal conclusions (*i.e.,* studies with high internal validity) but have limited generalizability (*i.e.,* moderate external validity) or from studies with high external validity but moderate internal validity.

Multiple domains of early learning means physical well-being and motor development; social-emotional development; approaches toward learning, which refers to the inclinations, dispositions, or styles, rather than skills, that reflect ways that children become involved in learning and develop their inclinations to pursue learning; language and literacy development, including emergent literacy; and cognition and general knowledge, which refers to thinking and problem-solving as well as knowledge about particular objects and the way the world works. Cognition and general knowledge include mathematical and scientific knowledge, abstract thought, and imagination.

Neighborhood assets means—

(1) Developmental assets that allow residents to attain the skills needed to be successful in all aspects of daily life (*e.g.,* educational institutions, early learning centers, and health resources);

(2) Commercial assets that are associated with production, employment, transactions, and sales (*e.g.,* labor force and retail establishments);

(3) Recreational assets that create value in a neighborhood beyond work and education (*e.g.,* parks, open space, community gardens, and arts organizations);

(4) Physical assets that are associated with the built environment and physical infrastructure (*e.g.,* housing, commercial buildings, and roads); and

(5) Social assets that establish well-functioning social interactions (*e.g.,* public safety, community engagement, and partnerships with youth, parents, and families).

Persistently lowest-achieving school means, as determined by the State—

(1) Any school receiving assistance through Title I that is in improvement, corrective action, or restructuring and that—

(a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(b) Is a high school that has had a graduation rate that is less than 60 percent over a number of years; and

(2) Any secondary school that is eligible for, but does not receive, Title I funds that—

(a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(b) Is a high school that has had a graduation rate that is less than 60 percent over a number of years.

Program indicators are indicators that the Department will use only for research and evaluation purposes and for which an applicant is not required to propose solutions.

Project indicators are indicators for which an applicant proposes solutions intended to result in progress on the indicators.

Public officials means elected officials (*e.g.,* council members, aldermen and women, commissioners, State legislators, Congressional representatives, members of the school board), appointed officials (*e.g.,* members of a planning or zoning commission, or of any other regulatory or advisory board or commission), or individuals who are not necessarily public officials, but who have been appointed by a public official to serve on the Promise Neighborhoods governing board or advisory board.

Rapid-time, in reference to reporting and availability of locally-collected data, means that data are available quickly enough to inform current lessons, instruction, and related education programs and family and community supports.

Representative of the geographic area proposed to be served means that residents of the geographic area proposed to be served have an active role in decision-making and that at least one-third of the eligible entity's governing board or advisory board is made up of—

(1) Residents who live in the geographic area proposed to be served, which may include residents who are representative of the ethnic and racial composition of the neighborhood's residents and the languages they speak;

(2) Residents of the city or county in which the neighborhood is located but who live outside the geographic area proposed to be served, and who are low-income (which means earning less than 80 percent of the area's median income as published by the Department of Housing and Urban Development);

(3) Public officials (as defined in this notice) who serve the geographic area proposed to be served (although not more than one-half of the governing board or advisory board may be made up of public officials); or

(4) Some combination of individuals from the three groups listed in paragraphs (1), (2), and (3) of this definition.

Rural community means a neighborhood that—

(1) Is served by an LEA that is currently eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Applicants may determine whether a particular LEA is eligible for these programs by referring to information on the following Department Web sites. For the SRSA program: *http://www.ed.gov/programs/reapsrsa/eligible10/index.html.* For the RLIS program: *http://www.ed.gov/*

programs/reaprlisp/eligible10/index.html; or

(2) Includes only schools designated with a school locale code of 42 or 43. Applicants may determine school locale codes by referring to the following Department Web site: *http://nces.ed.gov/ccd/schoolsearch/.*

School climate needs assessment means an evaluation tool that measures the extent to which the school setting promotes or inhibits academic performance by collecting perception data from individuals, which could include students, staff, or families.

Segmentation analysis means the process of grouping and analyzing data from children and families in the geographic area proposed to be served according to indicators of need (as defined in this notice) or other relevant indicators.

Note: The analysis is intended to allow grantees to differentiate and more effectively target interventions based on what they learn about the needs of different populations in the geographic area.

Strong evidence means evidence from studies with designs that can support causal conclusions (*i.e.,* studies with high internal validity), and studies that, in total, include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.,* studies with high external validity).

Student achievement means—

(1) For tested grades and subjects:

(a) A student's score on the State's assessments under the ESEA; and, as appropriate,

(b) Other measures of student learning, such as those described in paragraph (2) of this definition, provided they are rigorous and comparable across classrooms and programs.

(2) For non-tested grades and subjects: Alternative measures of student learning and performance, such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in achievement data for an individual student between two or more points in time. Growth may also include other measures that are rigorous and comparable across classrooms.

Student mobility rate is calculated by dividing the total number of new student entries and withdrawals at a school, from the day after the first official enrollment number is collected through the end of the academic year, by the first official enrollment number of the academic year.

Note: This definition is not meant to limit a grantee from also collecting information about why students enter or withdraw from the school, *e.g.,* transferring to charter schools, moving outside of the school district for non-academic or academic reasons.

Theory of action means an organization's strategy regarding how, considering its capacity and resources, it will take the necessary steps and measures to accomplish its desired results.

Theory of change means an organization's beliefs about how its inputs, and early and intermediate outcomes, relate to accomplishing its long-term desired results.

Final Selection Criteria

We establish the following selection criteria for evaluating a planning and implementation grant application under the Promise Neighborhoods program. These criteria are designed to align with the absolute priority for planning and implementation grants. Thus, the ''need for project'' criterion aligns with the absolute priority requirement that applicants describe the need in the neighborhood. The ''quality of project design'' and ''quality of project services'' criteria align with the absolute priority requirement that applicants describe a strategy to build a continuum of solutions with strong schools at the center. The ''quality of the management plan'' criterion aligns with the absolute priority requirement that applicants describe their capacity to achieve results.

In the notice inviting applications, the application package, or both, we will announce the maximum possible points assigned to each criterion. We may apply one or more of these criteria in any year in which this program is in effect.

Final Planning Grants Selection Criteria

The selection criteria for planning grant applicants are as follows:

(1) *Need for project.*

(a) The Secretary considers the need for the proposed project.

(b) In determining the need for the proposed project, the Secretary considers—

(i) The magnitude or severity of the problems to be addressed by the proposed project as described by indicators of need and other relevant indicators; and

(ii) The extent to which the geographically defined area has been described.

(2) *Quality of the project design.*

(a) The Secretary considers the quality of the design of the proposed project.

(b) In determining the quality of the design of the proposed project, the Secretary considers—

(i) The extent to which the continuum of solutions will be aligned with an ambitious, rigorous, and comprehensive strategy for improvement of schools in the neighborhood;

(ii) The extent to which the applicant describes a proposal to plan to create a complete continuum of solutions, including early learning through grade 12, college- and career-readiness, and family and community supports, without time and resource gaps that will prepare all children in the neighborhood to attain an excellent education and successfully transition to college and a career; and

(iii) The extent to which solutions leverage existing neighborhood assets and coordinate with other efforts, including programs supported by Federal, State, local, and private funds.

(3) *Quality of project services.*

(a) The Secretary considers the quality of the services to be provided by the proposed project.

(b) In determining the quality of the project services, the Secretary considers—

(i) The extent to which the applicant describes how the needs assessment and segmentation analysis, including identifying and describing indicators, will be used during the planning phase to determine each solution within the continuum; and

(ii) The extent to which the applicant describes how it will determine that solutions are based on the best available evidence including, where available, strong or moderate evidence, and ensure that solutions drive results and lead to changes on indicators.

(4) *Quality of the management plan.*

(a) The Secretary considers the quality of the management plan for the proposed project.

(b) In determining the quality of the management plan for the proposed project, the Secretary considers the experience, lessons learned, and proposal to build capacity of the applicant's management team and project director in all of the following areas—

(i) Working with the neighborhood and its residents; the schools described in paragraph (2)(b) of Absolute Priority 1; the LEA in which those schools are located; Federal, State, and local government leaders; and other service providers;

(ii) Collecting, analyzing, and using data for decision-making, learning,

continuous improvement, and accountability;

(iii) Creating formal and informal partnerships, including the alignment of the visions, theories of action, and theories of change described in its memorandum of understanding, and creating a system for holding partners accountable for performance in accordance with the memorandum of understanding; and

(iv) Integrating funding streams from multiple public and private sources, including its proposal to leverage and integrate high-quality programs in the neighborhood into the continuum of solutions.

Final Implementation Grants Selection Criteria

The selection criteria for implementation grant applicants are as follows:

(1) *Need for project.*

(a) The Secretary considers the need for the proposed project.

(b) In determining the need for the proposed project, the Secretary considers—

(i) The magnitude or severity of the problems to be addressed by the proposed project as described by indicators of need and other relevant indicators identified in part by the needs assessment and segmentation analysis; and

(ii) The extent to which the geographically defined area has been described.

(2) *Quality of the project design.*

(a) The Secretary considers the quality of the design of the proposed project.

(b) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the continuum of solutions is aligned with an ambitious, rigorous, and comprehensive strategy for improvement of schools in the neighborhood.

(ii) The extent to which the applicant describes an implementation plan to create a complete continuum of solutions, including early learning through grade 12, college- and career-readiness, and family and community supports, without time and resource gaps, that will prepare all children in the neighborhood to attain an excellent education and successfully transition to college and a career, and that will significantly increase the proportion of students in the neighborhood that are served by the complete continuum to reach scale over time.

(iii) The extent to which the applicant identifies existing neighborhood assets and programs supported by Federal, State, local, and private funds that will be used to implement a continuum of solutions.

(iv) The extent to which the applicant describes its implementation plan, including clear, annual goals for improving systems and leveraging resources as described in paragraph (2) of Absolute Priority 1.

(3) *Quality of project services.*

(a) The Secretary considers the quality of the services to be provided by the proposed project.

(b) In determining the quality of the project services, the Secretary considers—

(i) The extent to which the applicant describes how the needs assessment and segmentation analysis, including identifying and describing indicators, were used to determine each solution within the continuum;

(ii) The extent to which the applicant documents that proposed solutions are based on the best available evidence including, where available, strong or moderate evidence; and

(iii) The extent to which the applicant describes clear, annual goals for improvement on indicators.

(4) *Quality of the management plan.*

(a) The Secretary considers the quality of the management plan for the proposed project.

(b) In determining the quality of the management plan for the proposed project, the Secretary considers the experience, lessons learned, and proposal to build capacity of the applicant's management team and project director in all of the following areas—

(i) Working with the neighborhood and its residents; the schools described in paragraph (2)(b) of Absolute Priority 1; the LEA in which those schools are located; Federal, State, and local government leaders; and other service providers;

(ii) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability, including whether the applicant has a plan to build, adapt, or expand a longitudinal data system that integrates student-level data from multiple sources in order to measure progress while abiding by privacy laws and requirements;

(iii) Creating formal and informal partnerships, including the alignment of the visions, theories of action, and theories of change described in its memorandum of understanding, and creating a system for holding partners accountable for performance in accordance with the memorandum of understanding; and

(iv) Integrating funding streams from multiple public and private sources, including its proposal to leverage and integrate high-quality programs in the neighborhood into the continuum of solutions.

This notice does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This notice does not solicit applications. In any year in which we choose to use one or more of these proposed priorities, requirements, definitions, and selection criteria, we invite applications through a notice in the **Federal Register.**

Executive Order 12866: Under Executive Order 12866, the Secretary must determine whether this regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Secretary has determined that this regulatory action is significant under section 3(f) of the Executive order.

This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this proposed regulatory action.

The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this regulatory action, we have determined that the benefits of the priorities, requirements, definitions, and selection criteria justify the costs.

We have determined, also, that this regulatory action does not unduly

interfere with State, local, and tribal governments in the exercise of their governmental functions.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR Part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 29, 2011.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2011–16757 Filed 7–5–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Promise Neighborhoods Program—Implementation Grant Competition

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

Overview Information

Promise Neighborhoods Program—Implementation Grant Competition.

Notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.215N (Implementation grants).

DATES: *Applications Available:* July 6, 2011.

Deadline for Notice of Intent To Apply: July 22, 2011.

Date of Pre-Application Webinars: Planning Application: July 14, 2011 and August 2, 2011. Implementation Application: July 19, 2011 and July 28, 2011.

Deadline for Transmittal of Applications: September 6, 2011.

Deadline for Intergovernmental Review: November 3, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Promise Neighborhoods program is carried out under the legislative authority of the Fund for Improvement of Education (FIE), title V, part D, subpart 1, sections 5411 through 5413 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7243–7243b). FIE supports nationally significant programs to improve the quality of elementary and secondary education at the State and local levels and to help all children meet challenging State academic content and student academic achievement standards.

The purpose of the Promise Neighborhoods program is to significantly improve the educational and developmental outcomes of children and youth in our most distressed communities, and to transform those communities by—

(1) Identifying and increasing the capacity of eligible organizations (as defined in this notice) that are focused on achieving results for children and youth throughout an entire neighborhood;

(2) Building a complete continuum of cradle-through-college-to-career solutions (continuum of solutions) (as defined in this notice) of both educational programs and family and community supports (both as defined in this notice), with great schools at the center. All solutions in the continuum of solutions must be accessible to children with disabilities (CWD) (as defined in this notice) and English learners (ELs) (as defined in this notice);

(3) Integrating programs and breaking down agency ''silos'' so that solutions are implemented effectively and efficiently across agencies;

(4) Developing the local infrastructure of systems and resources needed to sustain and scale up proven, effective solutions across the broader region beyond the initial neighborhood; and

(5) Learning about the overall impact of the Promise Neighborhoods program and about the relationship between particular strategies in Promise Neighborhoods and student outcomes, including through a rigorous evaluation of the program.

Background: The vision of this program is that all children and youth growing up in Promise Neighborhoods have access to great schools and strong systems of family and community support that will prepare them to attain an excellent education and successfully transition to college and a career.

A Promise Neighborhood is both a place and a strategy. A place eligible to become a Promise Neighborhood is a geographic area that is distressed, often facing inadequate access to high-quality early learning programs and services, with struggling schools, low high-school and college graduation rates, high rates of unemployment, high rates of crime, and indicators of poor health. These conditions contribute to and intensify the negative outcomes associated with children and youth living in poverty. Children and youth who are from low-income families and grow up in neighborhoods of concentrated poverty face educational and life challenges above and beyond the challenges faced by children who are from low-income families who grow up in neighborhoods without a high concentration of poverty. A Federal evaluation of the reading and mathematics outcomes of elementary students in 71 schools in 18 districts and 7 States found that even when controlling for individual student poverty, there is a significant negative association between school-level poverty and student achievement.[1] The evaluation found that students have lower academic outcomes when a higher percentage of their same-school peers qualify for free and reduced-priced lunch (FRPL) compared to when a lower percentage of their same-school peers qualify for FRPL. The compounding effects of neighborhood poverty continue later in life: Another study found that, for children with similar levels of family income, growing up in a neighborhood where the number of families in poverty was between 20 and 30 percent increased the chance of downward economic mobility—moving

[1] Westat and Policy Studies Associate. *The longitudinal evaluation of school change and performance (LESCP) in title I schools.* Prepared for the U.S. Department of Education. Available January 2010 online at *http://www.policystudies.com/studies/school/lescp_vol2.pdf.*

down the income ladder relative to their parents—by more than 50 percent compared with children who grew up in neighborhoods with under 10 percent of families in poverty.[2]

A Promise Neighborhood is also a strategy for addressing the issues in distressed communities. Promise Neighborhoods are led by organizations that work to ensure that all children and youth in the target geographic area have access to the continuum of solutions needed to graduate from high school college- and career-ready. Within these geographic areas, Promise Neighborhoods create a high level of participation in cradle-to-career supports for children and youth, where over time a greater proportion of the neighborhood is served by programs and neighborhood indicators show significant progress. For this reason, each Promise Neighborhood grantee must have several core features: (1) Significant need in the neighborhood the grant serves; (2) a strategy to build a continuum of solutions with strong schools at the center; and (3) the capacity to achieve results. As the proportion of neighborhood children, students, and families accessing services and attending great schools increases, the entire neighborhood will be positively affected.

While there are a number of organizations and communities that are working on developing Promise Neighborhoods strategies, these entities are at different stages of readiness to create a Promise Neighborhood. Therefore, we have established priorities, requirements, definitions, and selection criteria for both planning and implementation grants in a notice of final priorities, requirements, definitions, and selection criteria published elsewhere in this issue of the **Federal Register.** The priorities, requirements, and selection criteria are different for planning grant and implementation grant applicants, while the definitions apply to both groups of applicants. This notice invites applications for implementation grants. Elsewhere in this issue of the **Federal Register,** we have published a notice inviting applications for FY 2011 for planning grants.

Planning grants will support eligible organizations that need to develop feasible plans to create a continuum of solutions with the potential to significantly improve the educational and developmental outcomes of children and youth in a neighborhood. These grants will support eligible organizations that demonstrate the need for creating a Promise Neighborhood in the geographic areas they are targeting, a sound strategy for developing a feasible plan to create a continuum of solutions, and the capacity to develop the plan.

Under Absolute Priority 1 for planning grants, Promise Neighborhoods planning grantees generally must undertake the following activities during the planning year (the complete and exact requirements of the priority are specified elsewhere in the notice):

(1) Conduct a comprehensive needs assessment and segmentation analysis (as defined in this notice) of children and youth in the neighborhood.

(2) Develop a plan to deliver a continuum of solutions with the potential to drive results. This includes building community support for and involvement in the development of the plan.

(3) Establish effective partnerships both to provide solutions along the continuum and to commit resources to sustain and scale up what works.

(4) Plan, build, adapt, or expand a longitudinal data system that will provide information that the grantee will use for learning, continuous improvement, and accountability.

(5) Participate in a community of practice (as defined in this notice).

Implementation grants will support eligible organizations in carrying out their plans to create a continuum of solutions that will significantly improve the educational and developmental outcomes of children and youth in the target neighborhood. These grants will aid eligible organizations that have developed a plan that demonstrates the need for the creation of a Promise Neighborhood in the geographic area they are targeting, a sound strategy for implementing a plan for creating a continuum of solutions, and the capacity to implement the plan. More specifically, grantees will use implementation grant funds to develop the administrative capacity necessary to successfully implement a continuum of solutions, such as managing partnerships, integrating multiple funding sources, and supporting the grantee's longitudinal data system. While implementation grantees will be best positioned to determine the allocation of grant funds given the results of their needs assessments and plans to build their organizational capacity, the Department expects that the majority of resources to provide solutions within the continuum of solutions will come from public and private funding sources that are integrated and aligned with the Promise Neighborhoods strategy.

Under Absolute Priority 1 for implementation grants, Promise Neighborhoods implementation grantees generally will undertake the following activities during the implementation years (the complete and exact requirements of the priority are specified elsewhere in the notice):

(1) Implement a continuum of solutions that addresses neighborhood challenges, as identified through a needs assessment and segmentation analysis, and that will improve results for children and youth in the neighborhood.

(2) Continue to build and strengthen partnerships that will provide solutions along the continuum of solutions and that will commit resources to sustain and scale up what works.

(3) Collect data on indicators at least annually, and use and improve a longitudinal data system for learning, continuous improvement, and accountability.

(4) Demonstrate progress on goals for improving systems, such as by making changes in policies and organizations, and by leveraging resources to sustain and scale up what works.

(5) Participate in a community of practice (as defined in this notice).

Considering the time and urgency required to dramatically improve outcomes of children and youth in our most distressed neighborhoods and to transform those neighborhoods, implementation grantees will establish both short- and long-term goals to define success.

Consistent with the approach of the Promise Neighborhoods program, we believe that it is important for communities to develop a comprehensive neighborhood revitalization strategy that addresses neighborhood assets (as defined in this notice) that are essential to transforming distressed neighborhoods into healthy and vibrant communities of opportunity. Although not a proposed requirement for planning or implementation applicants, we believe that a Promise Neighborhood will be most successful when it is part of, and contributing to, an area's broader neighborhood revitalization strategy. We believe that only through the development of such comprehensive neighborhood revitalization plans that embrace the coordinated use of programs and resources in order to effectively address the interrelated needs within a community will the

[2] Sharkey, Patrick. ''Neighborhoods and the Black-White Mobility Gap.'' Economic Mobility Project: An Initiative of The Pew Charitable Trusts, 2009.

broader vision of neighborhood transformation occur.

Because a diverse group of communities could benefit from Promise Neighborhoods, the Secretary has established an absolute priority for applicants that propose to serve one or more rural communities only (as defined in this notice) and an absolute priority for applicants that propose to serve one or more Indian Tribes (as defined in this notice).

Note: In developing their strategies for planning or implementing a continuum of solutions, applicants should be mindful of the importance of ensuring that all children, including infants and toddlers in the neighborhood, have an opportunity to benefit. For example, individuals with disabilities and language minorities, particularly recent immigrants, may encounter unique challenges that prevent them from accessing the benefits of a Promise Neighborhoods project.

Successful applicants under this competition must comply with Federal civil rights laws that apply to recipients and subrecipients of Federal financial assistance including: Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, or national origin); Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (prohibiting discrimination on the basis of disability); Title IX of the Education Amendments of 1972 (prohibiting discrimination on the basis of sex); and the Age Discrimination Act of 1975 (prohibiting discrimination on the basis of age).

Applicants, therefore, in designing their projects and preparing their required General Education Provisions Act (GEPA) Section 427 assurance, will need to address barriers to participation for individuals, including individuals with disabilities and limited English proficiency, and must consider the steps they will take to ensure equitable participation of all children and families in the project, in compliance with civil rights obligations. (Section 427 requires each applicant to include in its application a description of the steps the applicant proposes to take to ensure equitable access to, and participation in, its federally-assisted program for students, teachers and other program beneficiaries with special needs.)

Priorities: This competition includes three absolute priorities, four competitive preference priorities, and one invitational priority that are explained in the following paragraphs. These priorities are from the 2011 Promise Neighborhoods NFP, published elsewhere in this issue of the **Federal Register.**

Absolute Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one or more of these absolute priorities.

Note: Applicants must indicate in their application whether they are applying under Implementation Grant Priority 1 (Absolute), Implementation Grant Priority 2 (Absolute), or Implementation Grant Priority 3 (Absolute). An applicant that applies under Implementation Grant Priority 2 (Absolute) but is not eligible for funding under Implementation Grant Priority 2 (Absolute), or applies under Implementation Grant Priority 3 (Absolute) but is not eligible for funding under Implementation Grant Priority 3 (Absolute), may be considered for funding under Implementation Grant Priority 1 (Absolute).

These priorities are:

Implementation Grant Priority 1 (Absolute) Submission of a Promise Neighborhood Plan.

To meet this priority, an applicant must submit a plan to create a Promise Neighborhood. The plan must describe the need in the neighborhood, a strategy to build a continuum of solutions, and the applicant's capacity to achieve results. Specifically, an applicant must—

(1) Describe the geographically defined area [3] (neighborhood) to be served and the level of distress in that area based on indicators of need and other relevant indicators. The statement of need in the neighborhood must be based, in part, on results of a comprehensive needs assessment and segmentation analysis (as defined in this notice). Applicants may propose to serve multiple, non-contiguous geographically defined areas. In cases where target areas are not contiguous, the applicant must explain its rationale for including non-contiguous areas;

(2) Describe the applicant's strategy for building a continuum of solutions over time that addresses neighborhood challenges as identified in the needs assessment and segmentation analysis. The applicant must also describe how it has built community support for and involvement in the development of the plan. The continuum of solutions must be based on the best available evidence including, where available, strong or moderate evidence (as defined in this notice), and be designed to significantly improve educational outcomes and to support the healthy development and well-being of children and youth in the neighborhood. The strategy must be designed to ensure that over time, a greater proportion of children and youth in the neighborhood who attend the target school or schools have access to a complete continuum of solutions, and must ensure that over time, a greater proportion of children and youth in the neighborhood who do not attend the target school or schools have access to solutions within the continuum of solutions. The strategy must also ensure that, over time, students not living in the neighborhood who attend the target school or schools have access to solutions within the continuum of solutions.

The success of the applicant's strategy to build a continuum of solutions will be based on the results of the project, as measured against the project indicators as defined in this notice and described in Table 1 and Table 2. In its strategy, the applicant must propose clear and measurable annual goals during the grant period against which improvements will be measured using the indicators. The strategy must—

(a) Identify each solution that the project will implement within the proposed continuum of solutions, and must include—

(i) High-quality early learning programs and services designed to improve outcomes across multiple domains of early learning (as defined in this notice) for children from birth through third grade;

(ii) Ambitious, rigorous, and comprehensive education reforms that are linked to improved educational outcomes for children and youth in preschool through the 12th grade. Public schools served through the grant may include persistently lowest-achieving schools (as defined in this notice) or low-performing schools (as defined in this notice) that are not also persistently lowest-achieving schools. An applicant (or one or more of its partners) may serve an effective school or schools (as defined in this notice) but only if the applicant (or one or more of its partners) also serves at least one low-performing school (as defined in this notice) or persistently lowest-achieving school (as defined in this notice). An applicant must identify in its application the public school or schools it would serve and describe the current status of reforms in the school or schools, including, if applicable, the type of intervention model being implemented. In cases where an applicant operates a school or partners with a school that does not serve all students in the neighborhood, the applicant must partner with at least one

[3] For the purposes of this notice, the Department uses the terms ''georgraphic area'' and ''neighborhood'' interchangeably.

additional school that also serves students in the neighborhood. An applicant proposing to work with a persistently lowest-achieving school must include in its strategy one of the four school intervention models (turnaround model, restart model, school closure, or transformation model) described in Appendix C of the Race to the Top (RTT) notice inviting applications for new awards for FY 2010 that was published in the **Federal Register** on November 18, 2009 (74 FR 59836, 59866).

An applicant proposing to work with a low-performing school must include in its strategy ambitious, rigorous, and comprehensive interventions to assist, augment, or replace schools, which may include implementing one of the four school intervention models, or may include another model of sufficient ambition, rigor, and comprehensiveness to significantly improve academic and other outcomes for students. An applicant proposing to work with a low-performing school must include in its strategy an intervention that addresses the effectiveness of teachers and leaders and the school's use of time and resources, which may include increased learning time (as defined in this notice);

Note regarding school reform strategies: So as not to penalize an applicant for proposing to work with an LEA that has implemented rigorous reform strategies prior to the publication of this notice, an applicant is not required to propose a new reform strategy in place of an existing reform strategy in order to be eligible for a Promise Neighborhoods implementation grant. For example, an LEA might have begun to implement improvement activities that meet many, but not all, of the elements of a transformation model of school intervention. In this case, the applicant could propose, as part of its Promise Neighborhood strategy, to work with the LEA as the LEA continues with its reforms.

(iii) Programs that prepare students to be college- and career-ready; and

(iv) Family and community supports (as defined in this notice).

To the extent feasible and appropriate, the applicant must describe, in its plan, how the applicant and its partners will leverage and integrate high-quality programs, related public and private investments, and existing neighborhood assets into the continuum of solutions. An applicant must also include in its application an appendix that summarizes the evidence supporting each proposed solution and describes how the solution is based on the best available evidence, including, where available, strong or moderate evidence (as defined in this notice). An applicant must also describe in the appendix how and when—during the implementation process—the solution will be implemented; the partners that will participate in the implementation of each solution (in any case in which the applicant does not implement the solution directly); the estimated per-child cost, including administrative costs, to implement each solution; the estimated number of children, by age, in the neighborhood who will be served by each solution and how a segmentation analysis was used to target the children and youth to be served; and the source of funds that will be used to pay for each solution. In the description of the estimated number of children to be served, the applicant must include the percentage of all children of the same age group within the neighborhood proposed to be served with each solution, and the annual goals required to increase the proportion of children served to reach scale over time.

An applicant must also describe in its plan how it will identify Federal, State, or local policies, regulations, or other requirements that would impede its ability to achieve its goals and how it will report on those impediments to the Department and other relevant agencies.

As appropriate, considering the time and urgency required to dramatically improve outcomes of children and youth in our most distressed neighborhoods and to transform those neighborhoods, applicants must establish both short-term and long-term goals to measure progress.

As part of the description of its strategy to build a continuum of solutions, the applicant must also describe how it will participate in, organize, or facilitate, as appropriate, communities of practice for Promise Neighborhoods;

(b) Establish clear, annual goals for evaluating progress in improving systems, such as changes in policies, environments, or organizations that affect children and youth in the neighborhood. Examples of systems change could include a new school district policy to measure the results of family and community support programs, a new funding resource to support the Promise Neighborhoods strategy, or a cross-sector collaboration at the city level to break down municipal agency ''silos'' and partner with local philanthropic organizations to drive achievement of a set of results; and

(c) Establish clear, annual goals for evaluating progress in leveraging resources, such as the amount of monetary or in-kind investments from public or private organizations to support the Promise Neighborhoods strategy. Examples of leveraging resources are securing new or existing dollars to sustain and scale up what works in the Promise Neighborhood or integrating high-quality programs in the continuum of solutions. Applicants may consider, as part of their plans to scale up their Promise Neighborhood strategy, serving a larger geographic area by partnering with other applicants to the Promise Neighborhoods program from the same city or region;

(3) Explain how it used its needs assessment and segmentation analysis to determine the children with the highest needs and explain how it will ensure that children in the neighborhood receive the appropriate services from the continuum of solutions. In this explanation of how it used the needs assessment and segmentation analysis, the applicant must identify and describe in its application the educational indicators and family and community support indicators that the applicant used to conduct the needs assessment. Whether or not the implementation grant applicant received a Promise Neighborhoods planning grant, the applicant must describe how it—

(a) Collected data for the educational indicators listed in Table 1 and used them as both program and project indicators;

(b) Collected data for the family and community support indicators in Table 2 and used them as program indicators; and

(c) Collected data for unique family and community support indicators, developed by the applicant, that align with the goals and objectives of the project and used them as project indicators or used the indicators in Table 2 as project indicators.

An applicant must also describe how it will collect at least annual data on the indicators in Tables 1 and 2; establish clear, annual goals for growth on indicators; and report those data to the Department.

TABLE 1—EDUCATION INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# and % of children, from birth to kindergarten entry, who have a place where they usually go, other than an emergency room, when they are sick or in need of advice about their health.	Children enter kindergarten ready to succeed in school.
—# and % of three-year-olds and children in kindergarten who demonstrate at the beginning of the program or school year age-appropriate functioning across multiple domains of early learning (as defined in this notice) as determined using developmentally appropriate early learning measures (as defined in this notice).	
—# & % of children, from birth to kindergarten entry, participating in center-based or formal home-based early learning settings or programs, which may include Early Head Start, Head Start, child care, or preschool.	
—# & % of students at or above grade level according to State mathematics and reading or language arts assessments in at least the grades required by the ESEA (3rd through 8th and once in high school).	Students are proficient in core academic subjects.
—Attendance rate of students in 6th, 7th, 8th, and 9th grade	Students successfully transition from middle school grades to high school.
—Graduation rate (as defined in this notice)	Youth graduate from high school
—# & % of Promise Neighborhood students who graduate with a regular high school diploma, as defined in 34 CFR 200.19(b)(1)(iv), and obtain postsecondary degrees, vocational certificates, or other industry-recognized certifications or credentials without the need for remediation.	High school graduates obtain a postsecondary degree, certification, or credential.

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# & % of children who participate in at least 60 minutes of moderate to vigorous physical activity daily; and.	Students are healthy.
—# & % of children who consume five or more servings of fruits and vegetables daily; or	
—possible third indicator, to be determined (TBD) by applicant.	
—# & % of students who feel safe at school and traveling to and from school, as measured by a school climate needs assessment (as defined in this notice); or	Students feel safe at school and in their community.
—possible second indicator, TBD by applicant.	
—Student mobility rate (as defined in this notice); or	Students live in stable communities.
—possible second indicator, TBD by applicant.	
—For children birth to kindergarten entry, the # and % of parents or family members who report that they read to their child three or more times a week;	Families and community members support learning in Promise Neighborhood schools.
—For children in the kindergarten through eighth grades, the # and % of parents or family members who report encouraging their child to read books outside of school; and	
—For children in the ninth through twelfth grades, the # and % of parents or family members who report talking with their child about the importance of college and career; or	
—possible fourth indicator TBD by applicant.	
—# & % of students who have school and home access (and % of the day they have access) to broadband internet (as defined in this notice) and a connected computing device; or	Students have access to 21st century learning tools.
—possible second indicator TBD by applicant.	

Note: The indicators in Table 1 and Table 2 are not intended to limit an applicant from collecting and using data for additional indicators. Examples of additional indicators are—

(i) The # and % of children who participate in high-quality learning activities during out-of-school hours or in the hours after the traditional school day ends;

(ii) The # and % of students who are suspended or receive discipline referrals during the year;

(iii) The share of housing stock in the geographically defined area that is rent-protected, publicly assisted, or targeted for redevelopment with local, State, or Federal funds; and

(iv) The # and % of children who are homeless or in foster care and who have an assigned adult advocate.

Note: While the Department believes there are many programmatic benefits of collecting data on every child in the proposed neighborhood, the Department will consider requests to collect data on only a sample of the children in the neighborhood for some indicators so long as the applicant describes in its application how it would ensure the sample would be representative of the children in the neighborhood;

(4) Describe the experience and lessons learned, and describe how the applicant will build the capacity of its management team and project director in all of the following areas:

(a) Working with the neighborhood and its residents, including parents and families that have children or other members with disabilities or ELs, as well as with the school(s) described in paragraph (2) of this priority; the LEA in which the school or schools are located; Federal, State, and local government leaders; and other service providers.

(b) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability. The applicant must describe—

(i) Progress towards developing, launching, and implementing a longitudinal data system that integrates student-level data from multiple sources in order to measure progress on educational and family and community support indicators for all children in the neighborhood, disaggregated by the subgroups listed in section 1111(b)(3)(C)(xiii) of the ESEA;

(ii) How the applicant has linked or made progress to link the longitudinal data system to school-based, LEA, and State data systems; made the data accessible to parents, families, community residents, program partners, researchers, and evaluators while abiding by Federal, State, and other privacy laws and requirements; and managed and maintained the system;

(iii) How the applicant has used rapid-time (as defined in this notice) data in prior years and, how it will continue to use those data once the Promise Neighborhood strategy is implemented, for continuous program improvement; and

(iv) How the applicant will document the implementation process, including by describing lessons learned and best practices.

(c) Creating and strengthening formal and informal partnerships, for such purposes as providing solutions along the continuum of solutions and committing resources to sustaining and scaling up what works. Each applicant must submit, as part of its application, a memorandum of understanding, signed by each organization or agency with which it would partner in implementing the proposed Promise Neighborhood. The memorandum of understanding must describe—

(i) Each partner's financial and programmatic commitment; and

(ii) How each partner's existing vision, theory of change (as defined in this notice), theory of action (as defined in this notice), and current activities align with those of the proposed Promise Neighborhood;

(d) The governance structure proposed for the Promise Neighborhood, including a system for holding partners accountable, how the eligible entity's governing board or advisory board is representative of the geographic area proposed to be served (as defined in this notice), and how residents of the geographic area would have an active role in the organization's decision-making.

(e) Integrating funding streams from multiple public and private sources from the Federal, State, and local level. Examples of public funds include Federal resources from the U.S. Department of Education, such as the 21st Century Community Learning Centers program and title I of the ESEA, and from other Federal agencies, such as the U.S. Departments of Health and Human Services, Housing and Urban Development, Justice, Labor, and Treasury.

(5) Describe the applicant's commitment to work with the Department, and with a national evaluator for Promise Neighborhoods or another entity designated by the Department, to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods program and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(a) Ensuring that, through memoranda of understanding with appropriate entities, the national evaluator and the Department have access to relevant program and project data sources (*e.g.,* administrative data and program and project indicator data), including data on a quarterly basis if requested by the Department;

(b) Developing, in consultation with the national evaluator, an evaluation strategy, including identifying a credible comparison group (as defined in this notice); and

(c) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for both program participants and a designated comparison group of non-participants.

Implementation Grant Priority 2 (Absolute) Promise Neighborhoods in Rural Communities.

To meet this priority, an applicant must propose to implement a Promise Neighborhood strategy that (1) meets all of the requirements in Absolute Priority 1; and (2) serves one or more rural communities only.

Implementation Grant Priority 3 (Absolute) Promise Neighborhoods in Tribal Communities.

To meet this priority, an applicant must propose to implement a Promise Neighborhood strategy that (1) meets all of the requirements in Absolute Priority 1; and (2) serves one or more Indian tribes (as defined in this notice).

Competitive Preference Priorities: For FY 2011, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award additional points to an application depending on how well the application meets Implementation Grant Priorities 4, 5, 6, or 7 (Competitive Preference). Applicants may address more than one of the competitive preference priorities; however, the Department will review and award points only for a maximum of two of the competitive preference priorities. Therefore, an applicant must identify in the project narrative section of its application the priority or the two priorities it wishes the Department to consider for purposes of earning the competitive preference priority points.

Note: The Department will not review or award points under any competitive preference priority for an application that (1) Fails to clearly identify the competitive preference priority or the two priorities it wishes the Department to consider for purposes of earning the competitive preference priority points, or (2) identifies more than two competitive preference priorities.

These priorities are:

Implementation Grant Priority 4 (Competitive Preference)

Comprehensive Local Early Learning Network (zero, one, or two points).

To meet this priority, an applicant must propose in its plan to expand, enhance, or modify an existing network of early learning programs and services to ensure that they are high-quality and comprehensive for children from birth through the third grade. The plan must also ensure that the network establishes a high standard of quality across early learning settings and is designed to improve outcomes across multiple domains of early learning. Distinct from the early learning solutions described in paragraph (2) of Absolute Priority 1, this priority supports implementation plans that integrate various early learning services and programs in the neighborhood, *i.e.,* school-based early learning programs in order to enhance the quality of such services and programs; locally- or State-funded preschool programs; Early Head Start and Head Start programs; the local child care resource and referral agency, if applicable; Individuals with Disabilities Education Act (IDEA) services and programs; services through private providers; home visiting programs; child care providers licensed by the State, including public and private providers and center-based care; and family, friend, or neighbor care in the Promise Neighborhood.

The early learning network must address or incorporate ongoing State-level efforts regarding the major components of high-quality early learning programs and services, such as State early learning and development standards, program quality standards, comprehensive assessment systems, workforce and professional development systems, health promotion, family and community engagement, a coordinated data infrastructure, and a method of measuring, monitoring, evaluating, and improving program quality. For example, an applicant might address how the Promise Neighborhoods project will use the State's early learning standards, as applicable, and the Head Start Child Development and Early Learning Framework (Framework), as applicable, to define the expectations of what children should know and be able to do before entering kindergarten. The Framework is available on the Office of Head Start's Web site at: *http://eclkc.ohs.acf.hhs.gov/hslc/ecdh/eecd/Assessment/Child%20Outcomes/*

HS_Revised_Child_Outcomes_Framework.pdf. Similarly, an applicant that addresses this priority must discuss, where applicable, how it would align with the State's Quality Rating and Improvement System (QRIS), as applicable, professional development and workforce infrastructure, and other appropriate State efforts. In addition, the plan must include, to the extent practicable, early learning opportunities on multiple platforms (*e.g.,* public television, web-based, etc.) and in multiple locations (*e.g.,* at home, at school, and at other community locations).

Note regarding accessibility of early learning programs and services: These early learning opportunities must be fully accessible to individuals with disabilities, including individuals who are blind or have low vision; otherwise, the plans must describe how accommodations or modifications will be provided to ensure that the benefits of the early learning opportunities are provided to children and youth with disabilities in an equally effective and equally integrated manner.

The implementation plan for a high-quality and comprehensive local early learning network must describe the governance structure and the major components of high-quality early learning programs and services as well as include goals, strategies, and benchmarks to provide early learning programs and services that result in improvements across multiple domains of early learning. The plan must result from a needs assessment and segmentation analysis (as defined in this notice) and must reflect input from a broad range of stakeholders. An application addressing this priority must designate an individual responsible for overseeing and coordinating the early learning initiatives and must include a resume or position description and other supporting documentation to demonstrate that the individual designated, or individual hired to carry out those responsibilities, possesses the appropriate State certification, and has experience and expertise in managing and administering high-quality early learning programs, including in coordinating across various high-quality early learning programs and services.

Implementation Grant Priority 5 (Competitive Preference)

Quality Internet Connectivity (zero or one point).

To meet this priority, an applicant must ensure that almost all students in the geographic area proposed to be served have broadband internet access (as defined in this notice) at home and at school, the knowledge and skills to use broadband internet access effectively, and a connected computing device to support schoolwork.

Implementation Grant Priority 6 (Competitive Preference)

Arts and Humanities (zero or one point).

To meet this priority, an applicant must include in its plan opportunities for children and youth to experience and participate actively in the arts and humanities in their community so as to broaden, enrich, and enliven the educational, cultural, and civic experiences available in the neighborhood. Applicants may include plans for offering these activities in school and in out-of-school settings and at any time during the calendar year.

Implementation Grant Priority 7 (Competitive Preference)

Quality Affordable Housing (Zero or One Point).

To meet this priority, an applicant must propose to serve geographic areas that were the subject of an affordable housing transformation pursuant to a Choice Neighborhoods or HOPE VI grant awarded by the U.S. Department of Housing and Urban Development during FY 2009 or later years. To be eligible under this priority, the applicant must either (1) be able to demonstrate that it has received a Choice Neighborhoods or HOPE VI grant or (2) provide, in its application, a memorandum of understanding between it and a partner that is a recipient of a Choice Neighborhoods or HOPE VI grant. The memorandum must indicate a commitment on the part of the applicant and partner to coordinate implementation and align resources to the greatest extent practicable.

Invitational Priority: For FY 2011, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Implementation Grant Priority 8 (Invitational)

Family Engagement in Learning Through Adult Education.

To meet this priority, an applicant must include a plan that is coordinated with adult education providers serving neighborhood residents, such as those funded through the Adult Education and Family Literacy Act, as amended. Coordinated services may include adult basic and secondary education and programs that provide training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement. Examples of services and programs include preparation for the General Education Development (GED) test; English literacy, family literacy, and work-based literacy training; or other training that prepares adults for postsecondary education and careers, or supports adult engagement in the educational success of children and youth in the neighborhood.

Optional Supplemental Funding Opportunity

The U.S. Department of Justice (DOJ) intends to provide an optional, supplemental funding opportunity for Promise Neighborhoods implementation grantees with plans that propose to analyze and resolve public safety concerns associated with violence, gangs, and illegal drugs utilizing strategies that include prevention, intervention, enforcement, and reentry of offenders back into communities upon release from prison and jail. Under this opportunity, DOJ, through an interagency agreement with the Department of Education, would provide additional funds to some Promise Neighborhoods implementation grantees. Specifically, DOJ would consider supporting Promise Neighborhoods grantees with plans that align with local leadership in implementing and sustaining innovative solutions that incorporate evidence and research into local program and policy decisions to address and reduce persistent crime. Additional information about this optional funding opportunity will be provided to Promise Neighborhoods implementation grantees after grant awards are announced.

Definitions

The following definitions apply to this program:

Broadband internet access means internet access sufficient to provide community members with the internet available when and where they need it and for the uses they require.

Children with disabilities or *CWD* means individuals who meet the definition of *child with a disability* in 34 CFR 300.8, *infant or toddler with a disability* in 34 CFR 300.25, *handicapped person* in 34 CFR 104.3(j), or disability as it pertains to an individual in 42 U.S.C. § 12102.

Community of practice means a group of grantees that agrees to interact regularly to solve a persistent problem or improve practice in an area that is

important to them and the success of their projects. Establishment of communities of practice under Promise Neighborhoods will enable grantees to meet, discuss, and collaborate with each other regarding grantee projects.

Continuum of cradle-through-college-to-career solutions or *continuum of solutions* means solutions that—

(1) Include programs, policies, practices, services, systems, and supports that result in improving educational and developmental outcomes for children from cradle through college to career;

(2) Are based on the best available evidence, including, where available, strong or moderate evidence (as defined in this notice);

(3) Are linked and integrated seamlessly (as defined in this notice); and

(4) Include both education programs and family and community supports.

Credible comparison group includes a comparison group formed by matching project participants with non-participants based on key characteristics that are thought to be related to outcomes. These characteristics include, but are not limited to: (1) Prior test scores and other measures of academic achievement (preferably the same measures that will be used to assess the outcomes of the project); (2) demographic characteristics, such as age, disability, gender, English proficiency, ethnicity, poverty level, parents' educational attainment, and single- or two-parent family background; (3) the time period in which the two groups are studied (*e.g.,* the two groups are children entering kindergarten in the same year as opposed to sequential years); and (4) methods used to collect outcome data (*e.g.,* the same test of reading skills administered in the same way to both groups).

Developmentally appropriate early learning measures means a range of assessment instruments that are used in ways consistent with the purposes for which they were designed and validated; appropriate for the ages and other characteristics of the children being assessed; designed and validated for use with children whose ages, cultures, languages spoken at home, socioeconomic status, abilities and disabilities, and other characteristics are similar to those of the children with whom the assessments will be used; and used in compliance with the measurement standards set forth by the American Educational Research Association (AERA), the American Psychological Association (APA), and the National Council for Measurement in Education (NCME) in the 1999 Standards for Educational and Psychological Testing.

Education programs means programs that include, but are not limited to—

(1) High-quality early learning programs or services designed to improve outcomes across multiple domains of early learning for young children. Such programs must be specifically intended to align with appropriate State early learning and development standards, practices, strategies, or activities across as broad an age range as birth through third grade so as to ensure that young children enter kindergarten and progress through the early elementary school grades demonstrating age-appropriate functioning across the multiple domains;

(2) For children in preschool through the 12th grade, programs, inclusive of related policies and personnel, that are linked to improved educational outcomes. The programs—

(a) Must include effective teachers and effective principals;

(b) Must include strategies, practices, or programs that encourage and facilitate the evaluation, analysis, and use of student achievement, student growth (as defined in this notice), and other data by educators, families, and other stakeholders to inform decision-making;

(c) Must include college- and career-ready standards, assessments, and practices, including a well-rounded curriculum, instructional practices, strategies, or programs in, at a minimum, core academic subjects as defined in section 9101(11) of the ESEA, that are aligned with high academic content and achievement standards and with high-quality assessments based on those standards; and

(d) May include creating multiple pathways for students to earn regular high school diplomas (*e.g.,* using schools that serve the needs of over-aged, under-credited, or other students with an exceptional need for flexibility regarding when they attend school or the additional supports they require; awarding credit based on demonstrated evidence of student competency; or offering dual-enrollment options); and

(3) Programs that prepare students for college and career success, which may include programs that—

(a) Create and support partnerships with community colleges, four-year colleges, or universities and that help instill a college-going culture in the neighborhood;

(b) Provide dual-enrollment opportunities for secondary students to gain college credit while in high school;

(c) Provide, through relationships with businesses and other organizations, apprenticeship opportunities to students;

(d) Align curricula in the core academic subjects with requirements for industry-recognized certifications or credentials, particularly in high-growth sectors;

(e) Provide access to career and technical education programs so that individuals can attain the skills and industry-recognized certifications or credentials for success in their careers;

(f) Help college students, including CWD and ELs from the neighborhood to transition to college, persist in their academic studies in college, graduate from college, and transition into the workforce; and

(g) Provide opportunities for all youth (both in and out of school) to achieve academic and employment success by improving educational and skill competencies and providing connections to employers. Such activities may include opportunities for on-going mentoring, supportive services, incentives for recognition and achievement, and opportunities related to leadership, development, decision-making, citizenship, and community service.

Effective school means a school that has—

(1) Significantly closed the achievement gaps between subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) within the school or district; or

(2)(a) Demonstrated success in significantly increasing student academic achievement in the school for all subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) in the school; and (b) made significant improvements in other areas, such as graduation rates (as defined in this notice) or recruitment and placement of effective teachers and effective principals.

Eligible organization means an organization that—

(1) Is representative of the geographic area proposed to be served (as defined in this notice);

(2) Is one of the following:

(a) A nonprofit organization that meets the definition of a nonprofit under 34 CFR 77.1(c), which may include a faith-based nonprofit organization.

(b) An institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, as amended.

(c) An Indian tribe (as defined in this notice);

(3) Currently provides at least one of the solutions from the applicant's proposed continuum of solutions in the geographic area proposed to be served; and

(4) Operates or proposes to work with and involve in carrying out its proposed project, in coordination with the school's LEA, at least one public elementary or secondary school that is located within the identified geographic area that the grant will serve.

English learners or *ELs* means individuals who meet the definition of limited English proficient, as defined in section 9101(25) of the ESEA.

Family and community supports means—

(1) Child and youth health programs, such as physical, mental, behavioral, and emotional health programs (*e.g.,* home visiting programs; Early Head Start; programs to improve nutrition and fitness, reduce childhood obesity, and create healthier communities);

(2) Safety programs, such as programs in school and out of school to prevent, control, and reduce crime, violence, drug and alcohol use, and gang activity; programs that address classroom and school-wide behavior and conduct; programs to prevent child abuse and neglect; programs to prevent truancy and reduce and prevent bullying and harassment; and programs to improve the physical and emotional security of the school setting as perceived, experienced, and created by students, staff, and families;

(3) Community stability programs, such as programs that—

(a) Increase the stability of families in communities by expanding access to quality, affordable housing, providing legal support to help families secure clear legal title to their homes, and providing housing counseling or housing placement services;

(b) Provide adult education and employment opportunities and training to improve educational levels, job skills and readiness in order to decrease unemployment, with a goal of increasing family stability;

(c) Improve families' awareness of, access to, and use of a range of social services, if possible at a single location;

(d) Provide unbiased, outcome-focused, and comprehensive financial education, inside and outside the classroom and at every life stage;

(e) Increase access to traditional financial institutions (*e.g.,* banks and credit unions) rather than alternative financial institutions (*e.g.,* check cashers and payday lenders);

(f) Help families increase their financial literacy, financial assets, and savings; and

(g) Help families access transportation to education and employment opportunities;

(4) Family and community engagement programs that are systemic, integrated, sustainable, and continue through a student's transition from K–12 school to college and career. These programs may include family literacy programs and programs that provide adult education and training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement; mentorship programs that create positive relationships between children and adults; programs that provide for the use of such community resources as libraries, museums, television and radio stations, and local businesses to support improved student educational outcomes; programs that support the engagement of families in early learning programs and services; programs that provide guidance on how to navigate through a complex school system and how to advocate for more and improved learning opportunities; and programs that promote collaboration with educators and community organizations to improve opportunities for healthy development and learning; and

(5) 21st century learning tools, such as technology (*e.g.,* computers and mobile phones) used by students in the classroom and in the community to support their education. This includes programs that help students use the tools to develop knowledge and skills in such areas as reading and writing, mathematics, research, critical thinking, communication, creativity, innovation, and entrepreneurship.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Note: This definition is not meant to prevent a grantee from also collecting information about the reasons why students do not graduate from the target high school, *e.g.,* dropping out or moving outside of the school district for non-academic or academic reasons.

Increased learning time means using a longer school day, week, or year to significantly increase the total number of school hours. This strategy is used to redesign the school's program in a manner that includes additional time for (a) instruction in core academic subjects as defined in section 9101(11) of the ESEA; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

Indian tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe, 25 U.S.C. 479a and 479a–1 or any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, *et seq.,* that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The term ''Indian'' means a member of an Indian tribe.

Indicators of need means currently available data that describe—

(1) Education need, which means—

(a) All or a portion of the neighborhood includes or is within the attendance zone of a low-performing school that is a high school, especially one in which the graduation rate (as defined in this notice) is less than 60 percent or a school that can be characterized as low-performing based on another proxy indicator, such as students' on-time progression from grade to grade; and

(b) Other indicators, such as significant achievement gaps between subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) within a school or LEA, high teacher and principal turnover, or high student absenteeism; and

(2) Family and community support need, which means—

(a) Percentages of children with preventable chronic health conditions (*e.g.,* asthma, poor nutrition, dental problems, obesity) or avoidable developmental delays;

(b) Immunization rates;

(c) Rates of crime, including violent crime;

(d) Student mobility rates;

(e) Teenage birth rates;

(f) Percentage of children in single-parent or no-parent families;

(g) Rates of vacant or substandard homes, including distressed public and assisted housing; or

(h) Percentage of the residents living at or below the Federal poverty threshold.

Linked and integrated seamlessly, with respect to the continuum of solutions, means solutions that have common outcomes, focus on similar milestones, support transitional time periods (*e.g.,* the beginning of

kindergarten, the middle grades, or graduation from high school) along the cradle-through-college-to-career continuum, and address time and resource gaps that create obstacles for students in making academic progress.

Low-performing schools means schools receiving assistance through title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), that are in corrective action or restructuring in the State, as determined under section 1116 of the ESEA, and the secondary schools (both middle and high schools) in the State that are equally as low-achieving as these Title I schools and are eligible for, but do not receive, Title I funds.

Moderate evidence means evidence from previous studies with designs that can support causal conclusions (*i.e.*, studies with high internal validity) but have limited generalizability (*i.e.,* moderate external validity) or from studies with high external validity but moderate internal validity.

Multiple domains of early learning means physical well-being and motor development; social-emotional development; approaches toward learning, which refers to the inclinations, dispositions, or styles, rather than skills, that reflect ways that children become involved in learning and develop their inclinations to pursue learning; language and literacy development, including emergent literacy; and cognition and general knowledge, which refers to thinking and problem-solving as well as knowledge about particular objects and the way the world works. Cognition and general knowledge include mathematical and scientific knowledge, abstract thought, and imagination.

Neighborhood assets means—

(1) Developmental assets that allow residents to attain the skills needed to be successful in all aspects of daily life (*e.g.*, educational institutions, early learning centers, and health resources);

(2) Commercial assets that are associated with production, employment, transactions, and sales (*e.g.*, labor force and retail establishments);

(3) Recreational assets that create value in a neighborhood beyond work and education (*e.g.*, parks, open space, community gardens, and arts organizations);

(4) Physical assets that are associated with the built environment and physical infrastructure (*e.g.*, housing, commercial buildings, and roads); and

(5) Social assets that establish well-functioning social interactions (*e.g.*, public safety, community engagement, and partnerships with youth, parents, and families).

Persistently lowest-achieving school means, as determined by the State—

(1) Any school receiving assistance through Title I that is in improvement, corrective action, or restructuring and that—

(a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(b) Is a high school that has had a graduation rate that is less than 60 percent over a number of years; and

(2) Any secondary school that is eligible for, but does not receive, Title I funds that—

(a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(b) Is a high school that has had a graduation rate that is less than 60 percent over a number of years.

Program indicators are indicators that the Department will use only for research and evaluation purposes and for which an applicant is not required to propose solutions.

Project indicators are indicators for which an applicant proposes solutions intended to result in progress on the indicators.

Public officials means elected officials (*e.g.*, council members, aldermen and women, commissioners, State legislators, Congressional representatives, members of the school board), appointed officials (*e.g.*, members of a planning or zoning commission, or of any other regulatory or advisory board or commission), or individuals who are not necessarily public officials, but who have been appointed by a public official to serve on the Promise Neighborhoods governing board or advisory board.

Rapid-time, in reference to reporting and availability of locally collected data, means that data are available quickly enough to inform current lessons, instruction, and related education programs and family and community supports.

Representative of the geographic area proposed to be served means that residents of the geographic area proposed to be served have an active role in decision-making and that at least one-third of the eligible entity's governing board or advisory board is made up of—

(1) Residents who live in the geographic area proposed to be served, which may include residents who are representative of the ethnic and racial composition of the neighborhood's residents and the languages they speak;

(2) Residents of the city or county in which the neighborhood is located but who live outside the geographic area proposed to be served, and who are low-income (which means earning less than 80 percent of the area's median income as published by the Department of Housing and Urban Development);

(3) Public officials (as defined in this notice) who serve the geographic area proposed to be served (although not more than one-half of the governing board or advisory board may be made up of public officials); or

(4) Some combination of individuals from the three groups listed in paragraphs (1), (2), and (3) of this definition.

Rural community means a neighborhood that—

(1) Is served by an LEA that is currently eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Applicants may determine whether a particular LEA is eligible for these programs by referring to information on the following Department Web sites. For the SRSA program: *http://www.ed.gov/programs/reapsrsa/eligible10/index.html.* For the RLIS program: *http://www.ed.gov/programs/reaprlisp/eligible10/index.html;* or

(2) Includes only schools designated with a school locale code of 42 or 43. Applicants may determine school locale codes by referring to the following Department Web site: *http://nces.ed.gov/ccd/schoolsearch/.*

School climate needs assessment means an evaluation tool that measures the extent to which the school setting promotes or inhibits academic performance by collecting perception data from individuals, which could include students, staff, or families.

Segmentation analysis means the process of grouping and analyzing data from children and families in the geographic area proposed to be served according to indicators of need (as defined in this notice) or other relevant indicators.

Note: The analysis is intended to allow grantees to differentiate and more effectively target interventions based on what they learn about the needs of different populations in the geographic area.

Strong evidence means evidence from studies with designs that can support

causal conclusions (*i.e.*, studies with high internal validity), and studies that, in total, include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.*, studies with high external validity).

Student achievement means—

(1) For tested grades and subjects:

(a) A student's score on the State's assessments under the ESEA; and, as appropriate,

(b) Other measures of student learning, such as those described in paragraph (2) of this definition, provided they are rigorous and comparable across classrooms and programs.

(2) For non-tested grades and subjects: alternative measures of student learning and performance, such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in achievement data for an individual student between two or more points in time. Growth may also include other measures that are rigorous and comparable across classrooms.

Student mobility rate is calculated by dividing the total number of new student entries and withdrawals at a school, from the day after the first official enrollment number is collected through the end of the academic year, by the first official enrollment number of the academic year.

Note: This definition is not meant to limit a grantee from also collecting information about why students enter or withdraw from the school, *e.g.*, transferring to charter schools, moving outside of the school district for non-academic or academic reasons.

Theory of action means an organization's strategy regarding how, considering its capacity and resources, it will take the necessary steps and measures to accomplish its desired results.

Theory of change means an organization's beliefs about how its inputs, and early and intermediate outcomes, relate to accomplishing its long-term desired results.

Program Authority: 20 U.S.C.7243–7243b.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final priorities, requirements, definitions, and selection criteria published elsewhere in this issue of the **Federal Register**.

Note: The regulations in 34 CFR Part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR Part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $23,450,000.

These estimated available funds are only for Implementation grants under the Promise Neighborhoods program.

Contingent upon the availability of funds and the quality of the applications received, we may make additional awards in FY 2012 or later years from the list of unfunded applicants from this competition.

Estimated Range of Awards: Implementation grants: $4,000,000 to $6,000,000.

Estimated Average Size of Awards: Implementation grants: $5,000,000.

Maximum Award: Implementation grants: $6,000,000.

The maximum award amount is $6,000,000 per 12-month budget period. We may choose not to further consider or review applications with budget requests for any 12-month budget period that exceed this amount, if we conclude, during our initial review of the application, that the proposed goals and objectives cannot be obtained with the specified maximum amount.

Estimated Number of Awards: Implementation grants: 4 to 6.

Note: The Department is not bound by any estimates in this notice.

Project Period: Implementation grants: 36–60 months.

III. Eligibility Information

1. *Eligible Applicants:* To be eligible for a grant under this competition, an applicant must be an eligible organization (as defined in this notice). For purposes of *Absolute Priority 3: Promise Neighborhoods in Tribal Communities,* an eligible applicant is an eligible organization that partners with an Indian tribe or is an Indian tribe that meets the definition of an eligible organization.

2. *Cost-Sharing or Matching:*

To be eligible for an implementation grant under this competition, an applicant must demonstrate that it has established a commitment from one or more entities in the public or private sector, which may include Federal, State, and local public agencies, philanthropic organizations, private businesses, or individuals, to provide matching funds for the implementation process. An applicant for an implementation grant must obtain matching funds or in-kind donations equal to at least 100 percent of its grant award, except that an applicant proposing a project that meets *Absolute Priority 2: Promise Neighborhoods in Rural Communities* or *Absolute Priority 3: Promise Neighborhoods in Tribal Communities* must obtain matching funds or in-kind donations equal to at least 50 percent of the grant award.

Eligible sources of matching include sources of funds used to pay for solutions within the continuum of solutions, such as Head Start programs, initiatives supported by the LEA, or public health services for children in the neighborhood. At least 10 percent of an implementation applicant's total match must be cash or in-kind contributions from the private sector, which may include philanthropic organizations, private businesses, or individuals.

Both planning and implementation applicants must demonstrate a commitment of matching funds in the applications. The applicants must specify the source of the funds or contributions and in the case of a third-party in-kind contribution, a description of how the value was determined for the donated or contributed goods or service. Applicants must demonstrate the match commitment by including letters in their applications explaining the type and quantity of the match commitment with original signatures from the executives of organizations or agencies providing the match. The Secretary may consider decreasing the matching requirement in the most exceptional circumstances, on a case-by-case basis.

An applicant that is unable to meet the matching requirement must include in its application a request to the Secretary to reduce the matching requirement, including the amount of the requested reduction, the total remaining match contribution, and a statement of the basis for the request. An applicant should review the Department's cost-sharing and cost-matching regulations, which include specific limitations in 34 CFR 74.23 applicable to non-profit organizations and institutions of higher education and 34 CFR 80.24 applicable to State, local, and Indian tribal governments, and the Office of Management and Budget (OMB) cost principles regarding donations, capital assets, depreciations and allowable costs. These circulars are available on OMB's Web site at *http://www.whitehouse.gov/omb/circulars/index.html*.

3. *Other: Funding Categories:* An applicant must state in its application whether it is applying for a Planning

grant or an Implementation grant. An applicant will be considered for an award only for the type of grant for which it applies.

IV. Application and Submission Information

1. *Address to Request Application Package:*

Ty Harris, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W250, LBJ, Washington, DC 20202–5970. Telephone: (202) 453–5629 or by e-mail: *PN2011faq@ed.gov*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Notice of Intent to Apply: July 22, 2011.

We will be able to develop a more efficient process for reviewing grant applications if we know the approximate number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify us of the applicant's intent to submit an application for funding by completing a web-based form. When completing this form, applicants will provide (1) the applicant organization's name and address, and (2) the type of grant for which the applicant intends to apply. Applicants may access this form online at *http://wdcrobcolp01.ed.gov/CFAPPS/survey/survey.cfm?ID=5c306e04–40e0–4cb3-b6e7–4a8ea1d2012e.* Applicants that do not complete this form may still apply for funding.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You are strongly encouraged to limit the application narrative [Part III] for an implementation application to no more than 50 pages, using the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative. Text in charts, tables, figures, and graphs may be single-spaced.

• Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

• Use one of the following fonts is strongly encouraged: Times New Roman, Courier, Courier New, or Arial.

The suggested page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section [Part III].

3. *Submission Dates and Times:*

Applications Available: July 6, 2011.

Deadline for Notice of Intent to Apply: July 22, 2011.

Date of Pre-Application Webinars: Planning Application: July 14, 2011 and August 2, 2011. Implementation Application: July 19, 2011 and July 28, 2011. These pre-application webinars are designed to provide technical assistance to interested applicants for Promise Neighborhoods grants. Detailed information regarding the pre-application webinar times will be available through the Department of Education Web site at *http://www2.ed.gov/programs/promiseneighborhoods/index.html.*

Deadline for Transmittal of Applications: September 6, 2011.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: November 3, 2011.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR Part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must: (1) Be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (*see http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*).

7. *Other Submission Requirements:*

Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in

accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Promise Neighborhoods Program—CFDA Number 84.215N (Implementation grants) must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Promise Neighborhoods Implementation Grant Competition at *http://www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.215, not 84.215N).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal

holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Jane Hodgdon, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W220, Washington, DC. FAX: (202) 401–4123.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215N), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA 84.215N), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the 2011 Promise Neighborhoods NFP and from 34 CFR 75.210. The points assigned to each criterion are indicated in the parenthesis next to the criterion. Applicants may earn up to a total of 100 points. The selection criteria for implementation grants are as follows:

A. *Need for project (15 points).*

The Secretary considers the need for the proposed project.

In determining the need for the proposed project, the Secretary considers—

(1) The magnitude or severity of the problems to be addressed by the proposed project as described by indicators of need and other relevant indicators identified in part by the needs assessment and segmentation analysis (10 points); and

(2) The extent to which the geographically defined area has been described (5 points).

B. *Quality of the project design (25 points).*

The Secretary considers the quality of the design of the proposed project.

In determining the quality of the design of the proposed project, the Secretary considers—

(1) The extent to which the continuum of solutions is aligned with an ambitious, rigorous, and comprehensive strategy for improvement of schools in the neighborhood (10 points);

(2) The extent to which the applicant describes an implementation plan to create a complete continuum of solutions, including early learning through grade 12, college- and career-readiness, and family and community supports, without time and resource gaps, that will prepare all children in the neighborhood to attain an excellent education and successfully transition to college and a career, and that will significantly increase the proportion of students in the neighborhood that are served by the complete continuum to reach scale over time (5 points);

(3) The extent to which the applicant identifies existing neighborhood assets and programs supported by Federal, State, local, and private funds that will be used to implement a continuum of solutions (5 points); and

(4) The extent to which the applicant describes its implementation plan, including clear, annual goals for improving systems and leveraging resources as described in paragraph (2) of Absolute Priority 1 (5 points).

C. *Quality of project services (15 points).*

The Secretary considers the quality of the services to be provided by the proposed project.

In determining the quality of the project services, the Secretary considers—

(1) The extent to which the applicant describes how the needs assessment and segmentation analysis, including identifying and describing indicators, were used to determine each solution within the continuum (5 points); and

(2) The extent to which the applicant documents that proposed solutions are based on the best available evidence including, where available, strong or moderate evidence (5 points); and

(3) The extent to which the applicant describes clear, annual goals for improvement on indicators (5 points).

D. *Quality of the management plan (45 points).*

The Secretary considers the quality of the management plan for the proposed project.

In determining the quality of the management plan for the proposed project, the Secretary considers the experience, lessons learned, and proposal to build capacity of the applicant's management team and project director in all of the following areas:

(1) Working with the neighborhood and its residents; the schools described in paragraph (2)(b) of Absolute Priority 1; the LEA in which those schools are

located; Federal, State, and local government leaders; and other service providers (10 points).

(2) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability, including whether the applicant has a plan to build, adapt, or expand a longitudinal data system that integrates student-level data from multiple sources in order to measure progress while abiding by privacy laws and requirements (15 points).

(3) Creating formal and informal partnerships, including the alignment of the visions, theories of action, and theories of change described in its memorandum of understanding, and creating a system for holding partners accountable for performance in accordance with the memorandum of understanding (10 points).

(4) Integrating funding streams from multiple public and private sources, including its proposal to leverage and integrate high-quality programs in the neighborhood into the continuum of solutions (10 points).

2. *Review and Selection Process:* The Department will screen applications submitted in accordance with the requirements in this notice, and will determine which applications have met eligibility and other statutory requirements.

The Department will use independent reviewers from various backgrounds and professions including: Pre-kindergarten-12 teachers and principals, college and university educators, researchers and evaluators, social entrepreneurs, strategy consultants, grant makers and managers, and others with education expertise. The Department will thoroughly screen all reviewers for conflicts of interest to ensure a fair and competitive review process.

Reviewers will read, prepare a written evaluation, and score the applications assigned to their panel, using the selection criteria provided in this notice.

For applications addressing Absolute Priority 1, Absolute priority 2, and Absolute Priority 3, the Secretary prepares a rank order of applications for each absolute priority based solely on the evaluation of their quality according to the selection criteria. The Department may use more than one tier of reviews in determining grantees, including possible site visits for Implementation grant applicants. Additional information about the review process will be published on the Department's Web site.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Transparency and Open Government Policy:* After awards are made under this competition, all of the submitted successful applications, together with reviewer scores and comments, will be posted on the Department's Web site.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR Part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Secretary has established the following performance indicators for this program: The percentage of implementation grantees that attain or exceed the annual goals that they establish and that are approved by the Secretary for—

(a) Project indicators;

(b) Improving systems; and

(c) Leveraging resources.

All grantees will be required to submit annual performance reports documenting their contribution in assisting the Department in measuring the performance of the program against these indicators, as well as other information requested by the Department.

5. *Continuation Awards:* In making a continuation grant, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Jane Hodgdon, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W220, Washington, DC 20202–5900. Telephone: (202) 453–6615 or by e-mail: *PN2011faq@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 29, 2011.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2011–16759 Filed 7–5–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Promise Neighborhoods Program—Planning Grant Competition

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

Overview Information

Promise Neighborhoods Program—Planning Grant Competition Notice inviting applications for new awards for fiscal year (FY) 2011.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.215P (Planning grants).

DATES:

Applications Available: July 6, 2011.

Deadline for Notice of Intent to Apply: July 22, 2011.

Date of Pre-Application Webinars: Planning Applications: July 14, 2011 and August 2, 2011. Implementation Applications: July 19, 2011 and July 28, 2011.

Deadline for Transmittal of Applications: September 6, 2011.

Deadline for Intergovernmental Review: November 3, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Promise Neighborhoods program is carried out under the legislative authority of the Fund for Improvement of Education (FIE), title V, part D, subpart 1, sections 5411 through 5413 of the Elementary and Secondary Education Act of 1965 (ESEA), as amended (20 U.S.C. 7243–7243b). FIE supports nationally significant programs to improve the quality of elementary and secondary education at the State and local levels and to help all children meet challenging State academic content and student academic achievement standards.

The purpose of the Promise Neighborhoods program is to significantly improve the educational and developmental outcomes of children and youth in our most distressed communities, and to transform those communities by—

(1) Identifying and increasing the capacity of eligible organizations (as defined in this notice) that are focused on achieving results for children and youth throughout an entire neighborhood;

(2) Building a complete continuum of cradle-through-college-to-career solutions (continuum of solutions) (as defined in this notice) of both educational programs and family and community supports (both as defined in this notice), with great schools at the center. All solutions in the continuum of solutions must be accessible to children with disabilities (CWD)(as defined in this notice) and English learners (ELs) (as defined in this notice);

(3) Integrating programs and breaking down agency ''silos'' so that solutions are implemented effectively and efficiently across agencies;

(4) Developing the local infrastructure of systems and resources needed to sustain and scale up proven, effective solutions across the broader region beyond the initial neighborhood; and

(5) Learning about the overall impact of the Promise Neighborhoods program and about the relationship between particular strategies in Promise Neighborhoods and student outcomes, including through a rigorous evaluation of the program.

Background: The vision of this program is that all children and youth growing up in Promise Neighborhoods have access to great schools and strong systems of family and community support that will prepare them to attain an excellent education and successfully transition to college and a career.

A Promise Neighborhood is both a place and a strategy. A place eligible to become a Promise Neighborhood is a geographic area that is distressed, often facing inadequate access to high-quality early learning programs and services, with struggling schools, low high school and college graduation rates, high rates of unemployment, high rates of crime, and indicators of poor health. These conditions contribute to and intensify the negative outcomes associated with children and youth living in poverty. Children who are from low-income families and grow up in neighborhoods of concentrated poverty face educational and life challenges above and beyond the challenges faced by children who are from low-income families who grow up in neighborhoods without a high concentration of poverty. A Federal evaluation of the reading and mathematics outcomes of elementary students in 71 schools in 18 districts and 7 States found that even when controlling for individual student poverty, there is a significant negative association between school-level poverty and student achievement.[1] The evaluation found that students have lower academic outcomes when a higher percentage of their same-school peers qualify for free and reduced-priced lunch (FRPL) compared to when a lower percentage of their same-school peers qualify for FRPL. The compounding effects of neighborhood poverty continue later in life: Another study found that, for children with similar levels of family income, growing up in a neighborhood where the number of families in poverty was between 20 and 30 percent increased the chance of downward economic mobility—moving down the income ladder relative to their parents—by more than 50 percent compared with children who grew up in neighborhoods with under 10 percent of families in poverty.[2]

A Promise Neighborhood is also a strategy for addressing the issues in distressed communities. Promise Neighborhoods are led by organizations

[1] Westat and Policy Studies Associate. *The longitudinal evaluation of school change and performance (LESCP) in title I schools.* Prepared for the U.S. Department of Education. Available January 2010 online at *http://www.policystudies.com/studies/school/lescp_vol2.pdf.*

[2] Sharkey, Patrick. ''Neighborhoods and the Black-White Mobility Gap.'' Economic Mobility Project: An Initiative of The Pew Charitable Trusts, 2009.

that work to ensure that all children and youth in the target geographic area have access to the continuum of solutions needed to graduate from high school college- and career-ready. Within these geographic areas, Promise Neighborhoods create a high level of participation in cradle-through-college-to-career supports for children and youth, where over time a greater proportion of the neighborhood is served by programs and neighborhood indicators show significant progress. For this reason, each Promise Neighborhood grantee must have several core features: (1) Significant need in the neighborhood the grant serves; (2) a strategy to build a continuum of solutions with strong schools at the center; and (3) the capacity to achieve results. As the proportion of neighborhood children, students, and families accessing services and attending great schools increases, the entire neighborhood will be positively affected.

While there are a number of organizations and communities that are working on developing Promise Neighborhoods strategies, these entities are at different stages of readiness to create a Promise Neighborhood. Therefore, we have established priorities, requirements, definitions, and selection criteria for both planning and implementation grants in a notice of final priorities, requirements, definitions, and selection criteria published elsewhere in this issue of the **Federal Register**. The priorities, requirements, and selection criteria are different for planning grant and implementation grant applicants, while the definitions apply to both groups of applicants. This notice invites applications for planning grants. Elsewhere in this issue of the **Federal Register**, we have published a notice inviting applications for FY 2011 for implementation grants.

Planning grants will support eligible organizations that need to develop feasible plans to create a continuum of solutions with the potential to significantly improve the educational and developmental outcomes of children and youth in a neighborhood. These grants will support eligible organizations that demonstrate the need for creating a Promise Neighborhood in the geographic areas they are targeting, a sound strategy for developing a feasible plan to create a continuum of solutions, and the capacity to develop the plan.

Under Absolute Priority 1 for planning grants, Promise Neighborhoods planning grantees generally must undertake the following activities during the planning year (the complete and exact requirements of the priority are specified elsewhere in the notice):

(1) Conduct a comprehensive needs assessment and segmentation analysis (as defined in this notice) of children and youth in the neighborhood.

(2) Develop a plan to deliver a continuum of solutions with the potential to drive results. This includes building community support for and involvement in the development of the plan.

(3) Establish effective partnerships both to provide solutions along the continuum and to commit resources to sustain and scale up what works.

(4) Plan, build, adapt, or expand a longitudinal data system that will provide information that the grantee will use for learning, continuous improvement, and accountability.

(5) Participate in a community of practice (as defined in this notice).

Implementation grants will support eligible organizations in carrying out their plans to create a continuum of solutions that will significantly improve the educational and developmental outcomes of children and youth in the target neighborhood. These grants will aid eligible organizations that have developed a plan that demonstrates the need for the creation of a Promise Neighborhood in the geographic area they are targeting, a sound strategy for implementing a plan to create a continuum of solutions, and the capacity to implement the plan. More specifically, grantees will use implementation grant funds to develop the administrative capacity necessary to successfully implement a continuum of solutions, such as managing partnerships, integrating multiple funding sources, and supporting the grantee's longitudinal data system. While implementation grantees will be best positioned to determine the allocation of grant funds given the results of their needs assessments and plans to build their organizational capacity, the Department expects that the majority of resources to provide solutions within the continuum of solutions will come from public and private funding sources that are integrated and aligned with the Promise Neighborhoods strategy.

Under Absolute Priority 1 for implementation grants, Promise Neighborhoods implementation grantees generally will undertake the following activities during the implementation years (the complete and exact requirements of the priority are specified elsewhere in the notice):

(1) Implement a continuum of solutions that addresses neighborhood challenges, as identified through a needs assessment and segmentation analysis, and that will improve results for children and youth in the neighborhood.

(2) Continue to build and strengthen partnerships that will provide solutions along the continuum of solutions and that will commit resources to sustain and scale up what works.

(3) Collect data on indicators at least annually, and use and improve a longitudinal data system for learning, continuous improvement, and accountability.

(4) Demonstrate progress on goals for improving systems, such as by making changes in policies and organizations, and by leveraging resources to sustain and scale up what works.

(5) Participate in a community of practice (as defined in this notice).

Considering the time and urgency required to dramatically improve outcomes of children and youth in our most distressed neighborhoods and to transform those neighborhoods, implementation grantees will establish both short- and long-term goals to define success.

Consistent with the approach of the Promise Neighborhoods program, we believe that it is important for communities to develop a comprehensive neighborhood revitalization strategy that addresses neighborhood assets (as defined in this notice) that are essential to transforming distressed neighborhoods into healthy and vibrant communities of opportunity. Although not a proposed requirement for planning or implementation applicants, we believe that a Promise Neighborhood will be most successful when it is part of, and contributing to, an area's broader neighborhood revitalization strategy. We believe that only through the development of such comprehensive neighborhood revitalization plans that embrace the coordinated use of programs and resources in order to effectively address the interrelated needs within a community will the broader vision of neighborhood transformation occur.

Because a diverse group of communities could benefit from Promise Neighborhoods, the Secretary has established an absolute priority for applicants that propose to serve one or more rural communities only (as defined in this notice) and an absolute priority for applicants that propose to serve one or more Indian Tribes (as defined in this notice).

Note: In developing their strategies for planning or implementing a continuum of

solutions, applicants should be mindful of the importance of ensuring that all children, including infants and toddlers in the neighborhood, have an opportunity to benefit. For example, individuals with disabilities and language minorities, particularly recent immigrants, may encounter unique challenges that prevent them from accessing the benefits of a Promise Neighborhoods project.

Successful applicants under this competition must comply with Federal civil rights laws that apply to recipients and subrecipients of Federal financial assistance including: Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, or national origin); Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (prohibiting discrimination on the basis of disability); Title IX of the Education Amendments of 1972 (prohibiting discrimination on the basis of sex); and the Age Discrimination Act of 1975 (prohibiting discrimination on the basis of age).

Applicants, therefore, in designing their projects and preparing their required General Education Provisions Act (GEPA) Section 427 assurance, will need to address barriers to participation for individuals, including individuals with disabilities and limited English proficiency, and must consider the steps they will take to ensure equitable participation of all children and families in the project, in compliance with civil rights obligations. (Section 427 requires each applicant to include in its application a description of the steps the applicant proposes to take to ensure equitable access to, and participation in, its federally-assisted program for students, teachers and other program beneficiaries with special needs.)

Priorities: This competition includes three absolute priorities, four competitive preference priorities, and one invitational priority that are explained in the following paragraphs. These priorities are from the 2011 Promise Neighborhoods NFP, published elsewhere in this issue of the **Federal Register.**

Absolute Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one or more of these priorities.

Note: Applicants must indicate in their application whether they are applying under Planning Grant Priority 1 (Absolute), Planning Grant Priority 2 (Absolute), or Planning Grant Priority 3 (Absolute). An applicant that applies under Planning Grant Priority 2 (Absolute) but is not eligible for funding under Planning Grant Priority 2 (Absolute), or applies under Planning Grant Priority 3 (Absolute) but is not eligible for funding under Planning Grant Priority 3 (Absolute), may be considered for funding under Planning Grant Priority 1 (Absolute).

These priorities are:

Planning Grant Priority 1 (Absolute) Proposal To Develop a Promise Neighborhood Plan

To meet this priority, an applicant must submit a proposal for how it will plan to create a Promise Neighborhood. This proposal must describe the need in the neighborhood, a strategy to build a continuum of solutions, and the applicant's capacity to achieve results. Specifically, an applicant must—

(1) Describe the geographically defined area [3] (neighborhood) to be served and the level of distress in that area based on indicators of need and other relevant indicators. Applicants may propose to serve multiple, non-contiguous geographically defined areas. In cases where target areas are not contiguous, the applicant must explain its rationale for including non-contiguous areas;

(2) Describe how it will plan to build a continuum of solutions based on the best available evidence including, where available, strong or moderate evidence (as defined in this notice) designed to significantly improve educational outcomes and to support the healthy development and well-being of children and youth in the neighborhood. The applicant must also describe how it will build community support for and involvement in the development of the plan. The plan must be designed to ensure that over time, children and youth in the neighborhood who attend the target school or schools have access to a complete continuum of solutions, and ensure, as appropriate, that children and youth in the neighborhood who do not attend the target school or schools have access to solutions within the continuum of solutions. The plan must also ensure that students not living in the neighborhood who attend the target school or schools have access to solutions within the continuum of solutions.

The success of the applicant's strategy to build a continuum of solutions will be based on the results of the project, as measured against the project indicators defined in this notice and described in Table 1 and Table 2. In its strategy, the applicant must describe how it will determine which solutions within the continuum of solutions to implement, and must include—

(a) High-quality early learning programs and services designed to improve outcomes across multiple domains of early learning (as defined in this notice) for children from birth through third grade;

(b) Ambitious, rigorous, and comprehensive education reforms that are linked to improved educational outcomes for children and youth in preschool through the 12th grade. Public schools served through the grant may include persistently lowest-achieving schools (as defined in this notice) or low-performing schools (as defined in this notice) that are not also persistently lowest-achieving schools. An applicant (or one or more of its partners) may serve an effective school or schools (as defined in this notice) but only if the applicant (or one or more of its partners) also serves at least one low-performing school (as defined in this notice) or persistently lowest-achieving school (as defined in this notice). An applicant must identify in its application the public school or schools that would be served and the current status of reforms in the school or schools, including, if applicable, the type of intervention model being implemented. In cases where an applicant operates a school or partners with a school that does not serve all students in the neighborhood, the applicant must partner with at least one additional school or schools that also serves students in the neighborhood. An applicant proposing to work with a persistently lowest-achieving school must include as part of its strategy one of the four school intervention models (turnaround model, restart model, school closure, or transformation model) described in Appendix C of the Race to the Top (RTT) notice inviting applications for new awards for FY 2010 that was published in the **Federal Register** on November 18, 2009 (74 FR 59836, 59866).

An applicant proposing to work with a low-performing school must include, as part of its strategy, ambitious, rigorous, and comprehensive interventions to assist, augment, or replace schools, which may include implementing one of the four school intervention models, or may include another model of sufficient ambition, rigor, and comprehensiveness to significantly improve academic and other outcomes for students. An applicant proposing to work with a low-performing school must include an intervention that addresses the effectiveness of teachers and leaders and

[3] For the purposes of this notice, the Department uses the terms ''geographic area'' and ''neighborhood'' interchangeably.

the school's use of time and resources, which may include increased learning time (as defined in this notice);

Note regarding school reform strategies: So as not to penalize an applicant for proposing to work with an LEA that has implemented rigorous reform strategies prior to the publication of this notice, an applicant is not required to propose a new reform strategy in place of an existing reform strategy in order to be eligible for a Promise Neighborhoods planning grant. For example, an LEA might have begun to implement improvement activities that meet many, but not all, of the elements of a transformation model of school intervention. In this case, the applicant could propose, as part of its Promise Neighborhood strategy, to work with the LEA as the LEA continues with its reforms.

(c) Programs that prepare students to be college- and career-ready; and

(d) Family and community supports (as defined in this notice).

To the extent feasible and appropriate, the applicant must describe, in its plan, how the applicant and its partners will leverage and integrate high-quality programs, related public and private investments, and existing neighborhood assets into the continuum of solutions.

An applicant must also describe in its plan how it will identify Federal, State, or local policies, regulations, or other requirements that would impede its ability to achieve its goals and how it will report on those impediments to the Department and other relevant agencies.

As part of the description of how it will plan to build a continuum of solutions, the applicant must describe how it will participate in, organize, or facilitate, as appropriate, communities of practice (as defined in this notice) for Promise Neighborhoods.

(3) Specify how it will conduct a comprehensive needs assessment and segmentation analysis of children and youth in the neighborhood during the planning grant project period and explain how it will use this needs assessment and segmentation analysis to determine the children with the highest needs and ensure that those children receive the appropriate services from the continuum of solutions. In this explanation of how it will use the needs assessment and segmentation analysis, the applicant must identify and describe in the application both the educational indicators and the family and community support indicators that the applicant will use in conducting the needs assessment during the planning year. During the planning year, the applicant must—

(a) Collect data for the educational indicators listed in Table 1 and use them as both program and project indicators;

(b) Collect data for the family and community support indicators in Table 2 and use them as program indicators; and

(c) Collect data for unique family and community support indicators, developed by the applicant, that align with the goals and objectives of projects and use them as project indicators or use the indicators in Table 2 as project indicators.

Note: Planning grant applicants are not required to propose solutions in their applications; however, they are required to describe how they will identify solutions, including the use of available evidence, during the planning year that will result in improvements on the project indicators.

TABLE 1—EDUCATION INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
— # and % of children birth to kindergarten entry who have a place where they usually go, other than an emergency room, when they are sick or in need of advice about their health.	Children enter kindergarten ready to succeed in school.
— # and % of three-year-olds and children in kindergarten who demonstrate at the beginning of the program or school year age-appropriate functioning across multiple domains of early learning (as defined in this notice) as determined using developmentally appropriate early learning measures (as defined in this notice).	
— # & % of children, from birth to kindergarten entry, participating in center-based or formal home-based early learning settings or programs, which may include Early Head Start, Head Start, child care, or preschool.	
— # & % of students at or above grade level according to State mathematics and reading or language arts assessments in at least the grades required by the ESEA (3rd through 8th and once in high school).	Students are proficient in core academic subjects.
— Attendance rate of students in 6th, 7th, 8th, and 9th grade	Students successfully transition from middle school grades to high school.
— Graduation rate (as defined in this notice)	Youth graduate from high school.
— # & % of Promise Neighborhood students who graduate with a regular high school diploma, as defined in 34 CFR 200.19(b)(1)(iv), and obtain postsecondary degrees, vocational certificates, or other industry-recognized certifications or credentials without the need for remediation.	High school graduates obtain a postsecondary degree, certification, or credential.

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
— # & % of children who participate in at least 60 minutes of moderate to vigorous physical activity daily; and	Students are healthy.
— # & % of children who consume five or more servings of fruits and vegetables daily; or	
— possible third indicator, to be determined (TBD) by applicant	
— # & % of students who feel safe at school and traveling to and from school, as measured by a school climate needs assessment (as defined in this notice); or	Students feel safe at school and in their community.
— possible second indicator, TBD by applicant	
— Student mobility rate (as defined in this notice); or	Students live in stable communities.
— possible second indicator, TBD by applicant.	
— For children birth to kindergarten entry, the # and % of parents or family members who report that they read to their child three or more times a week;	Families and community members support learning in Promise Neighborhood schools.
— For children in kindergarten through the eighth grade, the # and % of parents or family members who report encouraging their child to read books outside of school; and	

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE—Continued

Indicator	Result
— For children in the ninth through twelfth grades, the # and % of parents or family members who report talking with their child about the importance of college and career; or — possible fourth indicator TBD by applicant. For children in the ninth through twelfth grades, the # and % of parents or family members who report talking with their child about the importance of college and career; or — possible fourth indicator TBD by applicant	
— # & % of students who have school and home access (and % of the day they have access) to broadband internet (as defined in this notice) and a connected computing device; or — possible second indicator TBD by applicant.	Students have access to 21st century learning tools.

Note: The indicators in Table 1 and Table 2 are not intended to limit an applicant from collecting and using data for additional indicators. Examples of additional indicators are—

(i) The # and % of children who participate in high-quality learning activities during out-of-school hours or in the hours after the traditional school day ends;

(ii) The # and % of children who are suspended or receive discipline referrals during the school year;

(iii) The share of housing stock in the geographically defined area that is rent-protected, publicly assisted, or targeted for redevelopment with local, State, or Federal funds; and

(iv) The # and % of children who are homeless or in foster care and who have an assigned adult advocate.

Note: While the Department believes there are many programmatic benefits of collecting data on every child in the proposed neighborhood, the Department will consider requests to collect data on only a sample of the children in the neighborhood for some indicators so long as the applicant describes in its application how it would ensure the sample would be representative of the children in the neighborhood.

(4) Describe the experience and lessons learned, and describe how the applicant will build the capacity of its management team and project director in all of the following areas:

(a) Working with the neighborhood and its residents, including parents and families that have children or other family members with disabilities or ELs, as well as with the school(s) described in paragraph (2) of this priority; the LEA in which the school or schools are located; Federal, State, and local government leaders; and other service providers.

(b) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability. The applicant must describe—

(i) Its proposal to plan to build, adapt, or expand a longitudinal data system that integrates student-level data from multiple sources in order to measure progress on educational and family and community support indicators for all children in the neighborhood, disaggregated by the subgroups listed in section 1111(b)(3)(C)(xiii) of the ESEA;

(ii) How the applicant will link the longitudinal data system to school-based, LEA, and State data systems; make the data accessible to parents, families, community residents, program partners, researchers, and evaluators while abiding by Federal, State, and other privacy laws and requirements; and manage and maintain the system;

(iii) How the applicant will use rapid-time (as defined in this notice) data both in the planning year and, once the Promise Neighborhood strategy is implemented, for continuous program improvement; and

(iv) How the applicant will document the planning process, including by describing lessons learned and best practices;

(c) Creating formal and informal partnerships, for such purposes as providing solutions along the continuum of solutions and attaining resources to sustain and scale up what works. An applicant, as part of its application, must submit a preliminary memorandum of understanding, signed by each organization or agency with which it would partner in planning the proposed Promise Neighborhood. The preliminary memorandum of understanding must describe—

(i) Each partner's financial and programmatic commitment; and

(ii) How each partner's existing vision, theory of change (as defined in this notice), theory of action (as defined in this notice), and existing activities align with those of the proposed Promise Neighborhood strategy;

(d) The governance structure proposed for the Promise Neighborhood, including a system for holding partners accountable, how the eligible entity's governing board or advisory board is representative of the geographic area proposed to be served (as defined in this notice), and how residents of the geographic area would have an active role in the organization's decision-making; and

(e) Securing and integrating funding streams from multiple public and private sources from the Federal, State, and local level. Examples of public funds include Federal resources from the U.S. Department of Education, such as the 21st Century Community Learning Centers program and title I of the ESEA, and from other Federal agencies, such as the U.S. Departments of Health and Human Services, Housing and Urban Development, Justice, Labor, and Treasury.

(5) Describe the applicant's commitment to work with the Department, and with a national evaluator for Promise Neighborhoods or another entity designated by the Department, to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods program and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(a) Ensuring that, through memoranda of understanding with appropriate entities, the national evaluator and the Department have access to relevant program and project data (*e.g.,* administrative data and program and project indicator data), including data on a quarterly basis if requested by the Department;

(b) Developing, in consultation with the national evaluator, an evaluation strategy, including identifying a credible comparison group; and

(c) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for both program participants and a designated comparison group of non-participants.

Planning Grant Priority 2 (Absolute) Promise Neighborhoods in Rural Communities

To meet this priority, an applicant must propose to develop a plan for implementing a Promise Neighborhood strategy that (1) Meets all of the

requirements in *Absolute Priority 1;* and (2) proposes to serve one or more rural communities only.

Planning Grant Priority 3 (Absolute) Promise Neighborhoods in Tribal Communities

To meet this priority, an applicant must propose to develop a plan for implementing a Promise Neighborhood strategy that (1) Meets all of the requirements in *Absolute Priority 1;* and (2) proposes to serve one or more Indian tribes (as defined in this notice).

Competitive Preference Priorities: For FY 2011, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award additional points to an application depending on how well the application meets Planning Grant Priorities 4, 5, 6, or 7 (Competitive Preference). Applicants may address more than one of the competitive preference priorities; however, the Department will review and award points only for a maximum of two of the competitive preference priorities. Therefore, an applicant must identify in the project narrative section of its application the priority or the two priorities it wishes the Department to consider for purposes of earning the competitive preference priority points.

Note: The Department will not review or award points under any competitive preference priority for an application that (1) fails to clearly identify the competitive preference priority or two priorities it wishes the Department to consider for purposes of earning the competitive preference priority points, or (2) identifies more than two competitive preference priorities.

These priorities are:

Planning Grant Priority 4 (Competitive Preference) Comprehensive Local Early Learning Network (Zero, One, or Two Points)

To meet this priority, an applicant must propose to develop a plan to expand, enhance, or modify an existing network of early learning programs and services to ensure that they are high-quality and comprehensive for children from birth through the third grade. The plan must also ensure that the network establishes a high standard of quality across early learning settings and is designed to improve outcomes across multiple domains of early learning. Distinct from the early learning solutions described in paragraph (2) of *Absolute Priority 1,* this priority supports proposals to develop plans that integrate various early learning services and programs in the neighborhood in order to enhance the quality of such services and programs, *i.e.,* school-based early learning programs; locally- or State-funded preschool programs; Early Head Start and Head Start; the local child care resource and referral agency, if applicable; Individuals with Disabilities Education Act (IDEA) services and programs; services through private providers; home visiting programs; public and private child care providers that are licensed by the State, including public and private providers and center-based care; and family, friend, or neighbor care in the Promise Neighborhood.

The local early learning network must address or incorporate ongoing State-level efforts regarding the major components of high-quality early learning programs and services, such as State early learning and development standards, program quality standards, comprehensive assessment systems, workforce and professional development systems, health promotion, family and community engagement, a coordinated data infrastructure, and a method of measuring, monitoring, evaluating, and improving program quality. For example, an applicant might address how the Promise Neighborhoods project will use the State's early learning standards, as applicable, and the Head Start Child Development and Early Learning Framework (Framework), as applicable, to define the expectations of what children should know and be able to do before entering kindergarten. The Framework is available on the Office of Head Start's Web site at: *http://eclkc.ohs.acf.hhs.gov/hslc/ecdh/eecd/Assessment/Child%20Outcomes/HS_Revised_Child_Outcomes_Framework.pdf.* Similarly, an applicant that addresses this priority must discuss, where applicable, how it would align with the State's Quality Rating and Improvement System (QRIS), as applicable, professional development and workforce infrastructure, and other appropriate State efforts. In addition, the proposal must describe how the project will provide, to the extent practicable, early learning opportunities on multiple platforms (*e.g.,* public television, web-based) and in multiple locations (*e.g.,* at home, at school, and at other community locations.)

Note regarding accessibility of early learning programs and services: These early learning opportunities must be fully accessible to individuals with disabilities, including individuals who are blind or have low vision; otherwise, the plans must describe how accommodations or modifications will be provided to ensure that the benefits of the early learning opportunities are provided to children and youth with disabilities in an equally effective and equally integrated manner.

The proposal to develop a plan for a high-quality and comprehensive local early learning network must describe the governance structure and how the applicant will use the planning year to plan solutions that address the major components of high-quality early learning programs and services as well as establish goals, strategies, and benchmarks to provide early learning programs and services that result in improved outcomes across multiple domains of early learning (as defined in this notice). An applicant addressing this priority must designate an individual responsible for overseeing and integrating the early learning initiatives and must include a resume or position description and other supporting documentation to demonstrate that the individual designated, or individual hired to carry out those responsibilities, possesses the appropriate State certification, and has experience and expertise in managing and administering high-quality early learning programs, including in coordinating across various high-quality early learning programs and services.

Planning Grant Priority 5 (Competitive Preference) Quality Internet Connectivity (Zero or One Point)

To meet this priority, an applicant must propose to develop a plan to ensure that almost all students in the geographic area proposed to be served have broadband internet access (as defined in this notice) at home and at school, the knowledge and skills to use broadband internet access effectively, and a connected computing device to support schoolwork.

Planning Grant Priority 6 (Competitive Preference) Arts and Humanities (Zero or One Point)

To meet this priority, an applicant must propose to develop a plan to include opportunities for children and youth to experience and participate actively in the arts and humanities in their community so as to broaden, enrich, and enliven the educational, cultural, and civic experiences available in the neighborhood. Applicants may propose to develop plans for offering these activities in school and in out-of-school settings and at any time during the calendar year.

Planning Grant Priority 7 (Competitive Preference) Quality Affordable Housing (Zero or One Point)

To meet this priority, an applicant must propose to serve geographic areas that were the subject of an affordable housing transformation pursuant to a Choice Neighborhoods or HOPE VI grant

awarded by the U.S. Department of Housing and Urban Development during FY 2009 or later years. To be eligible under this priority, the applicant must either (1) be able to demonstrate that it has received a Choice Neighborhoods or HOPE VI grant or (2) provide, in its application, a memorandum of understanding between it and a partner that is a recipient of Choice Neighborhoods or HOPE VI grant. The memorandum must indicate a commitment on the part of the applicant and partner to coordinate planning and align resources to the greatest extent practicable.

Invitational Priority: For FY 2011, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Planning Grant Priority 8 (Invitational) Family Engagement in Learning Through Adult Education

To meet this priority, an applicant must propose to develop a plan that is coordinated with adult education providers serving neighborhood residents, such as those funded through the Adult Education and Family Literacy Act, as amended. Coordinated services may include adult basic and secondary education and programs that provide training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement. Examples of services and programs include preparation for the General Education Development (GED) test; English literacy, family literacy, and work-based literacy training; or other training that prepares adults for postsecondary education and careers or supports adult engagement in the educational success of children and youth in the neighborhood.

Definitions

The following definitions apply to this program:

Broadband internet access means internet access sufficient to provide community members with the internet available when and where they need it and for the uses they require.

Children with disabilities or *CWD* means individuals who meet the definition of *child with a disability* in 34 CFR 300.8, *infant or toddler with a disability* in 34 CFR 300.25, *handicapped person* in 34 CFR 104.3(j), or disability as it pertains to an individual in 42 U.S.C. § 12102.

Community of practice means a group of grantees that agrees to interact regularly to solve a persistent problem or improve practice in an area that is important to them and the success of their projects. Establishment of communities of practice under Promise Neighborhoods will enable grantees to meet, discuss, and collaborate with each other regarding grantee projects.

Continuum of cradle-through-college-to-career solutions or *continuum of solutions* means solutions that—

(1) Include programs, policies, practices, services, systems, and supports that result in improving educational and developmental outcomes for children from cradle through college to career;

(2) Are based on the best available evidence, including, where available, strong or moderate evidence (as defined in this notice);

(3) Are linked and integrated seamlessly (as defined in this notice); and

(4) Include both education programs and family and community supports.

Credible comparison group includes a comparison group formed by matching project participants with non-participants based on key characteristics that are thought to be related to outcomes. These characteristics include, but are not limited to: (1) Prior test scores and other measures of academic achievement (preferably the same measures that will be used to assess the outcomes of the project); (2) demographic characteristics, such as age, disability, gender, English proficiency, ethnicity, poverty level, parents' educational attainment, and single- or two-parent family background; (3) the time period in which the two groups are studied (*e.g.,* the two groups are children entering kindergarten in the same year as opposed to sequential years); and (4) methods used to collect outcome data (*e.g.,* the same test of reading skills administered in the same way to both groups).

Developmentally appropriate early learning measures means a range of assessment instruments that are used in ways consistent with the purposes for which they were designed and validated; appropriate for the ages and other characteristics of the children being assessed; designed and validated for use with children whose ages, cultures, languages spoken at home, socioeconomic status, abilities and disabilities, and other characteristics are similar to those of the children with whom the assessments will be used; and used in compliance with the measurement standards set forth by the American Educational Research Association (AERA), the American Psychological Association (APA), and the National Council for Measurement in Education (NCME) in the 1999 Standards for Educational and Psychological Testing.

Education programs means programs that include, but are not limited to—

(1) High-quality early learning programs or services designed to improve outcomes across multiple domains of early learning for young children. Such programs must be specifically intended to align with appropriate State early learning and development standards, practices, strategies, or activities across as broad an age range as birth through third grade so as to ensure that young children enter kindergarten and progress through the early elementary school grades demonstrating age-appropriate functioning across the multiple domains;

(2) For children in preschool through the 12th grade, programs, inclusive of related policies and personnel, that are linked to improved educational outcomes. The programs—

(a) Must include effective teachers and effective principals;

(b) Must include strategies, practices, or programs that encourage and facilitate the evaluation, analysis, and use of student achievement, student growth (as defined in this notice), and other data by educators, families, and other stakeholders to inform decision-making;

(c) Must include college- and career-ready standards, assessments, and practices, including a well-rounded curriculum, instructional practices, strategies, or programs in, at a minimum, core academic subjects as defined in section 9101(11) of the ESEA, that are aligned with high academic content and achievement standards and with high-quality assessments based on those standards; and

(d) May include creating multiple pathways for students to earn regular high school diplomas (*e.g.,* using schools that serve the needs of over-aged, under-credited, or other students with an exceptional need for flexibility regarding when they attend school or the additional supports they require; awarding credit based on demonstrated evidence of student competency; or offering dual-enrollment options); and

(3) Programs that prepare students for college and career success, which may include programs that—

(a) Create and support partnerships with community colleges, four-year colleges, or universities and that help

instill a college-going culture in the neighborhood;

(b) Provide dual-enrollment opportunities for secondary students to gain college credit while in high school;

(c) Provide, through relationships with businesses and other organizations, apprenticeship opportunities to students;

(d) Align curricula in the core academic subjects with requirements for industry-recognized certifications or credentials, particularly in high-growth sectors;

(e) Provide access to career and technical education programs so that individuals can attain the skills and industry-recognized certifications or credentials for success in their careers;

(f) Help college students, including CWD and ELs from the neighborhood to transition to college, persist in their academic studies in college, graduate from college, and transition into the workforce; and

(g) Provide opportunities for all youth (both in and out of school) to achieve academic and employment success by improving educational and skill competencies and providing connections to employers. Such activities may include opportunities for on-going mentoring, supportive services, incentives for recognition and achievement, and opportunities related to leadership, development, decision-making, citizenship, and community service.

Effective school means a school that has—

(1) Significantly closed the achievement gaps between subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) within the school or district; or

(2)(a) Demonstrated success in significantly increasing student academic achievement in the school for all subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) in the school; and (b) made significant improvements in other areas, such as graduation rates (as defined in this notice) or recruitment and placement of effective teachers and effective principals.

Eligible organization means an organization that—

(1) Is representative of the geographic area proposed to be served (as defined in this notice);

(2) Is one of the following:

(a) A nonprofit organization that meets the definition of a nonprofit under 34 CFR 77.1(c), which may include a faith-based nonprofit organization.

(b) An institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, as amended.

(c) An Indian tribe (as defined in this notice);

(3) Currently provides at least one of the solutions from the applicant's proposed continuum of solutions in the geographic area proposed to be served; and

(4) Operates or proposes to work with and involve in carrying out its proposed project, in coordination with the school's LEA, at least one public elementary or secondary school that is located within the identified geographic area that the grant will serve.

English learners or *ELs* means individuals who meet the definition of limited English proficient, as defined in section 9101(25) of the ESEA.

Family and community supports means—

(1) Child and youth health programs, such as physical, mental, behavioral, and emotional health programs (*e.g.,* home visiting programs; Early Head Start; programs to improve nutrition and fitness, reduce childhood obesity, and create healthier communities);

(2) Safety programs, such as programs in school and out of school to prevent, control, and reduce crime, violence, drug and alcohol use, and gang activity; programs that address classroom and school-wide behavior and conduct; programs to prevent child abuse and neglect; programs to prevent truancy and reduce and prevent bullying and harassment; and programs to improve the physical and emotional security of the school setting as perceived, experienced, and created by students, staff, and families;

(3) Community stability programs, such as programs that—

(a) Increase the stability of families in communities by expanding access to quality, affordable housing, providing legal support to help families secure clear legal title to their homes, and providing housing counseling or housing placement services;

(b) Provide adult education and employment opportunities and training to improve educational levels, job skills and readiness in order to decrease unemployment, with a goal of increasing family stability;

(c) Improve families' awareness of, access to, and use of a range of social services, if possible at a single location;

(d) Provide unbiased, outcome-focused, and comprehensive financial education, inside and outside the classroom and at every life stage;

(e) Increase access to traditional financial institutions (*e.g.,* banks and credit unions) rather than alternative financial institutions (*e.g.,* check cashers and payday lenders);

(f) Help families increase their financial literacy, financial assets, and savings; and

(g) Help families access transportation to education and employment opportunities;

(4) Family and community engagement programs that are systemic, integrated, sustainable, and continue through a student's transition from K–12 school to college and career. These programs may include family literacy programs and programs that provide adult education and training and opportunities for family members and other members of the community to support student learning and establish high expectations for student educational achievement; mentorship programs that create positive relationships between children and adults; programs that provide for the use of such community resources as libraries, museums, television and radio stations, and local businesses to support improved student educational outcomes; programs that support the engagement of families in early learning programs and services; programs that provide guidance on how to navigate through a complex school system and how to advocate for more and improved learning opportunities; and programs that promote collaboration with educators and community organizations to improve opportunities for healthy development and learning; and

(5) 21st century learning tools, such as technology (*e.g.,* computers and mobile phones) used by students in the classroom and in the community to support their education. This includes programs that help students use the tools to develop knowledge and skills in such areas as reading and writing, mathematics, research, critical thinking, communication, creativity, innovation, and entrepreneurship.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Note: This definition is not meant to prevent a grantee from also collecting information about the reasons why students do not graduate from the target high school, *e.g.,* dropping out or moving outside of the school district for non-academic or academic reasons.

Increased learning time means using a longer school day, week, or year to significantly increase the total number of school hours. This strategy is used to redesign the school's program in a manner that includes additional time for (a) instruction in core academic subjects as defined in section 9101(11) of the

ESEA; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

Indian tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe, 25 U.S.C. 479a and 479a–1 or any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, *et seq.,* that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The term ''Indian'' means a member of an Indian tribe.

Indicators of need means currently available data that describe—

(1) Education need, which means—

(a) All or a portion of the neighborhood includes or is within the attendance zone of a low-performing school that is a high school, especially one in which the graduation rate (as defined in this notice) is less than 60 percent or a school that can be characterized as low-performing based on another proxy indicator, such as students' on-time progression from grade to grade; and

(b) Other indicators, such as significant achievement gaps between subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) within a school or LEA, high teacher and principal turnover, or high student absenteeism; and

(2) Family and community support need, which means—

(a) Percentages of children with preventable chronic health conditions (*e.g.,* asthma, poor nutrition, dental problems, obesity) or avoidable developmental delays;

(b) Immunization rates;

(c) Rates of crime, including violent crime;

(d) Student mobility rates;

(e) Teenage birth rates;

(f) Percentage of children in single-parent or no-parent families;

(g) Rates of vacant or substandard homes, including distressed public and assisted housing; or

(h) Percentage of the residents living at or below the Federal poverty threshold.

Linked and integrated seamlessly, with respect to the continuum of solutions, means solutions that have common outcomes, focus on similar milestones, support transitional time periods (*e.g.,* the beginning of kindergarten, the middle grades, or graduation from high school) along the cradle-through-college-to-career continuum, and address time and resource gaps that create obstacles for students in making academic progress.

Low-performing schools means schools receiving assistance through title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), that are in corrective action or restructuring in the State, as determined under section 1116 of the ESEA, and the secondary schools (both middle and high schools) in the State that are equally as low-achieving as these Title I schools and are eligible for, but do not receive, Title I funds.

Moderate evidence means evidence from previous studies with designs that can support causal conclusions (*i.e.,* studies with high internal validity) but have limited generalizability (*i.e.,* moderate external validity) or from studies with high external validity but moderate internal validity.

Multiple domains of early learning means physical well-being and motor development; social-emotional development; approaches toward learning, which refers to the inclinations, dispositions, or styles, rather than skills, that reflect ways that children become involved in learning and develop their inclinations to pursue learning; language and literacy development, including emergent literacy; and cognition and general knowledge, which refers to thinking and problem-solving as well as knowledge about particular objects and the way the world works. Cognition and general knowledge include mathematical and scientific knowledge, abstract thought, and imagination.

Neighborhood assets means—

(1) Developmental assets that allow residents to attain the skills needed to be successful in all aspects of daily life (*e.g.,* educational institutions, early learning centers, and health resources);

(2) Commercial assets that are associated with production, employment, transactions, and sales (*e.g.,* labor force and retail establishments);

(3) Recreational assets that create value in a neighborhood beyond work and education (*e.g.,* parks, open space, community gardens, and arts organizations);

(4) Physical assets that are associated with the built environment and physical infrastructure (*e.g.,* housing, commercial buildings, and roads); and

(5) Social assets that establish well-functioning social interactions (*e.g.,* public safety, community engagement, and partnerships with youth, parents, and families).

Persistently lowest-achieving school means, as determined by the State—

(1) Any school receiving assistance through Title I that is in improvement, corrective action, or restructuring and that—

(a) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(b) Is a high school that has had a graduation rate that is less than 60 percent over a number of years; and

(2) Any secondary school that is eligible for, but does not receive, Title I funds that—

(a) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(b) Is a high school that has had a graduation rate that is less than 60 percent over a number of years.

Program indicators are indicators that the Department will use only for research and evaluation purposes and for which an applicant is not required to propose solutions.

Project indicators are indicators for which an applicant proposes solutions intended to result in progress on the indicators.

Public officials means elected officials (*e.g.,* council members, aldermen and women, commissioners, State legislators, Congressional representatives, members of the school board), appointed officials (*e.g.,* members of a planning or zoning commission, or of any other regulatory or advisory board or commission), or individuals who are not necessarily public officials, but who have been appointed by a public official to serve on the Promise Neighborhoods governing board or advisory board.

Rapid-time, in reference to reporting and availability of locally-collected data, means that data are available quickly enough to inform current lessons, instruction, and related education programs and family and community supports.

Representative of the geographic area proposed to be served means that residents of the geographic area

proposed to be served have an active role in decision-making and that at least one-third of the eligible entity's governing board or advisory board is made up of—

(1) Residents who live in the geographic area proposed to be served, which may include residents who are representative of the ethnic and racial composition of the neighborhood's residents and the languages they speak;

(2) Residents of the city or county in which the neighborhood is located but who live outside the geographic area proposed to be served, and who are low-income (which means earning less than 80 percent of the area's median income as published by the Department of Housing and Urban Development);

(3) Public officials (as defined in this notice) who serve the geographic area proposed to be served (although not more than one-half of the governing board or advisory board may be made up of public officials); or

(4) Some combination of individuals from the three groups listed in paragraphs (1), (2), and (3) of this definition.

Rural community means a neighborhood that—

(1) Is served by an LEA that is currently eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Applicants may determine whether a particular LEA is eligible for these programs by referring to information on the following Department Web sites. For the SRSA program: *http://www.ed.gov/programs/reapsrsa/eligible10/index.html.* For the RLIS program: *http://www.ed.gov/programs/reaprlisp/eligible10/index.html;* or

(2) Includes only schools designated with a school locale code of 42 or 43. Applicants may determine school locale codes by referring to the following Department Web site: *http://nces.ed.gov/ccd/schoolsearch/.*

School climate needs assessment means an evaluation tool that measures the extent to which the school setting promotes or inhibits academic performance by collecting perception data from individuals, which could include students, staff, or families.

Segmentation analysis means the process of grouping and analyzing data from children and families in the geographic area proposed to be served according to indicators of need (as defined in this notice) or other relevant indicators.

Note: The analysis is intended to allow grantees to differentiate and more effectively target interventions based on what they learn about the needs of different populations in the geographic area.

Strong evidence means evidence from studies with designs that can support causal conclusions (*i.e.,* studies with high internal validity), and studies that, in total, include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.,* studies with high external validity).

Student achievement means—

(1) For tested grades and subjects:

(a) A student's score on the State's assessments under the ESEA; and, as appropriate,

(b) Other measures of student learning, such as those described in paragraph (2) of this definition, provided they are rigorous and comparable across classrooms and programs.

(2) For non-tested grades and subjects: alternative measures of student learning and performance, such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in achievement data for an individual student between two or more points in time. Growth may also include other measures that are rigorous and comparable across classrooms.

Student mobility rate is calculated by dividing the total number of new student entries and withdrawals at a school, from the day after the first official enrollment number is collected through the end of the academic year, by the first official enrollment number of the academic year.

Note: This definition is not meant to limit a grantee from also collecting information about why students enter or withdraw from the school, *e.g.,* transferring to charter schools, moving outside of the school district for non-academic or academic reasons.

Theory of action means an organization's strategy regarding how, considering its capacity and resources, it will take the necessary steps and measures to accomplish its desired results.

Theory of change means an organization's beliefs about how its inputs, and early and intermediate outcomes, relate to accomplishing its long-term desired results.

Program Authority: 20 U.S.C. 7243–7243b.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final priorities, requirements, definitions, and selection criteria published elsewhere in this issue of the **Federal Register.**

Note: The regulations in 34 CFR Part 79 apply to all applicants except Federally recognized Indian tribes.

Note: The regulations in 34 CFR Part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $5,000,000.

These estimated available funds are only for Planning grants under the Promise Neighborhoods program.

Contingent upon the availability of funds and the quality of the applications received, we may make additional awards in FY 2012 or later years from the list of unfunded applicants from this competition.

Estimated Range of Awards: Planning grants: Up to $500,000.

Estimated Average Size of Awards: Planning grants: $500,000.

Maximum Award: Planning grants: $500,000.

The maximum award amount is $500,000 per 12-month budget period. We may choose not to further consider or review applications with budget requests for any 12-month budget period that exceed this amount, if we conclude, during our initial review of the application, that the proposed goals and objectives cannot be obtained with the specified maximum amount.

Estimated Number of Awards: Planning grants: Up to 10.

Note: The Department is not bound by any estimates in this notice.

Project Period: Planning grants: Up to 12 months.

III. Eligibility Information

1. *Eligible Applicants:* To be eligible for a grant under this competition, an applicant must be an eligible organization (as defined in this notice). For purposes of *Absolute Priority 3: Promise Neighborhoods in Tribal Communities,* an eligible applicant is an eligible organization that partners with an Indian tribe or is an Indian tribe that meets the definition of an eligible organization.

2. *Cost-Sharing or Matching:*

To be eligible for a planning grant under this competition, an applicant must demonstrate that it has established a commitment from one or more entities in the public or private sector, which may include Federal, State, and local

public agencies, philanthropic organizations, private businesses, or individuals, to provide matching funds for the planning process. An applicant for a planning grant must obtain matching funds or in-kind donations for the planning process equal to at least 50 percent of its grant award, except that an applicant proposing a project that meets *Absolute Priority 2: Promise Neighborhoods in Rural Communities* or *Absolute Priority 3: Promise Neighborhoods in Tribal Communities* must obtain matching funds or in-kind donations equal to at least 25 percent of the grant award.

Both planning and implementation applicants must demonstrate a commitment of matching funds in the applications. The applicants must specify the source of the funds or contributions and in the case of a third-party in-kind contribution, a description of how the value was determined for the donated or contributed goods or service. Applicants must demonstrate the match commitment by including letters in their applications explaining the type and quantity of the match commitment with original signatures from the executives of organizations or agencies providing the match. The Secretary may consider decreasing the matching requirement in the most exceptional circumstances, on a case-by-case basis.

An applicant that is unable to meet the matching requirement must include in its application a request to the Secretary to reduce the matching requirement, including the amount of the requested reduction, the total remaining match contribution, and a statement of the basis for the request. An applicant should review the Department's cost-sharing and cost-matching regulations, which include specific limitations in 34 CFR 74.23 applicable to non-profit organizations and institutions of higher education and 34 CFR 80.24 applicable to State, local, and Indian tribal governments, and the Office of Management and Budget (OMB) cost principles regarding donations, capital assets, depreciations and allowable costs. These circulars are available on OMB's Web site at *http://www.whitehouse.gov/omb/circulars/index.html.*

3. *Other: Funding Categories:* An applicant must state in its application whether it is applying for a Planning grant or an Implementation grant. An applicant will be considered for an award only for the type of grant for which it applies.

IV. Application and Submission Information

1. *Address to Request Application Package:* Ty Harris, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W250, LBJ, Washington, DC 20202–5970. Telephone: (202) 453–5629 or by e-mail: *PN2011faq@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Notice of Intent to Apply: July 22, 2011.

We will be able to develop a more efficient process for reviewing grant applications if we know the approximate number of applicants that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify us of the applicant's intent to submit an application for funding by completing a web-based form. When completing this form, applicants will provide (1) The applicant organization's name and address, and (2) the type of grant for which the applicant intends to apply. Applicants may access this form online at *http://wdcrobcolp01.ed.gov/CFAPPS/survey/survey.cfm?ID=5c306e04-40e0-4cb3-b6e7-4a8ea1d2012e.* Applicants that do not complete this form may still apply for funding.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You are strongly encouraged to limit the application narrative [Part III] for a planning application to no more than 40 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative. Text in charts, tables, figures, and graphs may be single-spaced.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts is strongly encouraged: Times New Roman, Courier, Courier New, or Arial.

The suggested page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section [Part III].

3. *Submission Dates and Times:*

Applications Available: July 6, 2011.

Deadline for Notice of Intent to Apply: July 22, 2011.

Date of Pre-Application Webinars: Planning Application: July 14, 2011 and August 2, 2011. Implementation Application: July 19, 2011 and July 28, 2011. These pre-application webinars are designed to provide technical assistance to interested applicants for Promise Neighborhoods grants. Detailed information regarding the pre-application webinar times will be available through the Department of Education Web site at *http://www2.ed.gov/programs/promiseneighborhoods/index.html.*

Deadline for Transmittal of Applications: September 6, 2011.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: November 3, 2011.

4. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal

Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) Be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (*see http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*).

7. *Other Submission Requirements:*

Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Promise Neighborhoods Program—CFDA Number 84.215P (Planning grants) must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for Promise Neighborhoods Planning Grant Competition at *http:/www.Grants.gov.* You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.215, not 84.215P).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk,

toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Jane Hodgdon, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W220, Washington, DC. FAX: (202) 401–4123.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215P), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA 84.215P), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from the 2011 Promise Neighborhoods NFP and from 34 CFR 75.210. The points assigned to each criterion are indicated in the parenthesis next to the criterion. Applicants may earn up to a total of 100 points. The selection criteria for planning grants are as follows:

A. *Need for project (15 points).*

The Secretary considers the need for the proposed project.

In determining the need for the proposed project, the Secretary considers—

(1) The magnitude or severity of the problems to be addressed by the proposed project as described by indicators of need and other relevant indicators (10 points); and

(2) The extent to which the geographically defined area has been described (5 points).

B. *Quality of the project design (20 points).*

The Secretary considers the quality of the design of the proposed project.

In determining the quality of the design of the proposed project, the Secretary considers—

(1) The extent to which the continuum of solutions will be aligned with an ambitious, rigorous, and comprehensive strategy for improvement of schools in the neighborhood (10 points);

(2) The extent to which the applicant describes a proposal to plan to create a complete continuum of solutions, including early learning through grade 12, college- and career-readiness, and

family and community supports, without time and resource gaps that will prepare all children in the neighborhood to attain an excellent education and successfully transition to college and a career (5 points); and

(3) The extent to which solutions leverage existing neighborhood assets and coordinate with other efforts, including programs supported by Federal, State, local, and private funds (5 points).

C. *Quality of project services (20 points).*

The Secretary considers the quality of the services to be provided by the proposed project.

In determining the quality of the project services, the Secretary considers—

(1) The extent to which the applicant describes how the needs assessment and segmentation analysis, including identifying and describing indicators, will be used during the planning phase to determine each solution within the continuum (10 points); and

(2) The extent to which the applicant describes how it will determine that solutions are based on the best available evidence including, where available, strong or moderate evidence, and ensure that solutions drive results and lead to changes on indicators (10 points).

D. *Quality of the management plan (45 points).*

The Secretary considers the quality of the management plan for the proposed project.

In determining the quality of the management plan for the proposed project, the Secretary considers the experience, lessons learned, and proposal to build capacity of the applicant's management team and project director in all of the following areas—

(1) Working with the neighborhood and its residents; the schools described in paragraph (2)(b) of Absolute Priority 1; the LEA in which those schools are located; Federal, State, and local government leaders; and other service providers (10 points);

(2) Collecting, analyzing, and using data for decision-making, learning, continuous improvement, and accountability (15 points);

(3) Creating formal and informal partnerships, including the alignment of the visions, theories of action, and theories of change described in its memorandum of understanding, and creating a system for holding partners accountable for performance in accordance with the memorandum of understanding (10 points); and

(4) Integrating funding streams from multiple public and private sources, including its proposal to leverage and integrate high-quality programs in the neighborhood into the continuum of solutions (10 points).

2. *Review and Selection Process:* The Department will screen applications submitted in accordance with the requirements in this notice, and will determine which applications have met eligibility and other statutory requirements.

The Department will use independent reviewers from various backgrounds and professions including: Pre-kindergarten-12 teachers and principals, college and university educators, researchers and evaluators, social entrepreneurs, strategy consultants, grant makers and managers, and others with education expertise. The Department will thoroughly screen all reviewers for conflicts of interest to ensure a fair and competitive review process.

Reviewers will read, prepare a written evaluation, and score the applications assigned to their panel, using the selection criteria provided in this notice.

For applications addressing Absolute Priority 1, Absolute priority 2, and Absolute Priority 3, the Secretary prepares a rank order of applications for each absolute priority based solely on the evaluation of their quality according to the selection criteria. The Department may use more than one tier of reviews in determining grantees. Additional information about the review process will be published on the Department's Web site.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Transparency and Open Government Policy:* After awards are made under this competition, all of the submitted successful applications, together with reviewer scores and comments, will be posted on the Department's Web site.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Secretary has established one performance indicator for this program: the percentage of planning grantees that produce a high-quality plan as measured by their receiving at least 90 percent of the total possible points in

the competition for FY 2012 implementation grants. All grantees will be required to submit a final performance report documenting their contribution in assisting the Department in measuring the performance of the program against this indicator, as well as other information requested by the Department.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Jane Hodgdon, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W220, Washington, DC 20202–5900. Telephone: (202) 453–6615 or by e-mail: *PN2011faq@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *http://www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *http://www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: June 29, 2011.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2011–16760 Filed 7–5–11; 8:45 am]

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FEDERAL REGISTER

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Part IV

Securities and Exchange Commission

17 CFR Part 275
Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–3222; File No. S7–37–10]

RIN 3235–AK81

Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is adopting rules to implement new exemptions from the registration requirements of the Investment Advisers Act of 1940 for advisers to certain privately offered investment funds; these exemptions were enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act''). As required by Title IV of the Dodd-Frank Act—the Private Fund Investment Advisers Registration Act of 2010—the new rules define ''venture capital fund'' and provide an exemption from registration for advisers with less than $150 million in private fund assets under management in the United States. The new rules also clarify the meaning of certain terms included in a new exemption from registration for ''foreign private advisers.''

DATES: *Effective Date:* July 21, 2011.

FOR FURTHER INFORMATION CONTACT: Brian McLaughlin Johnson, Tram N. Nguyen or David A. Vaughan, at (202) 551–6787 or *IArules@sec.gov*, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting rules 203(l)–1, 203(m)–1 and 202(a)(30)–1 (17 CFR 275.203(l)–1, 275.203(m)–1 and 275.202(a)(30)–1) under the Investment Advisers Act of 1940 (15 U.S.C. 80b) (the ''Advisers Act'').[1]

Table of Contents

I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Act,[2] which, among other things, repeals section 203(b)(3) of the Advisers Act.[3] Section 203(b)(3) exempted any investment adviser from registration if the investment adviser (i) had fewer than 15 clients in the preceding 12 months, (ii) did not hold itself out to the public as an investment adviser and (iii) did not act as an investment adviser to a registered investment company or a company that has elected to be a business development company (the ''private adviser exemption'').[4] Advisers specifically exempt under section 203(b) are not subject to reporting or recordkeeping provisions under the Advisers Act, and are not subject to examination by our staff.[5]

The primary purpose of Congress in repealing section 203(b)(3) was to require advisers to ''private funds'' to register under the Advisers Act.[6] Private funds include hedge funds, private equity funds and other types of pooled investment vehicles that are excluded from the definition of ''investment company'' under the Investment Company Act of 1940[7] (''Investment Company Act'') by reason of section 3(c)(1) or 3(c)(7) of such Act.[8] Section 3(c)(1) is available to a fund that does not publicly offer the securities it issues[9] and has 100 or fewer beneficial owners of its outstanding securities.[10] A fund relying on section 3(c)(7) cannot publicly offer the securities it issues[11] and generally must limit the owners of its outstanding securities to ''qualified purchasers.''[12]

[1] Unless otherwise noted, all references to rules under the Advisers Act will be to Title 17, Part 275 of the Code of Federal Regulations (17 CFR 275).

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[3] In this Release, when we refer to the ''Advisers Act,'' we refer to the Advisers Act as in effect on July 21, 2011.

[4] 15 U.S.C. 80b–3(b)(3) as in effect before July 21, 2011.

[5] Under section 204(a) of the Advisers Act, the Commission has the authority to require an investment adviser to maintain records and provide reports, as well as the authority to examine such adviser's records, unless the adviser is ''specifically exempted'' from the requirement to register pursuant to section 203(b) of the Advisers Act. Investment advisers that are exempt from registration in reliance on other sections of the Advisers Act (such as sections 203(l) or 203(m) which we discuss below) are not ''specifically exempted'' from the requirement to register pursuant to section 203(b), and thus the Commission has authority under section 204(a) of the Advisers Act to require those advisers to maintain records and provide reports and has authority to examine such advisers' records.

[6] *See* S. Rep. No. 111–176, at 71–3 (2010) (''S. Rep. No. 111–176''); H. Rep. No. 111–517, at 866 (2010) (''H. Rep. No. 111–517''). H. Rep. No. 111–517 contains the conference report accompanying the version of H.R. 4173 that was debated in conference. While the Senate voted to exempt private equity fund advisers in addition to venture capital fund advisers from the requirement to register under the Advisers Act, the Dodd-Frank Act exempts only venture capital fund advisers. Compare Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 408 (2010) (as passed by the Senate) with The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009) (as passed by the House) (''H.R. 4173'') *and* Dodd-Frank Act (2010), *supra* note 2.

[7] 15 U.S.C. 80a.

[8] Section 202(a)(29) of the Advisers Act defines the term ''private fund'' as ''an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.''

[9] Interests in a private fund may be offered pursuant to an exemption from registration under the Securities Act of 1933 (15 U.S.C. 77) (''Securities Act''). Notwithstanding these exemptions, the persons who market interests in a private fund may be subject to the registration requirements of section 15(a) under the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o(a)). The Exchange Act generally defines a ''broker'' as any person engaged in the business of effecting transactions in securities for the account of others. Section 3(a)(4)(A) of the Exchange Act (15 U.S.C. 78c(a)(4)(A)). *See also Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934,* Exchange Act Release No. 44291 (May 11, 2001) [66 FR 27759 (May 18, 2001)], at n.124 (''Solicitation is one of the most relevant factors in determining whether a person is effecting transactions.''); *Political Contributions by Certain Investment Advisers,* Investment Advisers Act Release No. 3043 (July 1, 2010) [75 FR 41018 (July 14, 2010)], n.326 (''Pay to Play Release'').

[10] *See* section 3(c)(1) of the Investment Company Act (providing an exclusion from the definition of ''investment company'' for any ''issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities.'').

[11] *See supra* note 9.

[12] *See* section 3(c)(7) of the Investment Company Act (providing an exclusion from the definition of

Each private fund advised by an adviser has typically qualified as a single client for purposes of the private adviser exemption.[13] As a result, investment advisers could advise up to 14 private funds, regardless of the total number of investors investing in the funds or the amount of assets of the funds, without the need to register with us.[14]

In Title IV of the Dodd-Frank Act (''Title IV''), Congress generally extended Advisers Act registration to advisers to hedge funds and many other private funds by eliminating the private adviser exemption.[15] In addition to removing the broad exemption provided by section 203(b)(3), Congress amended the Advisers Act to create three more limited exemptions from registration under the Advisers Act.[16] These amendments become effective on July 21, 2011.[17] New section 203(l) of the Advisers Act provides that an investment adviser that solely advises venture capital funds is exempt from registration under the Advisers Act (the ''venture capital exemption'') and directs the Commission to define ''venture capital fund'' within one year of enactment.[18] New section 203(m) of the Advisers Act directs the Commission to provide an exemption from registration to any investment adviser that solely advises private funds if the adviser has assets under management in the United States of less than $150 million (the ''private fund adviser exemption'').[19] In this Release, we will refer to advisers that rely on the venture capital and private fund adviser exemptions as ''exempt reporting advisers'' because sections 203(l) and 203(m) provide that the Commission shall require such advisers to maintain such records and to submit such reports ''as the Commission determines necessary or appropriate in the public interest or for the protection of investors.'' [20]

Section 203(b)(3) of the Advisers Act, as amended by the Dodd-Frank Act, provides an exemption for certain foreign private advisers (the ''foreign private adviser exemption'').[21] The term ''foreign private adviser'' is defined in new section 202(a)(30) of the Advisers Act as an investment adviser that has no place of business in the United States, has fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser,[22] and less than $25 million in aggregate assets under management from such clients and investors.[23]

These new exemptions are not mandatory.[24] Thus, an adviser that qualifies for any of the exemptions could choose to register (or remain registered) with the Commission, subject to section 203A of the Advisers Act, which generally prohibits most advisers from registering with the Commission if they do not have at least $100 million in assets under management.[25]

On November 19, 2010, the Commission proposed three rules that would implement these exemptions.[26] First, we proposed rule 203(l)–1 to define the term ''venture capital fund'' for purposes of the venture capital exemption. Second, we proposed rule 203(m)–1 to implement the private fund adviser exemption. Third, in order to clarify the application of the foreign private adviser exemption, we proposed new rule 202(a)(30)–1 to define several terms included in the statutory definition of a foreign private adviser as defined in section 202(a)(30) of the Advisers Act.[27] On the same day, we

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''investment company'' for any ''issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities.''). The term ''qualified purchaser'' is defined in section 2(a)(51) of the Investment Company Act.

[13] *See* rule 203(b)(3)–1(a)(2) as in effect before July 21, 2011.

[14] *See* Staff Report to the United States Securities and Exchange Commission, Implications of the Growth of Hedge Funds, at 21 (2003), *http://www.sec.gov/news/studies/hedgefunds0903.pdf* (discussing section 203(b)(3) of the Advisers Act as in effect before July 21, 2011). Concern about this lack of Commission oversight led us to adopt a rule in 2004 extending registration to hedge fund advisers. *See Registration Under the Advisers Act of Certain Hedge Fund Advisers,* Investment Advisers Act Release No. 2333 (Dec. 2, 2004) [69 FR 72054 (Dec. 10, 2004)] (''Hedge Fund Adviser Registration Release''). This rule was vacated by a Federal court in 2006. *Goldstein v. Securities and Exchange Commission,* 451 F.3d 873 (D.C. Cir. 2006) (''Goldstein'').

[15] Section 403 of the Dodd-Frank Act amended section 203(b)(3) of the Advisers Act by repealing the prior private adviser exemption and inserting a ''foreign private adviser exemption.'' *See infra* Section II.C. Unlike our 2004 rule, which sought to apply only to advisers of ''hedge funds,'' the Dodd-Frank Act requires that, unless another exemption applies, all advisers previously eligible for the private adviser exemption register with us regardless of the type of private funds or other clients the adviser has.

[16] Title IV also created exemptions and exclusions in addition to the three discussed at length in this Release. *See, e.g.,* sections 403 and 409 of the Dodd-Frank Act (exempting advisers to licensed small business investment companies from registration under the Advisers Act and excluding family offices from the definition of ''investment adviser'' under the Advisers Act). We are adopting a rule defining ''family office'' in a separate release (*Family Offices,* Investment Advisers Act Release No. 3220 (June 22, 2011)).

[17] Section 419 of the Dodd-Frank Act (specifying the effective date for Title IV).

[18] *See* section 407 of the Dodd-Frank Act (exempting advisers solely to ''venture capital funds,'' as defined by the Commission).

[19] *See* section 408 of the Dodd-Frank Act (directing the Commission to exempt private fund advisers with less than $150 million in aggregate assets under management in the United States).

[20] *See* sections 407 and 408 of the Dodd-Frank Act.

[21] Advisers specifically exempt under section 203(b) are not subject to reporting or recordkeeping provisions under the Advisers Act, and are not subject to examination by our staff. *See supra* note 5.

[22] Subparagraph (B) of section 202(a)(30) refers to the number of ''clients and investors in the United States in private funds,'' while subparagraph (C) refers to the assets of ''clients *in the United States* and investors in the United States in private funds'' (emphasis added). We interpret these provisions consistently so that only clients *in the United States* and investors in the United States should be included for purposes of determining eligibility for the exemption under subparagraph (B).

[23] The exemption is not available to an adviser that ''acts as—(I) an investment adviser to any investment company registered under the [Investment Company Act]; or (II) a company that has elected to be a business development company pursuant to section 54 of [that Act], and has not withdrawn its election.'' Section 202(a)(30)(D)(ii). We interpret subparagraph (II) to mean that the exemption is not available to an adviser *that advises* a business development company. This exemption also is not available to an adviser that holds itself out generally to the public in the United States as an investment adviser. Section 202(a)(30)(D)(i).

[24] An adviser choosing to avail itself of an exemption under section 203(l), 203(m) or 203(b)(3), however, may be required to register as an adviser with one or more state securities authorities. *See* section 203A(b)(1) of the Advisers Act (exempting from state regulatory requirements any adviser registered with the Commission or that is not registered because such person is excepted from the definition of an investment adviser under section 202(a)(11)). *See also infra* note 488 (discussing the application of section 222 of the Advisers Act).

[25] Section 203A(a)(1) of the Advisers Act generally prohibits an investment adviser regulated by the state in which it maintains its principal office and place of business from registering with the Commission unless it has at least $25 million of assets under management. Section 203A(b) preempts certain state laws regulating advisers that are registered with the Commission. Section 410 of the Dodd-Frank Act amended section 203A(a) to also prohibit generally an investment adviser from registering with the Commission if the adviser has assets under management between $25 million and $100 million and the adviser is required to be registered with, and if registered, would be subject to examination by, the state security authority where it maintains its principal office and place of business. *See* section 203A(a)(2) of the Advisers Act. In each of subparagraphs (1) and (2) of section 203A(a), additional conditions also may apply. *See* Implementing Adopting Release, *infra* note 32, at section II.A.

[26] *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets under Management, and Foreign Private Advisers,* Investment Advisers Act Release No. 3111 (Nov. 19, 2010) [75 FR 77190 (Dec. 10, 2010)] (''Proposing Release'').

[27] Proposed rule 202(a)(30)–1 included definitions for the following terms: (i) ''Client;'' (ii) ''investor;'' (iii) ''in the United States;'' (iv) ''place of business;'' and (v) ''assets under management.'' *See* discussion in section II.C of the Proposing Release, *supra* note 26. We proposed rule 202(a)(30)–1, in part, pursuant to section 211(a) of

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also proposed rules to implement other amendments made to the Advisers Act by the Dodd-Frank Act, which included reporting requirements for exempt reporting advisers.[28]

We received over 115 comment letters in response to our proposals to implement the new exemptions.[29] Most of these letters were from venture capital advisers, other types of private fund advisers, and industry associations or law firms on behalf of private fund and foreign investment advisers.[30] We also received several letters from investors and investor groups.[31] Although commenters generally supported the various proposed rules, many suggested modifications designed to expand the breadth of the exemptions or to clarify the scope of one or more elements of the proposed rules. Commenters also sought interpretative guidance on certain aspects of the scope of each of the rule proposals and related issues.

II. Discussion

Today, the Commission is adopting rules to implement the three new exemptions from registration under the Advisers Act. In response to comments, we have made several modifications to the proposals. In a separate companion release (the ''Implementing Adopting Release'') we are adopting rules to implement other amendments made to the Advisers Act by the Dodd-Frank Act, some of which also concern certain advisers that qualify for the exemptions discussed in this Release.[32]

A. Definition of Venture Capital Fund

We are adopting new rule 203(l)–1 to define ''venture capital fund'' for purposes of the new exemption for investment advisers that advise solely venture capital funds.[33] In summary, the rule defines a venture capital fund as a private fund that: (i) Holds no more than 20 percent of the fund's capital commitments in non-qualifying investments (other than short-term holdings) (''qualifying investments'' generally consist of equity securities of ''qualifying portfolio companies'' that are directly acquired by the fund, which we discuss below); (ii) does not borrow or otherwise incur leverage, other than limited short-term borrowing (excluding certain guarantees of qualifying portfolio company obligations by the fund); (iii) does not offer its investors redemption or other similar liquidity rights except in extraordinary circumstances; (iv) represents itself as pursuing a venture capital strategy to its investors and prospective investors; and (v) is not registered under the Investment Company Act and has not elected to be treated as a business development company (''BDC'').[34] Consistent with the proposal, rule 203(l)–1 also ''grandfathers'' any pre-existing fund as a venture capital fund if it satisfies certain criteria under the grandfathering provision.[35] An adviser is eligible to rely on the venture capital exemption only if it solely advises venture capital funds that meet all of the elements of the definition or funds that have been grandfathered.

The proposed rule defined the term venture capital fund in accordance with what we believed Congress understood venture capital funds to be, as reflected in the legislative materials, including the testimony Congress received.[36] As we discussed in the Proposing Release, the proposed definition of venture capital fund was designed to distinguish venture capital funds from other types of private funds, such as hedge funds and private equity funds, and to address concerns expressed by Congress regarding the potential for systemic risk.[37]

We received over 70 comment letters on the proposed venture capital fund definition, most of which were from venture capital advisers or related industry groups.[38] A number of commenters supported the Commission's efforts to define a venture capital fund,[39] citing the ''thoughtful'' approach taken and the quality of the proposed rule.[40] Commenters representing investors and investor groups and others generally supported the rule as proposed,[41] one of which stated that the proposed definition ''succeeds in clearly defining those private funds that will be exempt.''[42] Some of these commenters expressed support for a definition that is no broader than necessary in order to ensure that only advisers to ''venture capital funds, and not other types of private funds, are able to avoid the new mandatory registration requirements.'' [43]

Generally, however, our proposal prompted vigorous debate among commenters on the scope of the definition. For example, a number of commenters wanted us to take a different approach from the proposal and supported two alternatives. Two commenters urged us to rely on the California definition of ''venture capital

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the Advisers Act, which Congress amended to explicitly provide us with the authority to define technical, trade, and other terms used in the Advisers Act. *See* section 406 of the Dodd-Frank Act.

[28] *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 3110 (Nov. 19, 2010) [75 FR 77052 (Dec. 10, 2010)] (''Implementing Proposing Release'').

[29] The comment letters on the Proposing Release (File No. S7–37–10) are available at: *http://www.sec.gov/comments/s7-37-10/s73710.shtml.* We also considered comments submitted in response to the Implementing Proposing Release that were germane to the rules adopted in this Release.

[30] *See, e.g.,* Comment Letter of Biotechnical Industry Organization (Jan. 24, 2011) (''BIO Letter''); Comment Letter of Coalition of Private Investment Companies (Jan. 28, 2011) (''CPIC Letter''); Comment Letter of European Private Equity and Venture Capital Association (Jan. 24, 2011 (''EVCA Letter''); Comment Letter of O'Melveny & Myers LLP (Jan. 25, 2011) (''O'Melveny Letter''); Comment Letter of Norwest Venture Partners (Jan. 24, 2011) (''Norwest Letter'').

[31] *See, e.g.,* Comment Letter of the American Federation of Labor and Congress of Industrial Organizations (Jan. 24, 2011) (''AFL–CIO Letter''); Comment Letter of Americans for Financial Reform (Jan. 24, 2011) (''AFR Letter''); Comment Letter of The California Public Employees Retirement System (Feb. 10, 2011) (''CalPERS Letter''). *See also, e.g.,* Comment Letter of Adams Street Partners (Jan. 24, 2011); Comment Letter of Private Equity Investors, Inc. (Jan. 21, 2011) (''PEI Funds Letter'') (letters from advisers of funds that invest in other venture capital and private equity funds).

[32] *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 3221 (June 22, 2011).

[33] Rule 203(l)–1.

[34] Rule 203(l)–1(a).

[35] Rule 203(l)–1(b).

[36] *See* Proposing Release, *supra* note 26, at n.38 and accompanying and following text.

[37] *See, e.g.,* Proposing Release, *supra* note 26, discussion at section II.A. and text accompanying nn.43, 60, 61, 82, 99, 136.

[38] The National Venture Capital Association submitted a comment letter, dated January 13, 2011 (''NVCA Letter'') on behalf of its members, and 27 other commenters expressed their support for the comments raised in the NVCA Letter.

[39] *See* BIO Letter; Comment Letter of Charles River Ventures (Jan. 21, 2011) (''Charles River Letter''); NVCA Letter.

[40] *See, e.g.,* Comment Letter of Abbott Capital Management, LLC (Jan. 24, 2011) (''Abbott Capital Letter''); Comment Letter of DLA Piper LLP (Jan. 24, 2011) (''DLA Piper VC Letter''); Comment Letter of InterWest General Partners (Jan. 21, 2011) (''InterWest Letter''); NVCA Letter; Comment Letter of Oak Investment Partners (Jan. 24, 2011) (''Oak Investment Letter''); Comment Letter of Pine Brook Road Advisors, LP (Jan. 24, 2011) (''Pine Brook Letter'').

[41] *See* AFR Letter; AFL–CIO Letter; EVCA Letter; Comment Letter of U.S. Senator Carl Levin (Jan. 25, 2011) (''Sen. Levin Letter'').

[42] AFL–CIO Letter.

[43] Sen. Levin Letter. Although they did not object to the approach taken by the proposed rule, several commenters cautioned us against defining venture capital fund more broadly than necessary to preclude advisers to other types of private funds from qualifying under the venture capital exemption. *See* AFR Letter; CalPERS Letter; Sen. Levin Letter (''a variety of advisers or funds are likely to try to seek refuge from the registration requirement by urging an overbroad interpretation of the term 'venture capital fund' * * * It is important for the Commission to define the term narrowly to ensure that only venture capital funds, and not other types of private funds, are able to avoid the new mandatory registration requirement.'').

operating company.''[44] These commenters did not, however, address our concern, discussed in the Proposing Release, that the California definition includes many types of private equity and other private funds, and thus incorporation of this definition would not appear consistent with our understanding of the intended scope of section 203(l).[45] Our concern was acknowledged in a letter we received from the current Commissioner for the California Department of Corporations, stating that ''we understand the [Commission] cannot adopt verbatim the California definition of [venture capital fund]. Congressional directives require the [Commission] to exclude private equity funds, or any fund that pivots its investment strategy on the use of debt or leverage, from the definition of [venture capital fund].''[46] For these reasons and the other reasons cited in the Proposing Release, we are not modifying the proposal to rely on the California definition.[47]

Several other commenters favored defining a venture capital fund by reference to investments in ''small'' businesses or companies, although they disagreed on the factors that would deem a business or company to be ''small.''[48] As discussed in the Proposing Release, we considered defining a qualifying fund as a fund that invests in small companies, but noted the lack of consensus for defining such a term.[49] We also expressed the concern in the Proposing Release that defining a ''small'' company in a manner that imposes a single standardized metric such as net income, the number of employees, or another single factor test could ignore the complexities of doing business in different industries or regions. This could have the potential result that even a low threshold for a size metric could inadvertently restrict venture capital funds from funding otherwise promising young small companies.[50] For these reasons, we are not persuaded that the tests for a ''small'' company suggested by commenters address these concerns.

Unlike the commenters who suggested these alternative approaches, most commenters representing venture capital advisers and related groups accepted the approach of the proposed rule, and many of them acknowledged that the proposed definition would generally encompass most venture capital investing activity that typically occurs.[51] Several, however, also expressed the concern that a venture capital fund may, on occasion, deviate from its typical investing pattern with the result that the fund could not satisfy all of the definitional criteria under the proposed rule with respect to each investment all of the time.[52] Others explained that an investment fund that seeks to satisfy the definition of a venture capital fund (a ''qualifying fund'') would desire flexibility to invest small amounts of fund capital in investments that would not meet the criteria under the proposed rule, such as shares of other venture capital funds,[53] non-convertible debt,[54] or publicly traded securities.[55] Both groups of commenters urged us to accommodate them by broadening the definition and modifying the proposed criteria.

Commenters wanted advisers seeking to be eligible for the venture capital exemption to have greater flexibility to operate and invest in portfolio companies and to accommodate existing (and potentially evolving) business practices that may vary from what commenters characterized as typical venture capital fund practice.[56] Some argued that a limited basket for such atypical investing activity could facilitate job creation and capital formation.[57] They were also concerned that the multiple detailed criteria of the proposed rule could result in ''inadvertent'' violations of the criteria under the rule.[58] Some expressed concern that a Commission rule defining a venture capital fund by reference to investing activity would have the result of reducing an adviser's investment discretion.[59]

We are sensitive to commenters' concerns that the definition not operate to foreclose investment funds from investment opportunities that would benefit investors but would not change the character of a venture capital fund.[60] On the other hand, we are troubled that the cumulative effect of revising the rule to reflect all of the modifications supported by commenters could permit reliance on the exemption by advisers to other types of private funds and thus

[44] Comment Letter of Lowenstein Sandler PC (Jan. 4, 2011) (''Lowenstein Letter''); Comment Letter of Keith Bishop (Jan. 17, 2011).

[45] *See* Proposing Release, *supra* note 26, at n.72 and accompanying and preceding text.

[46] Comment Letter of Preston DuFauchard, Commissioner for the California Department of Corporations (Jan. 21, 2011) (''DuFauchard Letter'') (further stating that ''while regulators might have an interesting discussion on whether private equity funds contributed to the recent financial crisis, in light of the Congressional directives such a dialogue would be academic.'').

[47] *See* Proposing Release, *supra* note 26, at n.72 and accompanying and preceding text.

[48] *See* Comment Letter of National Association of Small Business Investment Companies and Small Business Investor Alliance (Jan. 24, 2011) (''NASBIC/SBIA Letter'') (supported a definition of ''small'' company by reference to the standards set forth in the Small Business Investment Act regulations). *But cf.* Lowenstein Letter; Comment Letter of Quaker BioVentures (Jan. 24, 2011) (''Quaker BioVentures Letter''); Comment Letter of Venrock (Jan. 23, 2011) (''Venrock Letter'') (each of which supported a definition of small company based on the size of its public float). *See also* Comment Letter of Georg Merkl (Jan. 25, 2011) (''Merkl Letter'') (referring to ''young, negative EBITDA [earnings before interest, taxes, depreciation and amortization] companies'').

[49] *See* Proposing Release, *supra* note 26, at section II.A.1.a. and n.69 and accompanying and following text.

[50] *See* Proposing Release, *supra* note 26, at n.69 and accompanying and preceding text.

[51] *See, e.g.,* Comment Letter of the Committee on Federal Regulation of Securities of the American Bar Association (Jan. 31, 2011) (''ABA Letter''); ATV Letter; BIO Letter; NVCA Letter; Comment Letter of Proskauer LLP (Jan. 23, 2011); Comment Letter of Union Square Ventures, LLC (Jan. 24, 2011) (''Union Square Letter'').

[52] *See, e.g.,* Comment Letter of Advanced Technology Ventures (Jan. 24, 2011) (''ATV Letter''); BIO Letter; NVCA Letter; Comment Letter of Sevin Rosen Funds (Jan. 24, 2011) (''Sevin Rosen Letter''). One commenter argued that the rule ''should not bar the occasional, but also quite ordinary, financial activities'' of a venture capital fund. Charles River Letter.

[53] *See, e.g.,* Comment Letter of Dechert LLP (Jan. 24, 2011) (''Dechert General Letter''); Comment Letter of First Round Capital (Jan. 24, 2011) (''First Round Letter''); Sevin Rosen Letter.

[54] *See, e.g.,* Comment Letter of BioVentures Investors (Jan. 24, 2011) (''BioVentures Letter''); Charles River Letter; Comment Letter of Davis Polk & Wardwell LLP (Jan. 24, 2011) (''Davis Polk Letter''); Merkl Letter.

[55] *See, e.g.,* Comment Letter of Cardinal Partners (Jan. 24, 2011) (''Cardinal Letter''); Davis Polk Letter; Comment Letter of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian (Jan. 24, 2011) (''Gunderson Dettmer Letter''); Merkl Letter.

[56] *See, e.g.,* NVCA Letter; Comment Letter of Bessemer Venture Partners (Jan. 24, 2011) (''Bessemer Letter''); Oak Investment Letter. *See also supra* note 51.

[57] *See, e.g.,* NVCA Letter (stating that a low level of 15% would ''allow innovation and job creation to flourish within the venture capital industry''); Sevin Rosen Letter (a 20% limit would be ''flexible enough not to severely impair the operations of bona fide [venture capital funds], a critically important resource for American innovation and job creation'').

[58] *See, e.g.,* NVCA Letter (''Because of the consequence (*i.e.,* Federal registration) of having even one inadvertent, non-qualifying investment, allowance for unintended or insignificant deviations, or differences in interpretations, is appropriate.''); Comment Letter of SV Life Sciences (Jan. 21, 2011) (''SV Life Sciences Letter'') (the ''lack of flexibility and ambiguity in certain definitions * * * could cause our firm or other venture firms to inadvertently hold non-qualifying investments''). *See also* ATV Letter.

[59] DuFauchard Letter (''Only the VC Fund advisers/managers are in a position to determine what best form 'down-round' financing should take. Whether that should be new capital, project finance, a bridge loan, or some other form of equity or debt, is neither a question for the regulators nor should it be a question of strict regulatory control.''); ESP Letter (''There is no way a single regulation can determine what the appropriate level of leverage should be for every portfolio company.''); Merkl Letter (''The Commission should not regulate from whom the [portfolio company] securities can be acquired or how the [company's] capital can be used.'').

[60] *See, e.g.,* Oak Investment Letter; Sevin Rosen Letter.

expand the exemption beyond what we believe was the intent of Congress.[61] A number of commenters argued that defining a venture capital fund by reference to multiple detailed criteria could result in ''inadvertent'' violations of the definitional criteria by a qualifying fund.[62] Another commenter acknowledged that providing *de minimis* carve-outs to the multiple criteria under the proposed rule could be ''cumbersome,''[63] which could lead to the result, asserted by some commenters, that an overly prescriptive rule could invite further unintentional violations of the registration provisions of the Advisers Act.[64]

To balance these competing considerations, we are adopting an approach suggested by several commenters that defines a venture capital fund to include a fund that invests a portion of its capital in investments that would not otherwise satisfy all of the elements of the rule (''non-qualifying basket'').[65] Defining a venture capital fund to include funds engaged in some amount of non-qualifying investment activity provides advisers to venture capital funds with greater investment flexibility, while precluding an adviser relying on the exemption from altering the character of the fund's investments to such extent that the fund could no longer be viewed as a venture capital fund within the intended scope of the exemption. To the extent an adviser uses the basket to invest in some non-qualifying investments, it will have less room to invest in others, but the choice is left to the adviser. While the definition limits the amount of non-qualifying investments, it allows the adviser to choose how to allocate those investments. Thus, one venture capital fund may take advantage of some opportunities to invest in debt whereas others may seek limited opportunities in publicly offered securities. The definition of ''business development company'' under the Advisers Act contains a similar basket for non-qualifying investments.[66]

Commenters suggested non-qualifying baskets ranging from 15 to 30 percent of a fund's capital commitments, although many of these same commenters wanted us to expand the other criteria of the proposed rule.[67] Several commenters in favor of a non-qualifying basket asserted that setting the level for non-qualifying investments at a sufficiently low threshold would preclude advisers to other types of private funds from relying on the venture capital exemption while providing venture capital advisers the flexibility to take advantage of investment opportunities.[68] These commenters properly framed the question before us. We did not, however, receive specific empirical analysis regarding the venture capital industry as a whole that would help us determine the appropriate size of the basket.[69] Many of those supporting a 15 percent non-qualifying basket also supported expanding some of the other elements of the definition, and thus it is unclear whether a 15 percent non-qualifying basket alone would satisfy their needs.[70] On the other hand, those supporting a much larger basket did not, in our view, adequately address our concern that an overly expansive definition would provide room for advisers to private equity funds to remain unregistered, a consequence several commenters urged us to avoid.[71]

On balance, and after giving due consideration to the approaches suggested by commenters, we are adopting a limit of 20 percent of a qualifying fund's capital commitments for non-qualifying investments. We believe that a 20 percent limit will provide the flexibility sought by many venture capital fund commenters while appropriately limiting the scope of the exemption. We note that several commenters recommended a non-qualifying basket limit of 20 percent.[72]

We considered adopting a 40 percent basket for non-qualifying investments by analogy to the Advisers Act definition of BDC.[73] That basket was established by Congress rather than the Commission, and it strikes us as too large in light of our task of implementing a statutory provision that does not specify a basket.[74] We find a better analogy in a rule we adopted in 2001 under the Investment Company Act. Under rule 35d–1 of that Act, commonly referred to as the ''names rule,'' an investment company with a name suggesting that it invests in certain investments is limited to investing no more than 20 percent of its assets in other types of investments (*i.e.,*

[61] For example, one commenter suggested that the definition of venture capital fund include a fund that incurs leverage of up to 20% of fund capital commitments without limit on duration and invests up to 20% of fund capital commitments in publicly traded securities and an additional 20% of fund capital commitments in non-conforming investments. Charles River Letter. Under these guidelines, it would be possible to structure a fund that borrows up to 20% of the fund's ''capital commitments'' to acquire highly leveraged derivatives and publicly traded debt securities. If the fund only calls 20% of its capital, fund indebtedness would equal 100% of fund assets, all of which would be in derivative instruments or publicly traded debt securities.

[62] *See supra* note 58.

[63] First Round Letter.

[64] *See, e.g., generally* NVCA Letter. *See also* Merkl Letter.

[65] *See, e.g.,* Abbott Capital Letter; ATV Letter; Bessemer Letter; BioVentures Letter; Cardinal Letter; Charles River Letter; Comment Letter of CompliGlobe Ltd. (Jan. 24, 2011) (''CompliGlobe Letter''); Davis Polk Letter; First Round Letter; NVCA Letter; Comment Letter of PTV Sciences (Jan. 24, 2011) (''PTV Sciences Letter''); Quaker BioVentures; Comment Letter of Santé Ventures (Jan. 24, 2011) (''Santé Ventures Letter''); Sevin Rosen Letter; SV Life Sciences; Comment Letter of U.S. Venture Partners (Jan. 24, 2011) (''USVP Letter''); Venrock Letter.

[66] Advisers Act section 202(a)(22) (defining a ''business development company'' as any company that meets the definition set forth in section 2(a)(48) of, and complies with section 55 of, the Investment Company Act, except that a BDC under the Advisers Act is defined to mean a company that invests 60% of its total assets in the assets specified in section 55 of the Investment Company Act).

[67] *See, e.g.,* NVCA Letter (more than 25 comment letters expressed general support for the comments raised in the NVCA Letter). Two commenters expressed support for a 30% basket for non-qualifying investments. *See* Comment Letter of Shearman & Sterling LLP (Jan. 24, 2011) (''Shearman Letter'') (citing, in support of this position, the BDC definition under the Investment Company Act, which specifies a threshold of 30% for non-qualifying activity); Quaker BioVentures Letter (citing, in support of this position, the BDC definition under the Investment Company Act and the BDC definition under the Advisers Act which increased the non-qualifying activity threshold to 40%).

[68] Norwest Letter; Sevin Rosen Letter (noting that a 20% limit is ''low enough to ensure that only true [venture capital funds] are able to qualify for the [venture capital] exemption.''). *See also* NVCA Letter.

[69] We did, however, receive much anecdotal evidence of particular advisers' experiences with non-qualifying investments. *See, e.g.,* Cardinal Letter (''In a very limited number of cases, it has been necessary for us to purchase securities from current shareholders of the portfolio company in order for the financing to be completed. However, in NO case have purchases from existing shareholders ever exceeded 15% of the total investment by Cardinal in a proposed financing.''); Charles River Letter (''The vast majority of our investments are in the form of Convertible Preferred Stock. * * * However, very rarely—but more often than never—- we invest in the form of a straight, non-convertible Demand Note.''); Pine Brook Letter (''Our fund documents provide for investments outside of our core investing practice of up to 25% of our committed capital.''). *But cf.* Mesirow Financial Private Equity Advisors, Inc. (Jan. 24, 2011) (''Mesirow Letter'') (a Commission-registered adviser that advises funds that invest in other venture capital and private equity funds stated that ''[s]ince the main purpose of [venture capital funds] is to invest in and help build operating companies, we believe their participation in non-qualifying activity will be rare.'').

[70] *See supra* note 67.

[71] *See supra* note 43.

[72] *See, e.g.,* ATV Letter; Charles River Letter; Sevin Rosen Letter. At least one commenter stated that the minimum threshold limit for the non-qualifying basket should be 20%. Charles River Letter (''we believe anything less than 20% would be inadequate'').

[73] *See supra* note 66.

[74] A larger non-qualifying basket of 40% could have the result of changing the fundamental underlying nature of the investments held by a qualifying fund, such as for example increasing the extent to which non-qualifying investments may contribute to the returns of the fund's portfolio.

non-qualifying investments).[75] In adopting that rule, we explained that ''if an investment company elects to use a name that suggests its investment policy, it is important that the level of required investments be high enough that the name will accurately reflect the company's investment policy.'' [76] We noted that having a registered investment company hold a significant amount of investments consistent with its name is an important tool for investor protection,[77] but setting the limit at 20 percent gives the investment company management flexibility.[78] While our policy goal today in defining a ''venture capital fund'' is somewhat different from our goal in prescribing limitations on investment company names, the tensions we sought to reconcile are similar.[79]

1. Qualifying Investments

Under the rule, to meet the definition of venture capital fund, the fund must hold, immediately after the acquisition of any asset (other than qualifying investments or short-term holdings), no more than 20 percent of the fund's capital commitments in non-qualifying investments (other than short-term holdings).[80] Thus, as discussed above, a qualifying fund could invest without restriction up to 20 percent of the fund's capital commitments in non-qualifying investments and would still fall within the venture capital fund definition.

For purposes of the rule, a ''qualifying investment,'' which we discuss in greater detail below, generally consists of any equity security issued by a qualifying portfolio company that is directly acquired by a qualifying fund and certain equity securities exchanged for the directly acquired securities.[81]

a. Equity Securities of Portfolio Companies

Rule 203(l)–1 defines a venture capital fund as a private fund that, excluding investments in short-term holdings and non-qualifying investments, generally holds equity securities of qualifying portfolio companies.[82]

We proposed to define ''equity security'' by reference to the Exchange Act.[83] Commenters did not generally object to our proposal to do so, although many urged that we expand the definition of venture capital fund to include investments in other types of securities.[84] Commenters asserted that venture capital funds may invest in securities other than equity securities (including debt securities) for various business reasons, including to provide ''bridge'' financing to portfolio companies between equity financing rounds,[85] for working capital needs [86] or for tax or structuring reasons.[87] Many of these commenters recommended that the rule also define a venture capital fund to include funds that invest in non-convertible bridge loans of a portfolio company,[88] interests in other pooled investment funds (including other venture capital funds) [89] and publicly offered securities.[90] Commenters argued that these types of investments facilitate access to capital for a company's expansion,[91] offer qualifying funds flexibility to structure investments in a manner that is most appropriate for the fund (and its investors), including for example to obtain favorable tax treatment, manage risks (such as bankruptcy protection), maintain the value of the fund's equity investment or satisfy the specific financing needs of a portfolio company,[92] and enable a portfolio company to seek such financing from venture capital funds if the company is unable to obtain financing from traditional lending sources.[93]

We recognize that a venture capital fund may, on occasion, make investments other than in equity securities.[94] Under the rule, as discussed above, a venture capital fund may make these investments (as well as other types of investments that commenters may not have suggested) to the extent there is room in the fund's non-qualifying basket. Hence, we are adopting the definition of equity security as proposed.

The final rule incorporates the definition of equity security in section 3(a)(11) of the Exchange Act and rule 3a11–1 thereunder.[95] Accordingly,

[75] Rule 35d–1(a)(2) under the Investment Company Act (''a materially deceptive and misleading name of a [registered investment company] includes * * * [a] name suggesting that the [registered investment company] focuses its investments in a particular type of investment or investments, or in a particular industry or group of industries, unless: (i) The [registered investment company] has adopted a policy to invest, under normal circumstances, at least 80% of the value of its [total assets] in the particular type of investments, or in investments in the particular industry or industries, suggested by the [registered investment company's] name * * *''). 17 CFR 270.35d–1(a)(2).

[76] *Investment Company Names,* Investment Company Act Release No. 24828 (Jan. 17, 2001) [66 FR 8509, 8511 (Feb. 1, 2001), correction 66 FR 14828 (Mar. 14, 2001)] (''Names Rule Adopting Release'').

[77] Names Rule Adopting Release, *supra* note 76, at text accompanying n.3 and text following n.7.

[78] *See* Names Rule Adopting Release, *supra* note 76, at text accompanying n.14. *See also* NVCA Letter; Sevin Rosen Letter (citing rule 35d–1 in support of recommending that the rule adopt a non-qualifying basket); Quaker BioVentures Letter (citing the approach taken by the staff generally limiting an investment company excluded by reason of section 3(c)(5)(C) of the Investment Company Act to investing no more than 20% of its assets in non-qualifying investments).

[79] A number of commenters recommended that the rule specify a range for the non-qualifying basket, arguing that this approach would provide advisers to venture capital funds with better flexibility to manage their investments over time. *See, e.g.,* DLA Piper VC Letter; DuFauchard Letter; Norwest Letter; Oak Investment Letter. As we discuss in greater detail below, the non-qualifying basket is determined as of the time immediately following each investment and hence a range is not necessary.

[80] Rule 203(l)–1(a)(2). The rule specifies that ''immediately after the acquisition of any asset (other than qualifying investments or short-term holdings)'' no more than 20% of the fund's aggregate capital contributions and uncalled committed capital may be held in assets (other than short-term holdings) that are not qualifying investments.'' *See infra* Section II.A.1.c. for a discussion on the operation of the 20% limit.

[81] *See* Sections II.A.1.b.

[82] Rule 203(l)–1(a)(2) (specifying the investments of a venture capital fund); (c)(3) (defining ''qualifying investment''); and (c)(6) (defining ''short-term holdings'').

[83] Proposed rule 203(l)–1(c)(2).

[84] Several commenters opposed any restriction on the definition of equity security. *See, e.g.,* Bessemer Letter; ESP Letter; NVCA Letter.

[85] ATV Letter; NVCA Letter.

[86] Comment Letter of Cook Children's Health Care Foundation Investment Committee (Jan. 20, 2011) (''Cook Children's Letter''); Comment Letter of Leland Fikes Foundation, Inc. (Jan. 21, 2011) (''Leland Fikes Letter'').

[87] Bessemer Letter; Merkl Letter.

[88] *See, e.g.,* Comment Letter of CounselWorks LLC (Jan. 24, 2011); ESP Letter; Comment Letter of McGuireWoods LLP (Jan. 24, 2011) (''McGuireWoods Letter''); NVCA Letter; Oak Investment Letter. *See also* BioVentures Letter (supported venture capital fund investments in non-convertible debt without a time limit); Cook Children's Letter; Leland Fikes Letter (each of which expressed general support). One commenter indicated that the proposed condition limiting investments in portfolio companies to equity securities was too narrow. *See* Pine Brook Letter.

[89] *See, e.g.,* Cook Children's Letter; Leland Fikes Letter; PEI Funds Letter; Comment Letter of SVB Financial Group (Jan. 24, 2011) (''SVB Letter'').

[90] *See, e.g.,* ATV Letter; BIO Letter (noted that investments by venture capital funds in ''PIPEs'' (*i.e.,* ''private investments in public equity'') are ''common'').

[91] *See, e.g.,* Lowenstein Letter; Comment Letter of John G. McDonald (Jan. 21, 2011) (''McDonald Letter''); Quaker BioVentures Letter; Comment Letter of Trident Capital (Jan. 24, 2011) (''Trident Letter'').

[92] *See, e.g.,* Merkl Letter; Oak Investments Letter; Sevin Rosen Letter; Comment Letter of Vedanta Capital, LP (Jan. 24, 2011) (''Vedanta Letter'').

[93] NVCA Letter; Trident Letter.

[94] *See, e.g.,* ESP Letter; Leland Fikes Letter; McGuireWoods Letter; NVCA Letter; Oak Investment Letter. *See also supra* Section II.A.

[95] Rule 203(l)–1(c)(2) (equity security ''has the same meaning as in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(11)) and § 240.3a11–1 of this chapter.''). *See* 15 U.S.C. 78c(a)(11) (defining ''equity security'' as ''any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission

Continued

equity security includes common stock as well as preferred stock, warrants and other securities convertible into common stock in addition to limited partnership interests.[96] Our definition of equity security is broad. The definition includes various securities in which venture capital funds typically invest and provides venture capital funds with flexibility to determine which equity securities in the portfolio company capital structure are appropriate for the fund. Our use of the definition of equity security under the Exchange Act acknowledges that venture capital funds typically invest in common stock and other equity instruments that may be convertible into equity common stock but does not otherwise specify the types of equity instruments that a venture capital fund could hold in deference to the business judgment of venture capital funds.

b. Capital Used for Operating and Business Purposes

Rule 203(l)–1 defines a venture capital fund as a private fund that holds no more than 20 percent of the fund's capital commitments in non-qualifying investments (other than short-term holdings). Under the final rule, qualifying investments are generally equity securities that were acquired by the fund in one of three ways that suggest that the fund's capital is being used to finance the operations of businesses rather than for trading in secondary markets. As discussed in greater detail below, rule 203(l)–1 defines a ''qualifying investment'' as: (i) Any equity security issued by a qualifying portfolio company that is directly acquired by the private fund from the company (''directly acquired equity''); (ii) any equity security issued by a qualifying portfolio company in exchange for directly acquired equity issued by the same qualifying portfolio company; and (iii) any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, or a predecessor, and that is acquired by the fund in exchange for directly acquired equity.[97]

In the Proposing Release we explained that one of the features of venture capital funds that distinguish them from hedge funds and private equity funds is that they invest capital directly in portfolio companies for the purpose of funding the expansion and development of the companies' business rather than buying out existing security holders.[98] Thus, we proposed that, to meet the definition, at least 80 percent of a fund's investment in each portfolio company must be acquired directly from the company, in effect limiting a venture capital fund's ability to acquire secondary market shares to 20 percent of the fund's investment in each company.[99]

A few commenters objected to any limitation on secondary market purchases of a qualifying portfolio company's shares,[100] but did not address the critical role this condition played in differentiating venture capital funds from other types of private funds, such as leveraged buyout funds, which acquire controlling equity interests in operating companies through the ''buyout'' of existing security holders.[101] Nor did they offer an alternative method in lieu of the direct acquisition criterion to distinguish venture capital funds from the buyout funds that are considered private equity funds. We continue to believe that the limit on secondary purchases is an important element for distinguishing advisers to venture capital funds from advisers to the types of private equity funds for which Congress did not provide an exemption.[102] Therefore, we are not modifying the definition of qualifying investment to broadly include equity securities acquired in secondary transactions.

We are, however, making two changes in this provision in response to commenters. First, we have eliminated the 20 percent limit for secondary market transactions that we included in this provision in our proposal in favor of the broader 20 percent limit for assets that are not qualifying investments.[103] Most commenters addressing the limit on secondary market acquisitions supported changing the threshold from 80 percent of the fund's investment in each portfolio company to either 50 percent in each portfolio company,[104] or 80 percent of the fund's total capital commitments.[105] These commenters argued that secondary acquisitions provide liquidity to founders, angel investors and employees/former employees or align the interests of a fund with those of a portfolio company.[106]

We believe that the limit on secondary purchases remains an important element for distinguishing advisers to venture capital funds from advisers to the types of private equity funds for which Congress did not provide an exemption.[107] However, as discussed above, a venture capital fund may purchase shares in secondary markets to the extent it has room for such securities in its non-qualifying basket.

Second, the final rule defines qualifying investments as including equity securities issued by the qualifying portfolio company that are received in exchange for directly acquired equities issued by the same qualifying portfolio company.[108] This revision was suggested by a number of

shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.''); rule 3a11–1 under the Exchange Act (17 CFR 240.3a11–1) (defining ''equity security'' to include ''any stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.'').

[96] *See* rule 3a11–1 under the Exchange Act (17 CFR 240.3a11–1) (defining ''equity security'' to include any ''limited partnership interest'').

[97] Rule 203(l)–1(c)(3). A security received as a dividend by virtue of the fund's holding of a qualifying investment would also be a qualifying investment. *See generally infra* note 480.

[98] Proposing Release, *supra* note 26, at text accompanying n.104.

[99] Proposed rule 203(l)–1(a)(2).

[100] *See, e.g.,* ESP Letter; Merkl Letter.

[101] *See also* Proposing Release, *supra* note 26, at section II.A.1.d.

[102] *See id.,* at n.112 and accompanying text.

[103] *Cf.* proposed rule 203(l)–1(a)(2) and rule 203(l)–1(a)(2).

[104] *See* DLA Piper VC Letter; Davis Polk Letter; Sevin Rosen Letter (each supported lowering the direct purchase requirement from 80% to 50% of each qualifying portfolio company's equity securities); Dechert General Letter (argued that the 20% allowance for secondary purchases should be increased to 45%, consistent with rules 3a–1 and 3c–5 under the Investment Company Act). *See also* ABA Letter (supported lowering the threshold from 80% to 70%); NVCA Letter; Mesirow Letter; Oak Investments Letter. Several commenters disagreed with the proposed direct acquisition criterion and recommended that venture capital fund investments in portfolio company securities through secondary transactions should not be subject to any limit. *See, e.g.,* ESP Letter; Merkl Letter.

[105] ATV Letter; Bessemer Letter; Charles River Letter; Davis Polk Letter; First Round Letter; Gunderson Dettmer Letter; InterWest Letter; Mesirow Letter; Norwest Letter; NVCA Letter; Oak Investment Letter; Sevin Rosen Letter; SVB Letter; Union Square Letter; Vedanta Letter. *See also* Comment Letter of Alta Partners (Jan. 24, 2011) (''Alta Partners Letter''); USVP Letter.

[106] *See, e.g.,* Bessemer Letter; Norwest Letter; Sevin Rosen Letter.

[107] *See* Proposing Release, *supra* note 26, at n.112 and accompanying text.

[108] Under rule 203(l)–1(c)(3)(ii), ''qualifying investments'' include any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company that is directly acquired. *See infra* note 113.

commenters to enable a qualifying fund to participate in the reorganization of the capital structure of a portfolio company, which may require the fund, along with other existing security holders, to accept newly issued equity securities in exchange for previously issued equity securities.[109]

The rule similarly treats as a qualifying investment any equity security issued by another company in exchange for directly acquired equities of a qualifying portfolio company, provided that the qualifying portfolio company becomes a majority-owned subsidiary of the other company or is a predecessor company.[110] This provision enables a qualifying fund to acquire securities in connection with the acquisition (or merger) of a qualifying portfolio company by another company,[111] without jeopardizing the fund's ability to satisfy the definition of venture capital fund. A venture capital fund's acquisition of publicly offered securities in these circumstances may not present the same degree of interconnectedness with the public markets as secondary acquisitions through the open markets that are typical of other types of leveraged buyout private funds.[112] As a result of the modification to the proposed rule, a venture capital fund could hold equity securities of a company subject to reporting under the Exchange Act, if such equity securities were issued to the fund in exchange for directly acquired equities of a qualifying portfolio company that became a majority-owned subsidiary of the reporting company.[113]

c. Operation of the 20 Percent Limit

Under the rule, to meet the definition of venture capital fund, a qualifying fund must hold, immediately after the acquisition of any asset (other than qualifying investments or short-term holdings), no more than 20 percent of the fund's capital commitments in non-qualifying investments (other than short-term holdings).[114] Under this approach, a fund need only calculate the 20 percent limit when the fund acquires a non-qualifying investment (other than short-term holdings); after the acquisition, the fund need not dispose of a non-qualifying investment simply because of a change in the value of that investment. A qualifying fund, however, could not purchase additional non-qualifying investments until the value of its then-existing non-qualifying investments fell below 20 percent of the fund's committed capital.

As discussed above, most commenters supporting a basket for non-qualifying investments recommended a limit expressed as a percentage of fund capital commitments.[115] One commenter further suggested that the value of investments included in the non-qualifying basket be calculated at the time each investment is made to include only those non-qualifying investments that are then held by the fund (thus excluding liquidated assets); the commenter argued that this approach would give funds certainty that a qualifying investment would not become ''non-qualifying'' and simplify the test for compliance.[116]

We are persuaded that the non-qualifying basket should be based on a qualifying fund's total capital commitments, and the fund's compliance with the 20 percent limit should be calculated at the time any non-qualifying investment is made, based on the non-qualifying investments then held in the fund's portfolio.[117] We understand that using a fund's capital commitments for determining investment thresholds is generally consistent with existing venture capital fund practice,[118] and nearly all of the commenters requesting a basket specified the basket as a percentage of the fund's capital commitments.[119] We expect that calculating the size of the non-qualifying basket as a percentage of a qualifying fund's capital commitments, which will remain relatively constant during the fund's term, will provide advisers with a degree of predictability when managing the fund's portfolio and determining how much of the basket remains available for new investments.

We acknowledge that limiting non-qualifying investments to a percentage of fund capital commitments could result in a qualifying fund that invests its initial capital call in non-qualifying investments;[120] but that ability would be constrained by the adviser's need to reconcile that investment with the fund's required representation that it pursues a venture capital strategy.[121] An investment adviser that manages a fund in such a manner that renders the representation to investors and potential investors that the fund pursues a venture capital strategy an untrue statement of material fact would violate the antifraud provisions of the Advisers Act.[122] We understand that a venture capital fund is not typically required to call or fully draw down all of its capital commitments. However, only *bona fide* capital commitments may be included in the calculation under rule 203(l)–

[109] *See, e.g.,* NVCA Letter. *See also* Sevin Rosen Letter. Although we understand that the securities received in an exchange are typically newly issued, the rule would also cover exchanges for outstanding securities. *See also infra* note 113.

[110] Under rule 203(l)–1(c)(3)(iii), ''qualifying investments'' include any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary (as defined in section 2(a)(24) of the Investment Company Act), or a predecessor company, and that is acquired by the private fund in exchange for an equity security described in paragraph (c)(3)(i) or (c)(3)(ii) of the rule. *See infra* note 113.

A ''majority-owned subsidiary'' is defined by reference to section 2(a)(24) of the Investment Company Act, (15 U.S.C. 80a2(a)(24), which defines a ''majority-owned subsidiary'' of any person as ''a company 50 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a majority-owned subsidiary of such person.''

[111] *See, e.g.,* Davis Polk Letter; Comment Letter of Institutional Venture Partners (Jan. 24, 2011) (''IVP Letter''); Mesirow Letter; PTV Sciences Letter. A number of commenters argued that without this expanded definition, typical transactions enabling a venture capital fund to restructure its investment in a portfolio company, exit its investment or obtain liquidity for itself and its investors, as well as profits, would be precluded. *See, e.g.,* NVCA Letter; PTV Sciences Letter.

[112] *See, e.g.,* Davis Polk Letter. *See also* Mesirow Letter.

[113] Under the rule, a qualifying fund could separately purchase additional securities pursuant to a public offering (or recapitalization) from a company after it ceases to be a ''qualifying portfolio company'' (because for example such company has become a reporting or foreign traded company), subject to the non-qualifying basket.

[114] Rule 203(l)–1(a)(2). The calculation of the 20% limit operates in a fashion similar to the diversification and ''Second Tier Security'' tests of rule 2a–7 under the Investment Company Act. 17 CFR 270.2a–7(a)(24). *See Revisions to Rules Regulating Money Market Funds,* Investment Company Act Release No. 18005 (Feb. 20, 1991) [56 FR 8113, 8118 (Feb. 27, 1991)].

[115] *See supra* note 67.

[116] Sevin Rosen Letter. *See also* BioVentures Letter (endorsing the NVCA Letter supporting a non-qualifying basket determined as a percentage of fund capital commitments, but also arguing in favor of determining the basket ''at any point in time, rather than in the aggregate over the life of the fund'').

[117] Capital commitments that have been called but returned to investors and subject to a future call would be treated as uncalled capital commitments. Capital commitments that are no longer subject to a call by the fund would not be treated as uncalled capital commitments.

[118] See *generally infra* notes 240–243 (discussing the use of a qualifying fund's capital commitments to determine the fund's compliance with the leverage criterion). *See also* DLA Piper VC Letter.

[119] *See generally supra* note 67. For purposes of reporting its ''regulatory assets under management'' on Form ADV, an adviser would include uncalled capital commitments of a private fund advised by the adviser.

[120] *See* AFL–CIO Letter; AFR Letter (discussing issues associated with specifying leverage as a percentage of fund capital commitments).

[121] *See infra* Section II.A.7.

[122] The Commission does not need to demonstrate that an adviser violating rule 206(4)–8 acted with *scienter. See Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles,* Investment Advisers Act Release No. 2628 (Aug. 3, 2007) [72 FR 44756 (Aug. 9, 2007)] (''Pooled Vehicles Release'').

1.[123] For example, commitments made for the purpose of increasing the non-qualifying basket and with an understanding with investors that they will not be called cannot be included.[124]

Moreover, we believe that by applying the 20 percent limit as of the time of acquisition of each non-qualifying investment, a fund is able to determine prospectively how much it can invest in the non-qualifying basket. We believe that this simpler approach to determining the non-qualifying basket would better limit a qualifying fund's non-qualifying investments and ease the burden of determining compliance with the criterion under the rule.

To determine compliance with the 20 percent limit, a venture capital fund would, immediately after the acquisition of any non-qualifying investment, excluding any short-term holdings,[125] calculate the total value of all of the fund's assets held at that time, excluding short-term holdings, that are invested in non-qualifying investments, as a percentage of the fund's total capital commitments.[126] For this purpose, the 20 percent test is determined based on the qualifying fund's non-qualifying investments after taking into account the acquisition of any newly acquired non-qualifying investment.[127]

To determine if a fund satisfies the 20 percent limit for non-qualifying investments, the fund may use either historical cost or fair value, as long as the same method is applied to all investments of a qualifying fund in a consistent manner during the term of the fund.[128] Under the rule, a venture capital fund could use either historical cost or fair value, depending, for example, on the fund's approach to valuing investments since the fund's inception. Under the final rule, a qualifying fund using historical cost need not account for changes in the value of its portfolio due to, for example, market fluctuations in the value of a non-qualifying investment or the sale or other disposition of a qualifying investment (including the associated distribution of sale proceeds to fund investors). Requiring fair value in this particular instance could make investment planning difficult because the amount of dollars allocated to the non-qualifying basket would vary depending on changes in the value of investments already made. In addition, requiring fair value could complicate compliance for those qualifying funds that make investments frequently, because each investment would result in a requirement to value the fund's assets. Because the rule specifies that the valuation method must be consistently applied, this approach is designed to prevent a qualifying fund, or its adviser, from alternating between valuation methodologies in order to circumvent the 20 percent limit.

Our rule's approach to the valuation method, which allows the use of historical cost in determining compliance with the non-qualifying basket limit, is similar in this respect to rules under the Employee Retirement Income Security Act of 1974 (''ERISA'') for funds qualifying as ''venture capital operating companies,'' which generally specify that the value of a fund's investments is determined on a cost basis.[129] Many commenters cited the ERISA rule in connection with comments on other proposed criteria,[130] and hence we believe advisers' familiarity with the ERISA rule will facilitate compliance with our approach to the 20 percent limit and reduce the burdens associated with compliance.

2. Short-Term Holdings

A qualifying fund may also invest in cash and cash equivalents, U.S. Treasuries with a remaining maturity of 60 days or less and shares of registered money market funds.[131] A qualifying fund need not include its investments in these short-term holdings when determining whether it satisfies the 20 percent limit for non-qualifying investments.[132]

Most commenters that addressed the cash element of the proposal did not disagree with our approach to the cash element but urged us to expand it to include money market funds,[133] any U.S. Treasury without regard to maturity,[134] debt issued by foreign governments,[135] repurchase agreements,[136] and certain highly rated corporate commercial paper.[137] Many commenters did not provide a rationale, other than business practice, for expanding the cash element to include these other types of investments or discuss whether these changes would also permit other types of funds to meet the definition. One commenter did note, however, that short-term investments are typically held during the period between a capital call and funding by

[123] *See also Investment Adviser Performance Compensation,* Investment Advisers Act Release No. 3198 (May 10, 2011) [76 FR 27959 (May 13, 2011)] at n.17 (in determining whether a person holds the requisite amount of assets under management, an investment adviser may include ''assets that a client is contractually obligated to invest in private funds managed by the adviser. Only *bona fide* contractual commitments may be included, *i.e.,* those that the adviser has a reasonable belief that the investor will be able to meet.'').

[124] Similarly, fee waivers or reductions for the purpose of inducing investors to increase the size of their capital commitments with an understanding that they will not be called (and hence enable the adviser to increase the size of the non-qualifying basket) would indicate that the commitments are not *bona fide.* In addition, the amount of capital commitments and contributions made by investors and the investments made by the fund are indispensable to the functioning of a venture capital fund, and we understand advisers to venture capital funds typically maintain records reflecting them. *See generally supra* note 5 (describing the Commission's authority to examine the records of advisers relying on the venture capital exemption). We note that a person claiming an exemption under the Federal securities laws has the burden of proving it is entitled to the exemption. *See, e.g., SEC* v. *Ralston Purina Co.,* 346 U.S. 119, 126 (1953); *Gilligan, Will & Co.* v. *SEC,* 267 F.2d 461, 466 (2d Cir. 1959); *Swenson v. Engelstad,* 626 F.2d 421, 425 (5th Cir. 1980); *SEC* v. *Wall St. Transcript Corp.,* 454 F. Supp. 559, 566 (S.D.N.Y. 1978) (stating that the defendant publisher ''must register unless it can be shown that it is'' entitled to rely on an exclusion from the definition of ''investment adviser'').

[125] Rule 203(l)–1(c)(6) (''Short-term holdings'' means cash and cash equivalents as defined in § 270.2a51–1(b)(7)(i), U.S. Treasuries with a remaining maturity of 60 days or less, and shares of an open-end management investment company registered under section 8 of the Investment Company Act of 1940 [15 U.S.C. 80a–8] that is regulated as a money market fund under § 270.2a–7 of this chapter.'').

[126] A qualifying investment that is acquired as a result of an exchange of equity securities provided by rule 203(l)–1(c)(3)(ii) and (iii) would not result in a requirement to calculate the 20% limit under rule 203(l)–1(a)(2).

[127] Rule 203(l)–1(a)(2).

[128] *Id.*

[129] Under U.S. Department of Labor regulations, a venture capital operating company (''VCOC'') is any entity that, as of the date of the first investment (or other relevant time), has at least 50% of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, invested in venture capital investments. 29 CFR 2510.3–101(d). *See also* Proposing Release, *supra* note 26, at n.70.

[130] For example, a number of commenters urged us to adopt the approach under ERISA that would determine whether or not a fund has satisfied the managerial assistance criterion. *See infra* note 225.

[131] Rule 203(l)–1(c)(6).

[132] Rule 203(l)–1(a)(2). As proposed, a venture capital fund would have been defined as a fund that invested *solely* in certain investments, including specified cash instruments. Proposed rule 203(l)–1(a)(2)(ii). In the final rule, a venture capital fund is defined as a fund that holds *no more* than 20% of its committed capital in assets that are not qualifying investments, excluding for this purpose short-term holdings (which is defined to include specified cash instruments). Rule 203(l)–1(a)(2). The general focus of both the proposal and the final rule is on the types of investments in which a qualifying fund may invest. As a result of the modifications to the rule to incorporate a non-qualifying basket, we are excluding short-term holdings from the calculation of qualifying and non-qualifying investments.

[133] Comment Letter of Federated Investors, Inc. (Jan. 18, 2011); IVP Letter; Merkl Letter.

[134] *See, e.g.,* Dechert General Letter; IVP Letter. *See also* Shearman Letter; SVB Letter (also argued that Treasuries pose no systemic risk issues).

[135] Dechert General Letter; Commenter Letter of European Fund and Asset Management Association (Jan. 24, 2011) (''EFAMA Letter''); Merkl Letter.

[136] IVP Letter; NVCA Letter.

[137] Sevin Rosen Letter.

investors and invested in instruments that may provide higher returns than the cash items identified in the proposed rule.[138]

The Commission recognizes that a broader definition of short-term holdings could yield venture capital funds greater returns.[139] The exclusion of short-term holdings from a qualifying fund's assets for purposes of the 20 percent test, however, recognizes that such holdings are not ordinarily held as part of the fund's investment portfolio but as a cash management tool.[140] Advisers to venture capital funds that wish to invest in longer-term or higher yielding debt may make use of the non-qualifying basket for such investments. We are, however, modifying the definition to include as short-term holdings shares of registered money market funds that are regulated under rule 2a–7 under the Investment Company Act,[141] which we understand are commonly held for purposes of cash management.[142]

The rule defines short-term holdings to include ''cash and cash equivalents'' by reference to rule 2a51–1(b)(7)(i) under the Investment Company Act.[143] We did not receive any comments on this aspect of the proposal and are adopting it without modification. Rule 2a51–1, however, is used to determine whether an owner of an investment company excluded by reason of section 3(c)(7) of the Investment Company Act meets the definition of a qualified purchaser by examining whether such owner holds sufficient ''investments'' (generally securities and other assets held for investment purposes).[144] We are not defining a venture capital fund's cash holdings by reference to whether the cash is held ''for investment purposes'' or to the net cash surrender value of an insurance policy. Furthermore, since rule 2a51–1 does not explicitly include short-term U.S. Treasuries, which we believe would be an appropriate form of cash equivalent for a venture capital fund to hold pending investment in a portfolio company or distribution to investors, our rule includes short-term U.S. Treasuries with a remaining maturity of 60 days or less.[145]

3. Qualifying Portfolio Company

Under the rule, qualifying investments generally consist of equity securities issued by a qualifying portfolio company. A ''qualifying portfolio company'' is defined as any company that: (i) Is not a reporting or foreign traded company and does not have a control relationship with a reporting or foreign traded company; (ii) does not incur leverage in connection with the investment by the private fund and distribute the proceeds of any such borrowing to the private fund in exchange for the private fund investment; and (iii) is not itself a fund (*i.e.,* is an operating company).[146] We are adopting the rule substantially as proposed, with modifications to the leverage criterion in order to address certain concerns raised by commenters. We describe each element of a qualifying portfolio company below. We understand each of the criteria to be characteristic of issuers of portfolio securities held by venture capital funds.[147] Moreover, collectively, we believe these criteria would operate to exclude most private equity funds and hedge funds from the definition.

a. Not a Reporting Company

Under the rule, a qualifying portfolio company is defined as a company that, at the time of any investment by a qualifying fund, is not a ''reporting or foreign traded'' company (a ''reporting company'') and does not control, is not controlled by or under common control with, a reporting company.[148] Under the definition, a venture capital fund may continue to treat as a qualifying investment any previously directly acquired equity security of a portfolio company that subsequently becomes a reporting company.[149] Moreover, after a company becomes a reporting company, a qualifying fund could acquire the company's publicly traded (or foreign traded) securities in the secondary markets, subject to the availability of the fund's non-qualifying basket.

As we discussed in the Proposing Release, venture capital funds provide operating capital to companies in the early stages of their development with the goal of eventually either selling the company or taking it public.[150] Unlike

[138] NVCA Letter.

[139] *See, e.g.,* NVCA Letter.

[140] We do not view investing in short-term holdings as being a venture capital strategy; however, for purposes of the exemption, a qualifying fund could invest in short-term holdings as part of implementing its investment strategy. *See also infra* Section II.A.7.

[141] Rule 203(l)–1(c)(6).

[142] *See, e.g.,* NVCA Letter.

[143] Rule 2a51–1(b)(7) under the Investment Company Act provides that cash and cash equivalents include foreign currencies ''held for investment purposes'' and ''(i) [b]ank deposits, certificates of deposit, bankers acceptances and similar bank instruments held for investment purposes; and (ii) [t]he net cash surrender value of an insurance policy.'' 17 CFR 270.2a51–1(b)(7).

[144] *See generally* sections 2(a)(51) and 3(c)(7) of the Investment Company Act; 17 CFR 270.2a51–1(b) and (c).

[145] We have treated debt securities with maturities of 60 days or less differently than debt securities with longer maturities under our rules. In particular, we have recognized that the potential for fluctuation in those shorter-term securities' market value has decreased sufficiently that, under certain conditions, we allow certain open-end investment companies to value them using amortized cost value rather than market value. *See Valuation of Debt Instruments by Money Market Funds and Certain Other Open-End Investment Companies,* Investment Company Act Release No. 9786 (May 31, 1977) [42 FR 28999 (June 7, 1977)]. We believe that the same consideration warrants treating U.S. Treasury securities with a remaining maturity of 60 days or less as more akin to cash equivalents than Treasuries with longer maturities for purposes of the definition of venture capital fund.

[146] Rule 203(l)–1(c)(4). In the Proposing Release, we used the defined term ''publicly traded'' company, but are modifying the rule to use the defined term ''reporting or foreign traded'' company to match more closely the defined term and to make clear that certain companies that have issued securities that are traded on a foreign exchange are covered by the definition. *See* proposed rule 203(l)–1(c)(3) and (4).

[147] *See* Proposing Release, *supra* note 26, sections II.A.1.a.–II.A.1.e.

[148] Rule 203(l)–1(c)(4)(i); rule 203(l)–1(c)(5) (defining a ''reporting or foreign traded'' company as one that is subject to the reporting requirements under section 13 or 15(d) of the Exchange Act, or has a security listed or traded on any exchange or organized market operating in a foreign jurisdiction). This definition is similar to rule 2a51–1 under the Investment Company Act (defining ''public company,'' for purposes of the qualified purchaser standard, as ''a company that files reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934''), and rule 12g3–2 under the Exchange Act (conditioning a foreign private issuer's exemption from registering securities under section 12(g) of the Exchange Act if, among other conditions, the ''issuer is not required to file or furnish reports'' pursuant to section 13(a) or section 15(d) of the Exchange Act). 17 CFR 270.2a51–1; 17 CFR 240.12g3–2. Under the rule, securities of a ''reporting or foreign traded company'' include securities of non-U.S. companies that are listed on a non-U.S. market or non-U.S. exchange. Rule 203(l)–1(c)(5).

[149] Rule 203(l)–1(c)(4)(i) (defining a qualifying portfolio company as any company that at the time of any investment by a venture capital fund is not a reporting or foreign traded company).

[150] *See* Testimony of James Chanos, Chairman, Coalition of Private Investment Companies, July 15, 2009, at 4 (''[V]enture capital funds are an important source of funding for start-up companies or turnaround ventures.''); National Venture Capital Association Yearbook 2010 (''NVCA Yearbook 2010''), at 7–8 (noting that venture capital is a ''long-term investment'' and the ''payoff [to the venture capital firm] comes after the company is acquired or goes public.''); George W. Fenn, Nellie Liang and Stephen Prowse, The Economics of the Private Equity Market, December 1995, 22, n.61 and accompanying text (''Fenn *et al.*'') (''Private sales'' are not normally the most important type of exit strategy as compared to IPOs, yet of the 635 successful portfolio company exits by venture capitalists between 1991–1993 ''merger and acquisition transactions accounted for 191 deals and IPOs for 444 deals.'' Furthermore, between 1983 and 1994, of the 2,200 venture capital fund exits, 1,104 (approximately 50%) were attributed to mergers and acquisitions of venture-backed firms.). *See also* Jack S. Levin, Structuring Venture Capital, Private Equity and Entrepreneurial Transactions, 2000 (''Levin'') at 1–2 to 1–7 (describing the various types of venture capital and private equity investment business but stating that ''the phrase 'venture capital' is sometimes used narrowly to refer only to financing the start-up of a new

Continued

other types of private funds, venture capital funds are characterized as not trading in the public markets, but may sell portfolio company securities into the public markets once the portfolio company has matured.[151] As of year-end 2010, U.S. venture capital funds managed approximately $176.7 billion in assets.[152] In comparison, as of year-end 2010, the U.S. publicly traded equity market had a market value of approximately $15.4 trillion,[153] whereas global hedge funds had approximately $1.7 trillion in assets under management.[154] The aggregate amount invested in venture capital funds is considerably smaller.[155] Congressional testimony asserted that these funds may be less connected with the public markets and may involve less potential for systemic risk.[156] This appears to be a key consideration by Congress that led to the enactment of the venture capital exemption.[157] As we discussed in the Proposing Release, the rule we proposed sought to incorporate this Congressional understanding of the nature of investments of a venture capital fund, and these principles guided our consideration of the proposed venture capital fund definition.[158] The proposed rule would have required that a qualifying fund invest primarily in equity securities of companies that are not capitalized by the public markets.[159]

Several commenters asserted that the definition should not exclude securities of reporting companies.[160] Most, however, did not object to the rule's limitation on investments in non-reporting companies, but instead sought a more flexible definition that would include some level of investments in reporting companies under certain conditions. For example, certain commenters supported venture capital fund investments in reporting companies only if, at the time the company becomes a reporting company, the fund continued to hold at least a majority of its original investment made when the company was a non-reporting company.[161] Some of these commenters asserted that public offerings, which trigger reporting requirements under the Federal securities laws, were viewed as an additional financing round, with pre-existing venture investors expected to participate.[162] Alternatively, several commenters recommended that a venture capital fund could limit its investment in reporting companies, such as 15 or 20 percent of the fund's capital commitments.[163]

We understand that venture capital funds seek flexibility to invest in promising portfolio companies, including companies deemed sufficiently profitable to become reporting companies or companies that may be owned directly or indirectly by a public company. Rather than modify the rule to impose additional criteria for investing in reporting companies, however, we have adopted a limit of 20 percent for non-qualifying investments, which may be used to hold securities of reporting companies. We believe that the 20 percent limit appropriately balances commenters' expressed desire for greater flexibility to accommodate existing business practices while providing sufficient limits on the extent of investments that would implicate Congressional statements regarding the interconnectedness of venture capital funds with the public markets.[164]

business''); Anna T. Pinedo & James R. Tanenbaum, Exempt and Hybrid Securities Offerings (2009), Vol. 1 at 12–2 (discussing the role initial public offerings play in providing venture capital investors with liquidity).

[151] *See* Testimony of Trevor Loy, Flywheel Ventures, before the Senate Banking Subcommittee on Securities, Insurance and Investment Hearing, July 15, 2009 (''Loy Testimony''), at 5 (''We do not trade in the public markets.''). *See also* Testimony of Terry McGuire, General Partner, Polaris Venture Partners, and Chairman, National Venture Capital Association, before the U.S. House of Representatives Committee on Financial Services, October 6, 2009 (''McGuire Testimony'') at 11 (''[V]enture capital funds do not typically trade in the public markets and generally limit advisory activities to the purchase and sale of securities of private operating companies in private transactions''); Levin, *supra* note 150, at 1–4 (''A *third* distinguishing feature of venture capital/private equity investing is that the securities purchased are generally privately held as opposed to publicly traded * * * a venture capital/private equity investment is normally made in a privately-held company, and in the relatively infrequent cases where the investment is into a publicly-held company, the [venture capital fund] generally holds non-public securities.'') (emphasis in original).

[152] National Venture Capital Association Yearbook 2011 (''NVCA Yearbook 2011'') at 9, Fig. 1.0.

[153] Bloomberg Terminal Database, WCAUUS <Index> Bloomberg United States Exchange Market Capitalization).

[154] Credit Suisse, *2010 Hedge Fund Industry Review,* Feb. 2011 (''Credit Suisse Report''), at 1.

[155] In 2010, investors investing in newly formed funds committed approximately $12.3 billion to venture capital funds compared to approximately $85.1 billion to private equity/buyout funds. NVCA Yearbook 2011, *supra* note 152, at 20 at Fig. 2.02. In comparison, hedge funds raised approximately $22.6 billion from investors in 2010. Credit Suisse Report, *supra* note 154, at 1.

[156] *See* S. Rep. No. 111–176, *supra* note 6, at 74–5 (noting that venture capital funds ''do not present the same risks as the large private funds whose advisers are required to register with the SEC under this title [IV]. Their activities are not interconnected with the global financial system, and they generally rely on equity funding, so that losses that may occur do not ripple throughout world markets but are borne by fund investors alone. Terry McGuire, Chairman of the National Venture Capital Association, wrote in congressional testimony that 'venture capital did not contribute to the implosion that occurred in the financial system in the last year, nor does it pose a future systemic risk to our world financial markets or retail investors.' ''). *See also* Loy Testimony, *supra* note 151, at 7 (noting the factors by which the venture capital industry is exposed to ''entrepreneurial and technological risk not systemic financial risk''); McGuire Testimony, *supra* note 151, at 6 (noting that the ''venture capital industry's activities are not interwoven with U.S. financial markets''). *See also* Group of Thirty, Financial Reform: A Framework for Financial Stability, January 15, 2009, at 9 (discussing the need for registration of managers of ''private pools of capital that employ substantial borrowed funds'' yet recognizing the need to exempt venture capital from registration).

[157] *See supra* note 156.

[158] *See* Proposing Release, *supra* note 26, at n.43 and n.60 and following text.

[159] Most commenters did not express any objection to our proposed definition of ''publicly traded,'' although one commenter did disagree with the proposed definition's approach to foreign traded securities. This commenter argued that the proposed rule should be modified to ''cover securities that have been publicly offered to investors in a foreign jurisdiction and equity securities that are widely held and traded over-the-counter in a foreign jurisdiction.'' Merkl Letter. We decline to adopt this approach because the definition would require us to define what constitutes a ''public offering'' notwithstanding the laws of foreign regulators and legislatures.

[160] *See* Bessemer Letter; IVP Letter (also suggested additional conditions); Merkl Letter. One commenter also suggested that the definition should not exclude investments in companies that may be deemed to be ''controlled'' by a public company (or its venture capital investment division). *See* Comment Letter of Berkeley Center for Law, Business and the Economy (Feb. 1, 2011) (''BCLBE Letter''). *See also* Dechert General Letter (argued that restricting the application of the control element may be necessary because an adviser to a venture capital fund could be controlled by a public company, and might itself be deemed to control a portfolio company as a result of its prior investments). Under our rule, a venture capital fund could invest in such companies under the non-qualifying basket.

[161] ATV Letter; BIO Letter; NVCA Letter. *See also* Davis Polk Letter; InterWest Letter; McDonald Letter; Mesirow Letter; PTV Sciences Letter. A number of commenters supported expanding the proposed definition but without additional conditions. *See, e.g.,* BioVentures Letter; ESP Letter; Quaker BioVentures Letter; SV Life Sciences Letter.

[162] *See, e.g.,* Alta Partners Letter; Gunderson Dettmer Letter; InterWest Letter; McDonald Letter; NVCA Letter; Quaker BioVentures Letter. *See also* Bessemer Letter; BIO Letter; Lowenstein Letter.

[163] Alta Partners Letter (supported limiting investments in public companies to 15% of fund capital commitments); Gunderson Dettmer Letter (supported limiting investments in public securities to 20% of fund capital commitments). *See also* Davis Polk Letter (supported limiting investments in public companies to 20% of fund capital commitments provided the fund continues to hold a majority of its original investment in the company when it was private); SVB Letter (supported investments in public securities but did not identify a percentage threshold).

[164] *See supra* Section II.A.1.b. One commenter argued that, in addition to funds that would satisfy the proposed definition, a venture capital fund should include any fund that invests at least 75% of its capital in privately held ''domestic small business'' as defined in the Small Business Investment Act (the ''SBIA'') regulations, regardless of the equity/debt nature of the investment. *See* NASBIC/SBIA Letter. In the Proposing Release, we noted our concerns with adopting a definition for a ''small'' company, including reliance on the SBIA regulatory standards for treatment as a ''small''

Under our rule, a qualifying portfolio company is defined to include a company that is not a reporting company (and does not have a control relationship with a reporting company) at the time of each fund investment.[165] However, one commenter observed that an existing investment in a portfolio company that ultimately becomes a successful venture capital investment (such as when the company issues its securities in a public offering or becomes a reporting company) should not result in the investment becoming a non-qualifying investment.[166] We agree. Under the rule, such an investment would not become a non-qualifying investment because the definition focuses on the time at which the venture capital fund acquires the particular equity security issued by a portfolio company and does not limit the definition of qualifying portfolio company solely to companies that are and remain non-reporting companies. Under this approach, an adviser could continue to rely on the exemption even if the venture capital fund's portfolio ultimately consisted entirely of securities that become securities of reporting companies. We believe that our approach would give advisers to venture capital funds sufficient flexibility to exercise their business judgment on the appropriate time to dispose of portfolio company investments—whether that occurs at a time when the company is or is not a reporting company.[167] Moreover, under the Federal securities laws, a person, such as a venture capital fund, that is deemed to be an affiliate of a company may be limited in its ability to dispose of the company's securities.[168] Under the final rule, a qualifying fund would not be in the position of having to dispose of securities of a qualifying portfolio company that subsequently becomes a reporting company.

b. Portfolio Company Leverage

Rule 203(l)–1 defines a qualifying portfolio company for purposes of the exemption as one that does not borrow or issue debt obligations in connection with the venture capital fund's investment in the company and distribute to the fund the proceeds of such borrowing or issuance in exchange for the fund's investment.[169] As a consequence, certain types of funds that use leverage or finance their investments in portfolio companies or the buyout of existing investors with borrowed money (*e.g.*, leveraged buyout funds, which are a different subset of private equity funds) would not meet the rule's definition of a venture capital fund.[170] As discussed in greater detail below and in the Proposing Release, we believe that Congress did not intend the venture capital fund definition to apply to these types of private equity funds.[171]

We proposed to define a qualifying portfolio company as a company that does not borrow ''in connection'' with a venture capital fund investment. We also proposed to define a qualifying portfolio company as a company that does not participate in an indirect buyout involving a qualifying fund (as a corollary to our proposed limitation on venture capital fund acquisitions of portfolio company securities through secondary transactions, *i.e.*, direct buyouts).[172] We proposed these elements to distinguish between venture capital funds that provide capital to portfolio companies for operating and business purposes (in exchange for an equity investment) and leveraged buyout funds, which acquire controlling equity interests in operating companies through the ''buyout'' of existing security holders or which finance such investments or buyouts with borrowed money.[173] We proposed these elements of the qualifying portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report,[174] and the testimony before Congress that stressed the lack of leverage in venture capital investing.[175]

Some commenters argued that defining a venture capital fund as a fund that does not participate in buyouts was too restrictive or too difficult to apply.[176] Most of the commenters who addressed the issue opposed a definition that excluded any buyouts of portfolio company securities by venture capital funds.[177] Some commenters argued that because a venture capital fund could, under the proposed rule, acquire up to 20 percent of portfolio company securities in secondary transactions, indirect buyouts achieved at the portfolio company level should not be precluded.[178] Some commenters stated that buyouts are an important means of providing liquidity to portfolio company founders, employees, former employees and vendors/service providers,[179] while others argued that

company, which generally imposes specific tests for net worth, net income or number of employees for each type of company, depending on its geographic location and industry classification. *See* Proposing Release, *supra* note 26, at n.69 and accompanying and following text. We have considered the issues raised in the NASBIC/SBIA Letter and continue to believe that a qualifying portfolio company should not be defined by reference to whether a company is ''small'' for the reasons cited in the Proposing Release.

[165] *See* rule 203(l)–1(c)(4)(i).

[166] PTV Sciences Letter (stating that following a merger or public offering of a qualifying portfolio company's securities, the shares held by the fund ''are turned into profits to our investors'').

[167] *See* Proposing Release, *supra* note 26, at n.55 and following text.

[168] *See* sections 2(a)(11) (defining ''underwriter'') and 5 of the Securities Act. *See also* E.H. Hawkins, SEC Staff No-Action Letter (June 26, 1997) (staff explained how the term ''underwriter'' in the Securities Act restricts resales of securities by affiliates of issuing companies).

[169] Rule 203(l)–1(c)(4)(ii).

[170] Leveraged buyout funds are private equity funds that will ''borrow significant amounts from banks to finance their deals—increasing the debt-to-equity ratio of the acquired companies * * *'' U.S. Govt. Accountability Office, Private Equity: Recent Growth in Leveraged Buyouts Exposed Risks that Warrant Continued Attention (2008) (''GAO Private Equity Report''), at 1. A leverage buyout fund in 2005 typically financed a deal with 34% equity and 66% debt. *Id.* at 13. *See also* Fenn *et al., supra* note 150, at 23 (companies that have been taken private in a leveraged buyout (or ''LBO'') transaction generally ''spend less on research and development, relative to assets, and have a greater proportion of fixed assets; their debt-to-assets ratios are high, above 60 percent, and are two to four times those of venture-backed firms.'' Moreover, compared to venture capital backed companies, LBO-private equity backed companies that are taken public typically use proceeds from an IPO to reduce debt whereas new venture capital backed firms tend to use proceeds to fund growth.); Testimony of Mark Tresnowksi, General Counsel, Madison Dearborn Partners, LLC, on behalf of the Private Equity Council, before the Senate Banking Subcommittee on Securities, Insurance and Investment, July 15, 2009, at 2 (indicating that portfolio companies in which private equity funds invest typically have 60% debt and 40% equity).

[171] *See* discussion in section II.A.1.c. and d. of the Proposing Release, *supra* note 26.

[172] Proposed rules 203(l)–1(a)(2)(i); (c)(4)(ii) and (c)(4)(iii).

[173] *See generally* Proposing Release, *supra* note 26, at sections II.A.1.c. and d.

[174] *See* S. Rep. No. 111–176, *supra* note 6, at 74 (''The Committee believes that venture capital funds, a subset of private investment funds specializing in long-term equity investment in small or start-up businesses, do not present the same risks as the large private funds whose advisers are required to register with the SEC under this title.''); *id.* at 75 (concluding that private equity funds that use limited or no leverage at the fund level engage in activities that do not pose risks to the wider markets through credit or counterparty relationships).

[175] *See* Proposing Release, *supra* note 26, at n.100.

[176] *See, e.g.,* McGuireWoods Letter; NVCA Letter; Pine Brook Letter.

[177] One commenter sought interpretative guidance on which buyout transactions would be considered to be ''in connection with'' a venture capital fund investment. Mesirow Letter. *See also* McGuireWoods Letter; NVCA Letter (discussing some interpretative issues with the ''in connection with'' language).

[178] ATV Letter; NVCA Letter. *See also* ABA Letter (also recommending that the buyout bucket be increased to 30%); Charles River Letter (supported a 20% buyout limit to accommodate the increasing industry use of buyouts); First Round Letter (supported 25% buyout limit for each deal and a 20% limit for all fund investments in order to facilitate liquidity to founders).

[179] *See, e.g.,* Davis Polk Letter; ESP Letter; SVB Letter.

buyouts occurring as a result of recapitalizations[180] or conversions of permissible bridge loans [181] should not preclude a fund from relying on the definition.[182]

We have eliminated the proposed indirect buyout criterion in the final rule. Because the non-qualifying basket does not exclude secondary market transactions (or other buyouts of existing security holders), it would be inconsistent to define a venture capital fund as a fund that does not participate in a buyout.

We are retaining and clarifying, however, the leveraged buyout criterion as it relates to qualifying portfolio companies. We had proposed to define a qualifying portfolio company as a company that, among other things, does not borrow ''in connection'' with a venture capital fund investment. As noted above, we proposed this element to distinguish venture capital funds from leveraged buyout funds, and we continue to believe that this remains an important distinction. We believe that these differences (*i.e.*, the use of buyouts and associated leverage) distinguish venture capital funds from buyout private equity funds for which Congress did not provide an exemption.[183]

One of the distinguishing features of venture capital funds is that, unlike many hedge funds and private equity funds, they invest capital directly in portfolio companies for the purpose of funding the expansion and development of the company's business rather than buying out existing security holders, otherwise purchasing securities from other shareholders, or leveraging the capital investment with debt financing.[184] Testimony received by Congress and our research suggest that venture capital funds provide capital to many types of businesses at different stages of development,[185] generally with the goal of financing the expansion of the company [186] and helping it progress to the next stage of its development through successive tranches of investment (*i.e.*, ''follow-on'' investments) if the company reaches agreed-upon milestones.[187]

In contrast, private equity funds that are identified as buyout funds typically provide capital to an operating company in exchange for majority or complete ownership of the company,[188] generally achieved through the buyout of existing shareholders or other security holders and financed with debt incurred by the portfolio company,[189] and compared to venture capital funds, hold the investment for shorter periods of time.[190] As a result of the use of the capital provided and the incurrence of this debt, following the buyout fund investment, the operating company may carry debt several times its equity and may devote significant levels of its cash flow and corporate earnings to repaying the debt financing, rather than investing in capital improvement or business operations.[191]

Some commenters agreed that distinguishing between venture capital and other private funds with reference to a portfolio company's leverage and indirect buyouts is important.[192] Many commenters, however, urged a more narrowly drawn restriction on a portfolio company's ability to borrow (or issue debt) or to effect indirect buyouts.[193] Some argued that the manner in which proceeds from indebtedness are used by a portfolio company (*e.g.*, distributed by the company to the venture capital fund) better distinguishes venture capital funds from leveraged buyout private equity funds.[194] Nevertheless, the majority of commenters who addressed this criterion supported a leverage criterion that would be more specific, or

[180] Alta Partners Letter; BioVentures Letter.

[181] ATV Letter; NVCA Letter.

[182] *See also* Pine Brook Letter (suggesting ''careful drafting'' that would not preclude transactions in the normal course of business by defining a set of prohibited buyout transactions (*e.g.*, ''leveraged dividend recapitalizations'')).

[183] *See supra* note 174 and accompanying text.

[184] *See* Loy Testimony, *supra* note 151, at 2 (''Although venture capital funds may occasionally borrow on a short-term basis immediately preceding the time when the cash installments are due, they do not use debt to make investments in excess of the partner's capital commitments or 'lever up' the fund in a manner that would expose the fund to losses in excess of the committed capital or that would result in losses to counter parties requiring a rescue infusion from the government.''). *See also infra* notes 189–191; Mark Heesen & Jennifer C. Dowling, National Venture Capital Association, *Venture Capital & Adviser Registration* (October 2010), materials submitted in connection with the Commission's Government-Business Forum on Small Business Capital Formation (summarizing the differences between venture capital funds and buyout and hedge funds), *available at http://www.sec.gov/info/smallbus/2010gbforumstatements.htm.*

[185] *See, e.g.,* McGuire Testimony, *supra* note 151, at 1; NVCA Yearbook 2010, *supra* note 150; PricewaterhouseCoopers/National Venture Capital Association MoneyTree Report, Q4 2009/Full-year 2009 Report (providing data on venture capital investments in portfolio companies); James Schell, Private Equity Funds: Business Structure and Operations (2010), at § 1.03[1] (''Schell''), at § 1.03[1]; *Paul A. Gompers & Josh Lerner, The Venture Capital Cycle*, at 459 (MIT Press 2004), at 178, 180 table 8.2 (displaying percentage of annual venture capital investments by stage of development and classifying ''early stage'' as seed, start-up, or early stage and ''late stage'' as expansion, second, third, or bridge financing).

[186] *See* McGuire Testimony, *supra* note 151, at 1; Loy Testimony, *supra* note 151, at 3 (''Once the venture fund is formed, our job is to find the most promising, innovative ideas, entrepreneurs, and companies that have the potential to grow exponentially with the application of our expertise and venture capital investment.''). *See also* William A. Sahlman, *The Structure and Governance of Venture-Capital Organizations,* Journal of Financial Economics 27 (1990), at 473, 503 (''Sahlman'') (noting venture capitalists typically invest more than once during the life of a company, with the expectation that each capital investment will be sufficient to take the company to the next stage of development, at which point the company will require additional capital to make further progress).

[187] *See* Sahlman, *supra* note 186, at 503; Loy Testimony, *supra* note 151, at 3 (''[W]e continue to invest additional capital into those companies that are performing well; we cease follow-on investments into companies that do not reach their agreed upon milestones.'').

[188] GAO Private Equity Report, *supra* note 170, at 8 (''A private equity-sponsored LBO generally is defined as an investment by a private equity fund in a public or private company (or division of a company) for majority or complete ownership.'').

[189] *See* Annalisa Barrett *et al.,* Prepared by the Corporate Library Inc., under contract for the IRRC Institute, What is the Impact of Private Equity Buyout Fund Ownership on IPO Companies' Corporate Governance?, at 7 (June 2009) (''Barrett *et al.*'') (''In general, VC firms provide funding to companies in early stages of their development, and the money they provide is used as working capital for the firm. Buyout firms, in contrast, work with mature companies, and the funds they provide are used to compensate the firm's existing owners.''); Ieke van den Burg and Poul Nyrup Rasmussen, Hedge Funds and Private Equity: A Critical Analysis (2007), at 16–17 (''van den Burg''); Sahlman, *supra* note 186, at 517. *See also* Tax Legislation: CRS Report, Taxation of Hedge Fund and Private Equity Managers, Tax Law and Estate Planning Course Handbook Series, Practicing Law Institute (Nov. 2, 2007) at 2 (noting that in a leveraged buyout ''private equity investors use the proceeds of debt issued by the target company to acquire all the outstanding shares of a public company, which then becomes private'').

[190] Unlike venture capital funds, which generally invest in portfolio companies for 10 years or more, private equity funds that use leveraged buyouts invest in their portfolio companies for shorter periods of time. *See* Loy Testimony, *supra* note 151, at 3 (citing venture capital fund investments periods in portfolio companies of five to 10 years or longer); van den Burg, *supra* note 189, at 19 (noting that LBO investors generally retain their investment in a listed company for 2 to 4 years or even less after the company goes public). *See also* Paul A. Gompers, *The Rise and Fall of Venture Capital,* Business And Economic History, vol. 23, no. 2, Winter 1994, at 17 (stating that ''an LBO investment is significantly shorter than that of a comparable venture capital investment. Assets are sold off almost immediately to meet debt burden, and many companies go public again (in a reverse LBO) in a very short period of time.'').

[191] *See* Barrett *et al., supra* note 189. *See also* Fenn *et al., supra* note 150, at 23 (companies that have been taken private in an LBO transaction generally ''spend less on research and development, relative to assets, and have a greater proportion of fixed assets; their debt-to-assets ratios are high, above 60%, and are two to four times those of venture-backed firms.'' Moreover, compared to venture capital backed companies, LBO-private equity backed companies that are taken public typically use proceeds from an IPO to reduce debt whereas new venture capital backed firms tend to use proceeds to fund growth.).

[192] *See, e.g.,* AFL–CIO Letter; Sen. Levin Letter; Pine Brook Letter.

[193] *See, e.g.,* ATV Letter; Charles River Letter; NVCA Letter; Oak Investment Letter; Pine Brook Letter.

[194] *See, e.g.,* NVCA Letter; Pine Brook Letter; SV Life Sciences Letter; Vedanta Letter.

limited, in scope,[195] focusing on the use of proceeds derived from portfolio company leverage.[196] Commenters suggested that the rule define leverage as leverage incurred for the purpose of buying out shareholders at the demand of the venture capital fund [197] or for returning capital to the fund,[198] and not, for example, define leverage to include indebtedness incurred to pay for a qualifying portfolio company's operating expenses.[199]

Some commenters argued that the proposed ''in connection with'' element would be difficult to apply, arguing that the standard was too vague or raised too many interpretative issues.[200] In response to our request for comment, many commenters sought confirmation that the limitation on portfolio company leverage would be triggered only in the instances of leverage provided to the portfolio company by the venture capital fund or if portfolio company borrowing were effected in satisfaction of a contractual obligation with the venture capital fund.[201]

After careful consideration of the intended purpose of the leverage limitation of the proposed rule and the concerns raised by commenters, we are modifying the qualifying portfolio company leverage criterion to define a qualifying portfolio company as any company that does not both borrow (or issue debt) in connection with a venture capital fund investment *and* distribute the proceeds of such borrowing or issuance to the venture capital fund in exchange for the fund's investment. In contrast to the proposed rule, the final rule more specifically delineates the types of leveraged transactions involving a qualifying fund (*i.e.,* a company's distribution of proceeds received in a debt offering to the qualifying fund) that would result in the company being excluded from the definition of a qualifying portfolio company. We believe that these modifications more closely achieve our goal of distinguishing advisers to venture capital funds from other types of private funds for which Congress did not provide an exemption because it looks to the substance, not just the form, of a transaction or series of transactions.

This definition of qualifying portfolio company would only exclude companies that borrow in connection with a venture capital fund's investment and distribute such borrowing proceeds to the venture capital fund in exchange for the investment, but would not exclude companies that borrow in the ordinary course of their business (*e.g.*, to finance inventory or capital equipment, manage cash flows, meet payroll, *etc.*). Under the rule, a venture capital fund could provide financing or loans to a portfolio company, provided that the financing meets the definition of equity security or is made subject to the 20 percent limit for non-qualifying investments. Although we would generally view any financing to a portfolio company that was provided by, or was a condition of a contractual obligation with, a fund or its adviser as part of the fund's investments in the company as being a type of financing that is ''in connection with'' the fund's investment, the definition's limitation would only apply if the proceeds of such financing were distributed to the venture capital fund in exchange for its investment. Moreover, subsequent distributions to the venture capital fund solely because it is an existing investor would not be inconsistent with this criterion. We believe that this modification to the rule adequately distinguishes between venture capital funds and leveraged buyout funds and provides a simpler and clearer approach to determining whether or not a qualifying portfolio company satisfies the definition.

c. Operating Company

Rule 203(l)–1 defines the term qualifying portfolio company for the purposes of the exemption to exclude any private fund or other pooled investment vehicle.[202] Under the rule, a qualifying portfolio company could not be another private fund, a commodity pool or other ''investment companies.'' [203] We are adopting this criterion because Congress did not express an intent to include venture capital funds of funds within the definition.[204] In the Senate Report, Congress characterized venture capital as a subset of private equity ''specializing in long-term equity investment in small or start-up businesses'' [205] and did not refer to funds investing in other funds. Moreover, testimony to Congress described venture capital investments in operating companies rather than other private funds.[206]

Moreover, without this definitional criterion, a qualifying fund could circumvent the intended scope of the rule by investing in other pooled investment vehicles that are not themselves subject to the definitional criteria under our rule.[207] For example, without this criterion, a venture capital fund could circumvent the intent of the rule by incurring off-balance sheet leverage or indirectly investing in reporting companies in excess of the 20 percent limit for non-qualifying

[195] *See, e.g.,* ATV Letter; Charles River Letter (supports modifying the rule so that up to 20% of fund capital commitments may be invested in portfolio companies that do not adhere to the leverage condition provided that the venture capital fund is not the party providing the leverage to the company); NVCA Letter; Comment Letter of the Securities Regulation Committee of the Business Law Section of the New York State Bar Association, Apr. 1, 2011 (''NYSBA Letter''); SVB Letter.

[196] Although two commenters supported the leverage limitation as proposed (*see* AFL–CIO Letter (also supporting a specific prohibition on borrowing by a portfolio company to pay dividends or fees to the venture capital fund); Sen. Levin Letter (together with the equity investment requirement, the definition appropriately excludes leveraged buyout funds)), two other commenters opposed it, arguing that qualifying portfolio company leverage should not be restricted at all (*see* ESP Letter (limits on leverage would prevent portfolio companies from receiving lending from venture debt funds and state governments and lenders rather than regulators should determine the appropriate level of portfolio company debt); Merkl Letter (young negative EBITDA companies would not be able to obtain significant amounts of debt and hence no leverage prohibition is required)). *See also* NASBIC/SBIA Letter (portfolio companies should not be precluded from accessing leverage); Sevin Rosen Letter, Pine Brook Letter (each expressed support for a use of proceeds approach).

[197] *See, e.g.,* Gunderson Dettmer Letter; McDonald Letter; NVCA Letter; SVB Letter.

[198] *See, e.g.,* McDonald Letter; NVCA Letter.

[199] Gunderson Dettmer Letter; Pine Brook Letter; Trident Letter; Vedanta Letter. One commenter suggested that a use of proceeds test would be difficult to enforce because such a test would need to be extremely detailed in order to prevent circumvention. *See* Merkl Letter.

[200] *See, e.g.,* Merkl Letter; Sevin Rosen Letter; SVB Letter.

[201] *See, e.g.,* ABA Letter; ATV Letter; Bessemer Letter; Mesirow Letter; NVCA Letter; SV Life Sciences Letter. *See also* Proposing Release, *supra* note 26, discussion at section II.A.1.c.

[202] Rule 203(l)–1(c)(4)(iii). For this purpose, pooled investment vehicles include investment companies, issuers relying on rule 3a–7 under the Investment Company Act and commodity pools. 17 CFR 270.3a–7.

[203] Under the ''holding out'' criterion (discussed in Section II.A.7. below), a fund that represents itself as pursuing a venture capital strategy to investors implies that the fund invests primarily in operating companies and not for example in entities that hold oil and gas leases.

[204] One commenter agreed that ''there is no indication that Congress intended the venture capital exemption to apply to 'funds of funds,'" but argued that the qualifying portfolio company definition was ''unduly restrictive'' because it would exclude such funds of funds and discourage use of special purpose vehicles. ABA Letter.

[205] S. Rep. No. 111–176, *supra* note 6, at 74.

[206] *See generally* Loy Testimony, *supra* note 151, and McGuire Testimony, *supra* note 151.

[207] One commenter indicated that it was ''sympathetic'' to the Commission's concerns about the use of fund of funds structures to circumvent the intended purpose of the exemption, and agreed that such ''investments would unacceptably heighten the possibility for abuse.'' *See* NVCA Letter (suggesting that the Commission address this concern by applying the venture capital fund leverage limit on a full ''look-through'' basis to the underlying funds).

investments.[208] Our exclusion is similar to the approach of other definitions of ''venture capital'' discussed in the Proposing Release, which limit investments to operating companies and thus would exclude investments in other private funds or securitized asset vehicles.[209]

Many commenters opposed the operating company criterion and recommended that the rule include fund of venture capital fund structures.[210] Some commenters supported no limits on investments in other pooled investment vehicles,[211] while others supported broadening the definition to include funds that invest in other funds if either (i) the underlying funds qualify as venture capital funds (*i.e.*, comply with rule 203(l)–1) [212] or (ii) investment in underlying funds does not exceed a specified threshold (such as a percentage of fund capital).[213] Commenters argued that broadening the definition of qualifying portfolio company was necessary in order to accommodate current business practices,[214] or was appropriate because funds of funds (including secondary funds) provide investors with liquidity or do not pose systemic risk.[215] Other commenters advocated a definition that would permit investments in qualifying portfolio companies held through an intermediate holding company structure formed solely for tax, legal or regulatory reasons.[216]

For purposes of the definition of a qualifying portfolio company, we agree that a fund may disregard a wholly owned intermediate holding company formed solely for tax, legal or regulatory reasons to hold the fund's investment in a qualifying portfolio company. Such structures are used to address the particular needs of venture capital funds or their investors and are not intended to circumvent the rule's general limitation on investing in other investment vehicles.[217]

We do not agree, however, that Congress viewed funds of venture capital funds as being consistent with the exemption, and continue to believe that this criterion remains an important tool to prevent circumvention of the intended scope of the venture capital exemption. A fund strategy of selecting a venture capital or other private fund in which to invest is different from a strategy of selecting qualifying portfolio companies. Nevertheless, we are persuaded that a venture capital fund's limited ability to invest a limited portion of its assets in other pooled investment vehicles would not be inconsistent with the intent of the rule if the fund primarily invests directly in qualifying portfolio companies. As a result, for purposes of the exemption, investments in other private funds or venture capital funds could be made using the non-qualifying basket.

4. Management Involvement

We are not adopting a managerial assistance element of the rule, as originally proposed. We proposed that advisers seeking to rely on the rule have a significant level of involvement in developing a fund's portfolio companies.[218] We modeled our proposed approach to managerial assistance in part on existing provisions under the Advisers Act and the Investment Company Act dealing with BDCs. These provisions were added over the years to ease the regulatory burden on venture capital and other private equity investments.[219] Congress did not use the existing BDC definitions when determining the scope of the venture capital exemption, and the primary policy considerations that led to the adoption of the BDC exemptions differed from those under the Dodd-Frank Act.[220]

Commenters presented several problems with the application of the managerial assistance criterion and its intended scope under the proposed rule. Some objected to the managerial assistance criterion as proposed, arguing that such assistance to (or control of) a portfolio company is not a key or distinguishing characteristic of venture capital investing; [221] that relationships between qualifying funds and qualifying portfolio companies may be less formal and may not constitute management or control of a portfolio company under the proposed rule; [222] or that the discretion to determine the extent of involvement with a portfolio company should not affect a qualifying fund's ability to satisfy the definitional criterion.[223]

Most commenters sought guidance on determining what activities would constitute managerial assistance or ''control.'' [224] Other commenters specifically requested confirmation that a management rights letter for purposes of ''venture capital operating company'' status under ERISA would be sufficient.[225] Finally, some commenters recommended that the rule address syndicated transactions,[226] and provide that the managerial assistance criterion would be satisfied if one fund within the syndicate provided the requisite assistance or control.[227]

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[208] Similarly, a qualifying fund could not, for example, invest in an investment management entity (*e.g.*, a general partner entity) that in turn invests in another pooled vehicle, except as an investment under the non-qualifying basket.

[209] *See* Proposing Release, *supra* note 26, at nn.70–72 (discussing the California venture capital exemption and the VCOC definition under ERISA, 29 CFR 2510.3–101(d)).

[210] *See, e.g.*, NVCA Letter; Sevin Rosen Letter; Comment Letter of VCFA Group (Jan. 21, 2011).

[211] *See, e.g.*, Cook Children's Letter; Leland Fikes Letter; Merkl Letter.

[212] *See, e.g.*, ATV Letter, Charles River Letter, NVCA Letter, Sevin Rosen Letter (specifically in the context of funds of ''seed'' funds); SVB Letter, Vedanta Letter (85% cap for investments in rule 203(l)–1 compliant, unleveraged funds). *See also* Dechert General Letter (suggested that funds investing solely in venture capital funds should be permitted or, in the alternative, investments of up to 20% of committed capital should be permitted in ''incubator'' funds).

[213] First Round Letter (supported investments in underlying funds representing no more than 10% of a fund's called capital, measured at the end of the fund's term); ATV Letter and Charles River Letter (supported investments in underlying funds representing no more than 20% of a fund's committed capital subject to other conditions); PEI Funds Letter (supports ''substantial'' investment in venture capital investments rather than a specific numerical threshold); Comment Letter of Private Equity Investors, Inc. and Willowbridge Partners, Inc. (Jan. 7, 2011) (''PEI/Willowbridge Letter'') (supported investments in other qualifying funds representing at least 50% of the qualifying fund's assets or committed capital) and Comment Letter of Venture Investment Associates (Jan. 24, 2011) (''VIA Letter'') (supported investments in underlying funds representing at least 50% of a qualifying fund's capital commitments).

[214] *See, e.g.*, ATV Letter, Charles River Letter, Cook Children's Letter, Leland Fikes Letter (each of which cited the use of technology incubators).

[215] *See, e.g.*, PEI/Willowbridge Letter and VIA Letter.

[216] *See, e.g.*, ABA Letter; Davis Polk Letter; NVCA Letter.

[217] *See, e.g.*, Davis Polk Letter for a discussion of these considerations.

[218] *See* Proposing Release, *supra* note 26, section II.A.2.

[219] *See id.*, at n.123.

[220] *See id.*, at section II.A.2.

[221] Merkl Letter; SVB Letter (managerial assistance criterion is unnecessary because it does not distinguish venture capital funds from other types of funds providing managerial assistance).

[222] ESP Letter.

[223] Sevin Rosen Letter.

[224] BCLBE Letter; Gunderson Dettmer Letter; McGuireWoods Letter; Shearman Letter. Shearman sought confirmation on whether control included both direct and indirect control, and BCLBE sought confirmation that board representation would be sufficient for control purposes. Other commenters, however, acknowledged that the ''offer-only'' element of the proposed rule would provide sufficient flexibility for a venture capital fund to alter its relationship with a portfolio company over time. *See, e.g.*, First Round Letter; NVCA Letter. The NVCA and one other commenter did not support imposing specific requirements as to what constituted managerial assistance. *See* NVCA Letter (definitive requirements are not appropriate); Sevin Rosen Letter (opposed requiring board seat or observer rights).

[225] ATV Letter; Charles River Letter; NVCA Letter; Oak Investment Letter; Santé Ventures Letter; Sevin Rosen Letter; Village Ventures Letter.

[226] ABA Letter; ESP Letter; McGuireWoods Letter.

[227] ABA Letter (asserted that most deals are syndicated deals). *See also* Dechert General Letter; ESP Letter (indicating that in syndicated

We appreciate the difficulties of applying the managerial assistance criterion under the proposed definition and in particular the issues associated with a qualifying fund proving compliance when it participates in a syndicated transaction involving multiple funds. We are persuaded that to modify the rule to specify which activities constitute ''managerial assistance'' would introduce additional complexity and require us to insert our judgment for that of a venture capital fund's adviser regarding the minimum level of portfolio company involvement that would be appropriate for the fund, rather than enabling investors to select venture capital funds based in part on their level of involvement.[228] We also appreciate that the offer of managerial assistance may not distinguish venture capital funds from other types of funds.

While many venture capital fund advisers do provide managerial assistance, we believe that the managerial assistance criterion, as proposed, does not distinguish these advisers from other advisers, would be difficult to apply and could be unnecessarily prescriptive without creating benefits for investors. As a consequence of our modification to the proposed rule, a qualifying fund is not required to offer (or provide) managerial assistance to, or control any, qualifying portfolio company in order to satisfy the definition.

5. Limitation on Leverage

Under rule 203(l)–1, a venture capital fund is a private fund that does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of the fund's capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days.[229] For purposes of this leverage criterion, any guarantee by the private fund of a qualifying portfolio company's obligations up to the value of the private fund's investment in the qualifying portfolio company is not subject to the 120 calendar day limit.[230]

The 15 percent threshold is determined based on the venture capital fund's aggregate capital commitments. In practice, this means that a qualifying fund could leverage an investment transaction up to 100 percent when acquiring equity securities of a particular portfolio company as long as the leverage amount does not exceed 15 percent of the fund's total capital commitments.

Although a minority of commenters generally supported the leverage criterion as proposed,[231] many commenters sought to broaden it in several ways. Two commenters that generally supported the leveraged criterion also recommended that the criterion exclude uncalled capital commitments so that a qualifying fund could not incur excessive leverage.[232] Although determining the leverage criterion as a percentage of total fund capital commitments may enable a qualifying fund to incur a degree of leverage that represents a disproportionate percentage of the fund's assets early in the life of the fund, the leverage criterion is also constrained by the 120 calendar day limit. Therefore, we do not believe it is necessary to exclude uncalled capital commitments from the leverage criterion.

Other commenters proposed to exclude from the 15 percent leverage limitation capital call lines of credit (*i.e.,* venture capital fund borrowings repaid with proceeds of capital calls from fund investors),[233] or borrowings by a venture capital fund in order to meet fee and expense obligations.[234] One commenter sought to increase the leverage threshold from 15 percent to 20 percent.[235] One commenter, on behalf of many venture capital advisers, however, agreed with the proposed leverage criterion, arguing that venture capital fund financing would generally not exceed 15 percent of fund capital commitments or remain outstanding for longer than 120 days.[236]

We decline to increase the leverage threshold for a qualifying fund under the rule or exclude other certain types of borrowings as requested by some commenters. Our rule defines a venture capital fund by reference to a maximum of 15 percent of borrowings based on our understanding that venture capital funds typically would not incur borrowings in excess of 10 to 15 percent of the fund's total capital contributions and uncalled capital commitments,[237] which commenters have confirmed.[238] We believe that imposing a maximum at the upper range of borrowings typically used by venture capital funds will accommodate existing practices of the vast majority of industry participants.

Our rule specifies that the 15 percent calculation must be determined based on the fund's aggregate capital contributions and uncalled capital commitments.[239] Unlike most registered investment companies or hedge funds, venture capital funds rely on investors funding their capital commitments from time to time in order to acquire portfolio companies.[240] A capital commitment is a contractual obligation to acquire an interest in, or provide the total commitment amount over time to, a fund, when called by the fund. Accordingly, an adviser to venture capital funds manages the fund in anticipation of all investors fully funding their commitments when due and typically has the right to penalize investors for failure to do so.[241] Venture

transactions, there may be varying degrees of managerial involvement by funds participating in the transactions; one fund may take an active role, with the other funds taking a more passive role with respect to portfolio companies).

[228] For example, one commenter indicated that although it may seek to offer assistance to portfolio companies, not all of the companies have accepted. Charles River Letter. Similarly, a number of venture capital advisers stated that their funds may invest in a significant but non-controlling stake in underlying portfolio companies. *See, e.g.,* ATV Letter; First Round Letter.

[229] Rule 203(l)–1(a)(3).

[230] *Id.*

[231] *See* Sen. Levin Letter; NVCA Letter. *See also* AFL–CIO Letter, AFR Letter (generally supported the leverage limit but also supported excluding uncalled capital commitments); Oak Investment Letter (generally supported the leverage limit, but did not agree that the 120-day limit should apply to guarantees of portfolio company obligations by venture capital funds).

[232] AFR Letter; AFL–CIO Letter.

[233] Cook Children's Letter; Leland Fikes Letter; SVB Letter. We would view a line of credit used to advance anticipated committed capital that remains available for longer than 120 days to be consistent with the criterion, if each drawdown is repaid within 120 days and subsequent drawdowns relate to subsequent capital calls.

[234] Dechert General Letter.

[235] *See* Charles River Letter (argued that a qualifying fund should be able to borrow, without limit on duration, up to 20% of capital commitments with the consent of its investors).

[236] NVCA Letter. *See also* Merkl Letter.

[237] *See* Loy Testimony, *supra* note 151, at 6 (''[M]any venture capital funds significantly limit borrowing such that all outstanding capital borrowed by the fund, together with guarantees of portfolio company indebtedness, does not exceed the lesser of (i) 10–15% of total limited partner commitments to the fund and (ii) undrawn limited partner commitments.'').

[238] NVCA Letter. *See also* Merkl Letter; Oak Investments Letter.

[239] Rule 203(l)–1(a)(3).

[240] Schell, *supra* note 185, at § 1.03[8] (''The typical Venture Capital Fund calls for Capital Contributions from time to time as needed for investments.''); *id.* at § 2.05[2] (stating that ''[venture capital funds] begin operation with Capital Commitments but no meaningful assets. Over a specific period of time, the Capital Commitments are called by the General Partner and used to acquire Portfolio Investments.'').

[241] *See* Loy Testimony, *supra* note 151, at 5 (''[Limited partners] make their investment in a venture fund with the full knowledge that they generally cannot withdraw their money or change their commitment to provide funds. Essentially they agree to ''lock-up'' their money for the life of the fund * * *''). *See also* Stephanie Breslow & Phyllis Schwartz, Private Equity Funds, Formation and

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capital funds are subject to investment restrictions, and, during the initial years of a fund, calculate fees payable to an adviser as a percentage of the total capital commitments of investors, regardless of whether or not the capital commitment is ultimately fully funded by an investor.[242] Venture capital fund advisers typically report and market themselves to investors on the basis of aggregate capital commitment amounts raised for prior or existing funds.[243] These factors would lead to the conclusion that, in contrast to other types of private funds, such as hedge funds, which trade on a more frequent basis, a venture capital fund would view the fund's total capital commitments as the primary metric for managing the fund's assets and for determining compliance with investment guidelines. Hence, we believe that calculating the leverage threshold to include uncalled capital commitments is appropriate, given that capital commitments are already used by venture capital funds themselves to measure investment guideline compliance.

Thus, we are retaining the 15 percent leverage threshold, as proposed, so that a qualifying fund could only incur debt (or provide guarantees of portfolio company obligations) subject to this threshold. However, we are modifying the leverage criterion to exclude from the 120-calendar day limit any guarantee of qualifying portfolio company obligations by the qualifying fund, up to the value of the fund's investment in the qualifying portfolio company.[244] Commenters generally argued in favor of extending the period during which a qualifying fund's leverage could remain outstanding. Some recommended extending the 120-day limit with respect to leverage to 180 days with one 180-day renewal in the case of non-convertible bridge loans extended by the venture capital fund to a portfolio company.[245] Others seeking to accommodate business practices and provide maximum flexibility for venture capital fund debt investments in portfolio companies recommended excluding guarantees of portfolio company debt by a venture capital fund from the 120-day limit.[246] Other commenters argued that guarantees of portfolio company obligations would not result in qualifying funds incurring extensive leverage.[247]

We understand that guarantees of portfolio company leverage by a venture capital fund are typically limited to the value of the fund's investment in the company (often through a pledge of the fund's interest in the company).[248] Such guarantees by a qualifying fund may help a qualifying portfolio company obtain credit for working capital purposes, rather than be used by the fund to leverage its investment in the company.[249] We are persuaded that such guarantees of portfolio company indebtedness do not present the same types of risks identified by Congress. Congress cited the implementation of trading strategies that use financial leverage by certain private funds as creating a potential for systemic risk.[250] In testimony before Congress, the venture capital industry identified the lack of financial leverage in venture capital funds as a basis for exempting advisers to venture capital funds[251] in contrast with other types of private funds such as hedge funds, which may engage in trading strategies that may contribute to systemic risk and affect the public securities markets.[252] For this reason, our proposed rule was designed to address concerns that financial leverage may contribute to systemic risk by excluding funds that incur more than a limited amount of leverage from the definition of venture capital fund.[253] We believe that the alternative approach to fund leverage we have adopted in the final rule better reflects industry practice while still addressing Congress' concern that the use of financial leverage may create the potential for systemic risk.

6. No Redemption Rights

We are adopting as proposed the definitional element under which a venture capital fund is a private fund that issues securities that do not provide investors redemption rights except in ''extraordinary circumstances'' but that entitle investors generally to receive *pro rata* distributions.[254] Unlike hedge funds, a venture capital fund does not typically permit investors to redeem their interests during the life of the fund,[255] but rather distributes assets generally as investments mature.[256]

Operation 2010 (''Breslow & Schwartz''), at § 2:5.6 (discussing the various remedies that may be imposed in the event an investor fails to fund its contractual capital commitment, including, but not limited to, ''the ability to draw additional capital from non-defaulting investors;'' ''the right to force a sale of the defaulting partner's interests at a price determined by the general partner;'' and ''the right to take any other action permitted at law or in equity'').

[242] *See, e.g.,* Breslow & Schwartz, *supra* note 241, at § 2:5.7 (noting that a cap of 10% to 25% of remaining capital commitments is a common limitation for follow-on investments). *See also* Schell, *supra* note 185, at § 1.01 (noting that capital contributions made by the investors are used to ''make investments * * * in a manner consistent with the investment strategy or guidelines established for the Fund.''); *id.* at § 1.03 (''Management fees in a Venture Capital Fund are usually an annual amount equal to a fixed percentage of total Capital Commitments.''); *see also* Dow Jones, *Private Equity Partnership Terms and Conditions,* 2007 edition (''Dow Jones Report'') at 15.

[243] *See, e.g.,* NVCA Yearbook 2010, *supra* note 150, at 16; John Jannarone, *Private Equity's Cash Problem,* Wall St. J., June 23, 2010, *http://online.wsj.com/article/SB10001424052748704853404575323073059041024.html#printMode.*

[244] Rule 203(l)–1(a)(3).

[245] *See, e.g.,* NVCA Letter; Davis Polk Letter; Bessemer Letter.

[246] Cook Children's Letter; Leland Fikes Letter; Gunderson Dettmer Letter; Oak Investment Letter; SVB Letter. *See also* ABA Letter.

[247] *See, e.g.,* SVB Letter.

[248] *See also* NVCA Letter.

[249] *See, e.g.,* Oak Investments Letter; SVB Letter.

[250] *See* Proposing Release, *supra* note 26, at n. 136 and accompanying text.

[251] *See* McGuire Testimony, *supra* note 151, at 7 (''Venture capital firms do not use long term leverage, rely on short term funding, or create third party or counterparty risk * * *. [F]rom previous testimony submitted by the buy-out industry, the typical capital structure of the companies acquired by a buyout fund is approximately 60% debt and 40% equity. In contrast, borrowing at the venture capital fund level, if done at all, typically is only used for short-term capital needs (pending drawdown of capital from its partners) and does not exceed 90 days. Not only are our partnerships run without debt but our portfolio companies are usually run without debt as well.''); Loy Testimony, *supra* note 151, at 2 (''Although venture capital funds may occasionally borrow on a short-term basis immediately preceding the time when the cash installments are due, they do not use debt to make investments in excess of the partner's capital commitments or 'lever up' the fund in a manner that would expose the fund to losses in excess of the committed capital or that would result in losses to counter parties requiring a rescue infusion from the government.'').

[252] *See* S. Rep. No. 111–176, *supra* note 6, at 74–75.

[253] In proposing an exemption for advisers to private equity funds, which would have required the Commission to define the term ''private equity fund,'' the Senate Banking Committee noted the difficulties in distinguishing some private equity funds from hedge funds and expected the Commission to exclude from the exemption private equity funds that raise significant potential systemic risk concerns. S. Rep. No. 111–176, *supra* note 6, at 75. *See also* G20 Working Group 1, Enhancing Sound Regulation and Strengthening Transparency, at 7 (March 25, 2009) (noting that unregulated entities such as hedge funds may contribute to systemic risks through their trading activities).

[254] Rule 203(l)–1(a)(4).

[255] *See* Schell, *supra* note 185, at § 1.03[7] (venture capital fund ''redemptions and withdrawals are rarely allowed, except in the case of legal compulsion''); Breslow & Schwartz, *supra* note 241, at § 2:14.2 (''the right to withdraw from the fund is typically provided only as a last resort'').

[256] Loy Testimony, *supra* note 151, at 2–3 (''As portfolio company investments are sold in the later years of the [venture capital] fund—when the company has grown so that it can access the public markets through an initial public offering (an IPO) or when it is an attractive target to be bought–the liquidity from these 'exits' is distributed back to the limited partners. The timing of these distributions is subject to the discretion of the general partner, and limited partners may not otherwise withdraw capital during the life of the venture [capital] fund.''). *Id.* at 5 (Investors ''make their investment in a venture [capital] fund with the full knowledge that they generally cannot withdraw their money or change their commitment to provide funds.

Although venture capital funds typically return capital and profits to investors only through *pro rata* distributions, such funds may also provide extraordinary rights for an investor to withdraw from the fund under foreseeable but unexpected circumstances or to be excluded from particular investments due to regulatory or other legal requirements.[257] These events may be ''foreseeable'' because they are circumstances that are known to occur (*e.g.,* changes in law, corporate events such as mergers, *etc.*) but are unexpected in their timing or scope. Thus, withdrawal, exclusion or similar ''opt-out'' rights would be deemed ''extraordinary circumstances'' if they are triggered by a material change in the tax law after an investor invests in the fund, or the enactment of laws that may prohibit an investor's participation in the fund's investment in particular countries or industries.[258] The trigger events for these rights are typically beyond the control of the adviser and fund investor (*e.g.,* tax and regulatory changes).

Most commenters addressing the redeemability criterion did not oppose it, but rather sought clarification or guidance on the scope of its application.[259] For example, commenters specifically requested confirmation that the lack of redeemability criterion would not preclude a qualifying fund from (i) making distributions of carried interest to a general partner,[260] (ii) specifying redemption rights for certain categories of investors under certain circumstances [261] or (iii) specifying opt-out rights for investors.[262] Several commenters, however, indicated that the term ''extraordinary circumstances'' is sufficiently clear,[263] suggesting that the proposal did not require further clarification.

We believe that the term ''extraordinary circumstances'' is sufficiently clear. Whether or not specific redemption or ''opt out'' rights for certain categories of investors under certain circumstances should be treated as ''extraordinary'' will depend on the particular facts and circumstances.

For these purposes, for example, a fund that permits quarterly or other periodic withdrawals would be considered to have granted investors redemption rights in the ordinary course even if those rights may be subject to an initial lock-up or suspension or restrictions on redemption. We believe, and several commenters confirmed, that the phrase ''extraordinary circumstances'' is sufficiently clear to distinguish the terms for investor liquidity of venture capital funds, as they operate today, from hedge funds.[264] Congressional testimony cited an investor's inability to withdraw from a venture capital fund as a key characteristic of venture capital funds and a factor for reducing their potential for systemic risk.[265] Although a fund prohibiting redemptions would satisfy the redeemability criterion of the venture capital fund definition, the rule does not specify a minimum period of time for an investor to remain in the fund.

In the Proposing Release, we expressed the general concern that a venture capital fund might seek to circumvent the intended scope of this criterion by providing investors with nominally ''extraordinary'' rights to redeem that effectively result in *de facto* redemption rights in the ordinary course.[266] One commenter expressly disagreed with this view, asserting that in the case of transfers effected with the consent of a general partner, such transactions are intended to accommodate an investor's internal corporate restructurings, bankruptcies or portfolio allocations rather than to provide investors with liquidity from the fund.[267] While consents to transfer do not raise the same level of concern as *de facto* redemption rights, we do not believe that an adviser or its related persons could, while relying on the venture capital exemption, create *de facto* periodic redemption or transfer rights by, for example, regularly identifying potential investors on behalf of fund investors seeking to transfer or redeem fund interests.[268]

We are not modifying the rule to include additional conditions for fund redemptions, such as specifying a minimum holding or investment period by investors or a maximum amount that may be redeemed at any time. Commenters generally did not support

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Essentially they agree to 'lock-up' their money for the life of the fund, generally 10 or more years as I stated earlier.''). *See also* Dow Jones Report, *supra* note 242, at 60 (noting that an investor in a private equity or venture capital fund typically does not have the right to transfer its interest). *See generally* Proposing Release, *supra* note 26, section II.A.4.

[257] *See* Hedge Fund Adviser Registration Release, *supra* note 14, at n.240 and accompanying text (''Many partnership agreements provide the investor the opportunity to redeem part or all of its investment, for example, in the event continuing to hold the investment became impractical or illegal, in the event of an owner's death or total disability, in the event key personnel at the fund adviser die, become incapacitated, or cease to be involved in the management of the fund for an extended period of time, in the event of a merger or reorganization of the fund, or in order to avoid a materially adverse tax or regulatory outcome. Similarly, some investment pools may offer redemption rights that can be exercised only in order to keep the pool's assets from being considered 'plan assets' under ERISA [Employee Retirement Income Security Act of 1974].''). *See, e.g.,* Breslow & Schwartz, *supra* note 241, at § 2:14.1 (''Private equity funds generally provide for mandatory withdrawal of a limited partner [*i.e.,* investor] only in the case where the continued participation by a limited partner in a fund would give rise to a regulatory or legal violation by the investor or the fund (or the general partner [*i.e.,* adviser] and its affiliates). Even then, it is often possible to address the regulatory issue by excusing the investor from particular investments while leaving them otherwise in the fund.'').

[258] *See, e.g.,* Breslow & Schwartz, *supra* note 241, at § 2:14.2 (''The most common reason for allowing withdrawals from private equity funds arises in the case of an ERISA violation where there is a substantial likelihood that the assets of the fund would be treated as 'plan assets' of any ERISA partner for purposes of Title I of ERISA or section 4975 of the Code.''). *See also* Schell, *supra* note 185, at § 9.04[3] (''Exclusion provisions allow the General Partner to exclude a Limited Partner from participation in any or all investments if a violation of law or another material adverse effect would otherwise occur.''); *id.* at Appendix D–31 (attaching model limited partnership agreement providing ''The General Partner at any time may cancel the obligations of all Partners to make Capital Contributions for Portfolio Instruments if * * * changes in applicable law * * * make such cancellation necessary or advisable * * *'').

[259] A number of commenters agreed with the redeemability criterion. *See, e.g.,* ATV Letter; Charles River Letter; Gunderson Dettmer Letter. However, one commenter argued that a fund's redeemability is not necessarily characteristic of venture capital funds. Comment Letter of Cooley LLP (Jan. 21, 2011).

[260] *See, e.g.,* NVCA Letter. The rule specifies that a qualifying fund is a private fund that ''issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw * * *'' If a general partner interest is not a ''security,'' then the redeemability criterion of the rule would not be implicated. Whether or not a general partner interest is a ''security'' depends on the particular facts and circumstances. *See generally Williamson* v. *Tucker,* 645 F.2d 404 (5th Cir. 1981), *cert. denied,* 454 U.S. 897 (1981).

[261] ABA Letter (sought guidance on whether granting redemption rights to certain types of investors such as ERISA funds and state plans, in the event of certain ERISA, tax or regulatory changes would be considered extraordinary).

[262] McGuireWoods Letter.

[263] *See* Gunderson Dettmer Letter; Merkl Letter; SVB Letter.

[264] *See, e.g., id.*

[265] *See supra* notes 255–256 and accompanying text.

[266] For example, in the Proposing Release, we stated that a private fund's governing documents might provide that investors do not have any right to redeem without the consent of the general partner. In practice, if the general partner typically permits investors to redeem their otherwise non-redeemable interests on a periodic basis, then the fund would not be considered to have issued securities that ''do not provide a holder with any right, except in extraordinary circumstances, to withdraw.'' Rule 203(l)–1(a)(4). *See* Proposing Release, *supra* note 26, at n.154.

[267] *See* NVCA Letter (disagreeing with statements in the Proposing Release regarding the *de facto* creation of redemption rights but generally agreeing with the general prohibition on redemptions except in extraordinary circumstances).

[268] Section 208(d) of the Advisers Act.

the imposition of such conditions,[269] and we agree that imposing such conditions would not appear to be necessary to achieve the purposes of the rule.

7. Represents Itself as Pursuing a Venture Capital Strategy

Under the rule, a qualifying fund must represent itself as pursuing a venture capital strategy to its investors and potential investors.[270] Without this element, a fund that did not engage in typical venture capital activities could be treated as a venture capital fund simply because it met the other elements specified in our rule (because for example it only invests in short-term holdings, does not borrow, does not offer investors redemption rights, and is not a registered investment company).[271] We believe that only funds that do not significantly differ from the common understanding of what a venture capital fund is,[272] and that are actually offered to investors as funds that pursue a venture capital strategy, should qualify for the exemption. Thus, for example, an adviser to a venture capital fund that is otherwise relying on the exemption could not (i) identify the fund as a hedge fund or multi-strategy fund (*i.e.,* venture capital is one of several strategies used to manage the fund) or (ii) include the fund in a hedge fund database or hedge fund index.

As proposed, rule 203(l)–1 defined a venture capital fund as a private fund that ''represents itself as being a venture capital fund to its investors and potential investors.'' [273] Although several commenters generally supported the ''holding out'' criterion as proposed,[274] many sought confirmation that the use of specific self-identifying terminology by a fund in its name (*e.g.,* ''private equity'' fund, ''multi-strategy'' fund or ''growth capital'' fund) would not automatically disqualify the fund under the definition.[275] Several commenters argued that historically, some funds have avoided referring to themselves as ''venture capital funds.'' [276] One commenter argued that the proposed condition was too restrictive because it focuses on the fund's name rather than its investment strategy and suggested that the definition instead exclude any fund that markets itself as a hedge fund, multi-strategy fund, buyout fund or fund of funds.[277]

We believe that the ''holding out'' criterion remains an important distinction between funds that are eligible to rely on the definition and funds that are not, because an investor's understanding of the fund and its investment strategy must be consistent with an adviser's reliance on the exemption. However, we also recognize that it is not necessary (nor indeed sufficient) for a qualifying fund to name itself as a ''venture capital fund'' in order for its adviser to rely on the venture capital exemption. Hence, we are modifying the proposed definition to refer to the way a qualifying fund describes its investment strategy to investors and prospective investors.

A qualifying fund name that does not use the words ''venture capital'' and is not inconsistent with pursuing a venture capital strategy would not preclude a qualifying fund from satisfying the definition.[278] Whether or not a fund represents itself as pursuing a venture capital strategy, however, will depend on the particular facts and circumstances. Statements made by a fund to its investors and prospective investors, not just what the fund calls itself, are important to an investor's understanding of the fund and its investment strategy.[279] The appropriate framework for analyzing whether a qualifying fund has satisfied the holding out criterion depends on all of the statements (and omissions) made by the fund to its investors and prospective investors. While this includes the fund name, it is only part of the analysis.

This approach is similar to our general approach to antifraud provisions under the Federal securities laws, including Advisers Act rule 206(4)–8 regarding pooled investment vehicles.[280] The general antifraud rule under rule 206(4)–8 looks to the private fund's statements and omissions in light of the circumstances under which such statements or omissions are made.[281] Similarly, the holding out criterion under our venture capital fund definition looks to all of the relevant statements made by the qualifying fund regarding its investment strategy.

8. Is a Private Fund

We define a venture capital fund for purposes of the exemption as a private fund, which is defined in the Advisers Act, and exclude from the definition funds that are registered investment companies (*e.g.,* mutual funds) or have elected to be regulated as BDCs.[282] We are adopting this provision as proposed.

There is no indication that Congress intended the venture capital exemption to apply to advisers to these publicly available funds,[283] referring to venture capital funds as a ''subset of private investment funds.'' [284] The comment letters that addressed this proposed criterion generally supported it.[285]

9. Application to Non-U.S. Advisers

The final rule does not define a venture capital fund as a fund advised by a U.S. adviser (*i.e.,* an adviser with a principal office and place of business

[269] *See, e.g.,* SVB Letter (expressing opposition to a rule that would limit redemptions following a minimum investment period or limit redemptions to a specified maximum threshold).

[270] Rule 203(1)–1(a)(1).

[271] We also note that a fund that represents to investors that it is one type of fund while pursuing a different type of fund strategy may raise concerns under rule 206(4)–8 of the Advisers Act.

[272] *See* Proposing Release, *supra* note 26, at n.157.

[273] Proposed Rule 203(l)–1(a)(1).

[274] *See* Gunderson Dettmer Letter; Sen. Levin Letter; Merkl Letter.

[275] *See, e.g.,* IVP Letter; Comment Letter of MissionPoint Capital Partners, Jan. 24, 2011; PEI Funds Letter.

[276] *See, e.g.,* NVCA Letter; Pine Brook Letter. *See also* IVP Letter; PEI Funds Letter.

[277] *See* Pine Brook Letter.

[278] Similarly, misleadingly including the words ''venture capital'' in the name of a fund pursuing a different strategy would not satisfy the definition.

[279] One commenter requested confirmation and examples of what constituted appropriate representations to investors given that ''many'' venture capital funds do not use private placement memoranda or other offering materials during fundraising. *See* Gunderson Dettmer Letter (expressed the view that the following would be sufficient: (i) Checking the ''venture capital'' box on Form D or (ii) stating on the adviser's Web site that all of the funds advised by the adviser are venture capital funds). As we noted above, whether or not a venture capital fund satisfies the ''holding out'' criterion will depend on the particular facts and circumstances surrounding all of the statements and omissions made by the fund in light of the circumstances under which they were made. Moreover, a venture capital fund that seeks to rely on the safe harbor for non-public offerings under rule 506 of Regulation D is subject to all of the conditions of such rule, including the prohibition on general solicitation and general advertising applicable to statements attributable to the fund on a publicly available Web site. *See* 17 CFR 230.502(c).

[280] 17 CFR 275.206(4)–8.

[281] *See* Pooled Vehicles Release, *supra* note 122, at n.27 (''A fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available,'' citing *Basic, Inc.* v. *Levinson,* 485 U.S. 224, 231–32 (1988)).

[282] Rule 203(l)–1(a) and (a)(5). *See also* discussion *infra* note 319.

[283] Legislative history does not indicate that Congress addressed this matter, nor does testimony before Congress suggest that this was contemplated. *See, e.g.,* McGuire Testimony, *supra* note 151, at 3 (noting that venture capital funds are not directly accessible by individual investors); Loy Testimony, *supra* note 151, at 2 (''Generally * * * capital for the venture fund is provided by qualified institutional investors such as pension funds, universities and endowments, private foundations, and to a lesser extent, high net worth individuals.''). *See generally* section 202(a)(29) of the Advisers Act (definition of ''private fund'').

[284] *See* S. Rep. No. 111–176, *supra* note 6, at 74 (describing venture capital funds as a subset of ''private investment funds'').

[285] Gunderson Dettmer Letter; Merkl Letter; NYSBA Letter; Sen. Levin Letter.

the United States). Thus, a non-U.S. adviser, as well as a U.S. adviser, may rely on the venture capital exemption provided that such adviser solely advises venture capital funds that satisfy all of the elements of the rule or satisfy the grandfathering provision (discussed in greater detail below). A non-U.S. adviser may rely on the venture capital exemption if all of its clients, whether U.S. or non-U.S., are venture capital funds.

Neither the statutory text of section 203(l) nor the legislative reports provide an indication of whether Congress intended the exemption to be available to advisers that operate principally outside of the United States but that invest in U.S. companies or solicit U.S. investors.[286] Testimony before Congress presented by members of the U.S. venture capital industry discussed the industry's role primarily in the U.S. economy including its lack of interconnection with the U.S. financial markets and ''interdependence'' with the world financial system.[287] Nevertheless, we expect that venture capital funds with advisers operating principally outside of the United States may seek to access the U.S. capital markets by investing in U.S. companies or soliciting U.S. investors; investors in the United States may also have an interest in venture capital opportunities outside of the United States.

Commenters generally did not support defining venture capital fund or qualifying portfolio company by reference to the jurisdiction of formation of the fund or portfolio company.[288] Several commenters, however, supported modifying the rule to apply the venture capital exemption in the same manner as the proposed private fund adviser exemption, with the result that a non-U.S. adviser could disregard its non-U.S. activities when assessing eligibility for the venture capital exemption.[289] Under this approach, only U.S.-domiciled private funds would be required to satisfy our definition of a venture capital fund in order for the adviser to rely on the venture capital exemption.[290] One commenter suggested that the same policy rationale underlying the private fund adviser exemption justified this approach to the venture capital exemption.[291] Two other commenters supported this approach arguing that non-U.S. funds may operate in a manner that does not resemble venture capital fund investing in the United States or by U.S. venture capital fund advisers.[292]

We do not agree that the private fund adviser exemption is the appropriate framework for the venture capital exemption in the case of non-U.S. advisers. Section 203(l) provides an exemption for an investment adviser based on the strategy of the funds that the adviser manages (*i.e.,* venture capital funds). This exemption thus specifies the activities in which an adviser's clients may engage, and does not refer to activities in the United States.[293] By contrast, section 203(m) is based upon the location where the advisory activity is conducted. Accordingly, we do not believe it would be appropriate for an adviser relying on section 203(l) to disregard its non-U.S. activities. Moreover, a non-U.S. adviser could circumvent the intended scope of the exemption by merely sponsoring and advising solely non-U.S. domiciled funds that are not venture capital funds.

Under our rule, only a private fund may qualify as a venture capital fund. As we noted in the Proposing Release, a non-U.S. fund that uses U.S. jurisdictional means in the offering of the securities it issues and that relies on section 3(c)(1) or 3(c)(7) of the Investment Company Act would be a private fund.[294] A non-U.S. fund that does not use U.S. jurisdictional means to conduct an offering would not be a private fund and therefore could not qualify as a venture capital fund, even if it operated as a venture capital fund in a manner that would otherwise meet the criteria under our definition.[295] As a result, under the proposed rule, if a non-U.S. fund did not qualify as a venture capital fund, then the fund's adviser would not be able to rely on the exemption.[296]

In light of this result, we asked in the Proposing Release whether we should adopt a broader interpretation of the term ''private fund.'' [297] In response, commenters supported making the venture capital exemption available to non-U.S. advisers even if they advise venture capital funds that are not offered through the use of U.S. jurisdictional means.[298] We agree. Accordingly, as adopted, rule 203(l)–1 contains a note indicating that an adviser may treat as a ''private fund''—and thus a venture capital fund, if it meets the rule's other criteria—any non-U.S. fund that is not offered through the use of U.S. jurisdictional means but that would be a private fund if the issuer were to conduct a private offering in the United States.[299] Moreover, a non-U.S. fund that is treated as a private fund under these circumstances by an adviser relying on the venture capital

[286] *See* section 203(l) of the Advisers Act; H. Rep. No. 111–517, *supra* note 6, at 867; S. Rep. No. 111–176, *supra* note 6, at 74–75.

[287] *See* Loy Testimony, *supra* note 151, at 4–5; McGuire Testimony, *supra* note 151, at 5–6.

[288] *See, e.g.,* Bessemer Letter; EVCA Letter; McDonald Letter; Merkl Letter; NVCA Letter; SV Life Sciences Letter.

[289] *See* McGuireWoods Letter; Shearman Letter. *See also* EFAMA Letter (also noting that as a practical matter, the rule should account for non-U.S. specific practices so that non-U.S. advisers could rely on the exemption); Gunderson Dettmer Letter (exemption should be available to non-U.S. advisers even if non-U.S. funds do not satisfy definitional elements); Dechert General Letter (non-U.S. advisers that manage funds that are not venture capital funds outside of the U.S. should be able to rely on rule 203(l) for funds that are managed in the U.S. or that are marketed to U.S. investors).

[290] *See* EFAMA Letter (certain conditions of the proposed rule, such as the limitation on cash investments to U.S. Treasuries, are inconsistent with practices outside the United States). We believe that these concerns are adequately addressed by the non-qualifying basket.

[291] *See* Shearman Letter.

[292] *See* EFAMA Letter; McGuireWoods Letter.

[293] *See also infra* note 322 and accompanying and following text.

[294] An issuer that is organized under the laws of the United States or of a state is a private fund if it is excluded from the definition of an investment company for most purposes under the Investment Company Act pursuant to section 3(c)(1) or 3(c)(7). Section 7(d) of the Investment Company Act prohibits a non-U.S. fund from using U.S. jurisdictional means to make a public offering, absent an order permitting registration. A non-U.S. fund may conduct a private U.S. offering in the United States without violating section 7(d) only if the fund complies with either section 3(c)(1) or 3(c)(7) with respect to its U.S. investors (or some other available exemption or exclusion). Consistent with this view, a non-U.S. fund is a private fund if it makes use of U.S. jurisdictional means to, directly or indirectly, offer or sell any security of which it is the issuer and relies on either section 3(c)(1) or 3(c)(7). *See* Hedge Fund Adviser Registration Release, *supra* note 14, at n.226; *Offer and Sale of Securities to Canadian Tax-Deferred Retirement Savings Accounts,* Securities Act Release No. 7656 (Mar. 19, 1999) [64 FR 14648 (Mar. 26, 1999)] (''Canadian Tax-Deferred Retirement Savings Accounts Release''), at nn.10, 20, 23; *Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore,* Securities Act Release No. 7516 (Mar. 23, 1998) [63 FR 14806 (Mar. 27, 1998)], at n.41. *See also* Dechert LLP, SEC Staff No-Action Letter (Aug. 24, 2009) at n.8; Goodwin, Procter & Hoar LLP, SEC Staff No-Action Letter (Feb. 28, 1997) (''Goodwin Procter No-Action Letter''); Touche Remnant & Co., SEC Staff No-Action Letter (Aug. 27, 1984) (''Touche Remnant No-Action Letter''); Proposing Release, *supra* note 26, at n.175 and accompanying text.

[295] *See* Proposing Release, *supra* note 26, at nn.175 and 188 and accompanying text.

[296] Under the Advisers Act, an adviser relying on the venture capital exemption must ''solely'' advise venture capital funds and under our rule all of the funds advised by the adviser must be private funds.

[297] *See* Proposing Release, *supra* note 26, at section II.A.8 (''[S]hould a non-U.S. fund be a private fund under the proposed rule if the non-U.S. fund would be deemed a private fund upon conducting a private offering in the United States in reliance on sections 3(c)(1) or 3(c)(7)?'').

[298] *See, e.g.,* Dechert General Letter; EFAMA Letter; Gunderson Dettmer Letter; McGuireWoods Letter; Shearman Letter.

[299] As discussed below, this issue also is relevant to the exemption provided by rule 203(m)–1. *See also infra* note 319.

exemption would also be treated as a private fund under the Advisers Act for all purposes. This element is designed to ensure that an adviser relying on the venture capital exemption by operation of the note is subject to the same Advisers Act requirements as other advisers relying on the venture capital exemption without use of the note.

10. Grandfathering Provision

Under the rule, the definition of ''venture capital fund'' includes any private fund that: (i) Represented to investors and potential investors at the time the fund offered its securities that it pursues a venture capital strategy; (ii) has sold securities to one or more investors prior to December 31, 2010; and (iii) does not sell any securities to, including accepting any capital commitments from, any person after July 21, 2011 (the ''grandfathering provision'').[300] A grandfathered fund would thus include any fund that has accepted all capital commitments by July 21, 2011 (including capital commitments from existing and new investors) even if none of the capital commitments has been called by such date.[301] The calling of capital after July 21, 2011 would be consistent with the grandfathering provision, as long as the investor became obligated by July 21, 2011 to make a future capital contribution. As a result, any investment adviser that solely advises private funds that meet the definition in either rule 203(l)–1(a) or (b) would be exempt from registration.

Although several commenters expressed support for the proposed rule,[302] two commenters indicated that the proposed grandfathering provision was too restrictive because of the holding out criterion.[303] In contrast, the North American Securities Administrators Association, Inc. expressed its view that the proposed grandfathering provision was too expansive and urged that the rule impose additional substantive requirements similar to those included among the definitional elements in rule 203(l)–1(a).[304]

As in the case of the holding out criterion discussed above, this element of the grandfathering provision elicited the most comments. Generally, commenters either (i) did not support a grandfathering provision that defined a venture capital fund as a fund that identified itself (or called itself) ''venture capital,'' [305] or (ii) sought clarification or an expansive interpretation of the holding out element so that existing funds would not be excluded from the definition merely because they have identified themselves as ''growth capital,'' ''multi-strategy'' or ''private equity,'' [306] which commenters asserted is typical of some older funds. No commenter addressed the dates proposed in the grandfathering provision.[307]

As discussed above, we believe that the ''holding out'' requirement is an important prophylactic tool to prevent circumvention of the intended scope of the venture capital exemption. Thus, we are adopting the grandfathering provision as proposed, with the modifications to the holding out criterion discussed above.[308] As noted above in the definition of a venture capital fund generally, the holding out criterion in the grandfathering provision has also been changed to refer to the strategy pursued by the private fund. A fund that seeks to qualify under our rule should examine all of the statements and representations made to investors and prospective investors to determine whether the fund has satisfied the ''holding out'' criterion as it is incorporated into the grandfathering provision.[309]

Thus, under the rule, an investment adviser may treat any existing private fund as a venture capital fund for purposes of section 203(l) of the Advisers Act if the fund meets the elements of the grandfathering provision. The current private adviser exemption does not require an adviser to identify or characterize itself as any type of adviser (or impose limits on advising any type of fund). Accordingly, we believe that advisers have not had an incentive to mis-characterize the investment strategies pursued by existing venture capital funds that have already been marketed to investors. As we note above, a fund that ''represents'' itself to investors as pursuing a venture capital strategy is typically one that discloses it pursues a venture capital strategy and identifies itself as such.[310] We do not expect existing funds identifying themselves as pursuing a ''private equity'' or ''hedge'' fund strategy would be able to rely on this element of the grandfathering provision.

We believe that most funds previously sold as venture capital funds likely would satisfy all or most of the conditions in the grandfathering provision. Nevertheless, we recognize that investment advisers that sponsored new funds before the adoption of rule 203(l)–1 faced uncertainty regarding the precise terms of the definition and hence uncertainty regarding their eligibility for the new exemption. Thus, as proposed, the grandfathering provision specifies that a qualifying fund must have commenced its offering (*i.e.,* initially sold securities) by December 2010 and must have concluded its offering by the effective date of Title IV (*i.e.,* July 21, 2011). This provision is designed to prevent circumvention of the intended scope of the exemption. Moreover, requiring existing venture capital funds to modify their investment conditions or characteristics, liquidate portfolio company holdings or alter the rights of investors in the funds in order to satisfy the definition of a venture capital fund would likely be impossible in many cases and yield unintended consequences for the funds and their investors.[311]

B. Exemption for Investment Advisers Solely to Private Funds With Less Than $150 Million in Assets Under Management

Section 203(m) of the Advisers Act directs the Commission to exempt from registration under the Advisers Act any investment adviser solely to private funds that has less than $150 million in assets under management in the United States.[312] Rule 203(m)–1, which we are

[300] Rule 203(l)–1(b).

[301] *See also Electronic Filing and Revision of Form D,* Securities Act Release No. 8891(Feb. 6, 2008) [73 FR 10592 (Feb. 27, 2008)], at section VIII, Form D, General Instructions—When to File (noting that a Form D is required to be filed within 15 days of the first sale of securities which would include ''the date on which the first investor is irrevocably contractually committed to invest''), n.159 (''a mandatory capital commitment call would not constitute a new offering, but would be made under the original offering'').

[302] Comment Letter of AustinVentures (Jan. 21, 2011) (''AV Letter''); Norwest Letter; NYSBA Letter. *See also* NVCA Letter.

[303] DLA Piper VC Letter; Pine Brook Letter.

[304] Comment Letter of North American Securities Administrators Association, Inc., Feb. 10, 2011 (''NASAA Letter'').

[305] Davis Polk Letter; DLA Piper VC Letter; Pine Brook Letter.

[306] Davis Polk Letter; Gunderson Dettmer Letter; IVP Letter; Norwest Letter; NVCA Letter.

[307] The NVCA specifically stated that other than clarification on the names that venture capital funds may use to identify themselves, no ''further changes to the grandfathering proposal are necessary or appropriate and [we] do not believe that this criterion, as it exists for new funds, presents problems to the industry.'' *See* NVCA Letter.

[308] *See supra* discussion at Section II.A.7.

[309] *Id.*

[310] *See id.*

[311] One commenter agreed that it may be difficult for a qualifying fund seeking to rely on the grandfathering provision to change fund terms and liquidate its positions to the possible detriment of the fund and its investors. AV Letter.

[312] Section 408 of the Dodd-Frank Act, which is codified in section 203(m) of the Advisers Act. *See supra* note 19.

adopting today, provides the exemption and, in addition, addresses several interpretive questions raised by section 203(m). As noted above, we refer to this exemption as the ''private fund adviser exemption.''

1. Advises Solely Private Funds

Rule 203(m)–1, like section 203(m), limits an adviser relying on the exemption to those advising ''private funds'' as that term is defined in the Advisers Act.[313] An adviser that has one or more clients that are not private funds is not eligible for the exemption and must register under the Advisers Act unless another exemption is available. An adviser may advise an unlimited number of private funds, provided the aggregate value of the assets of the private funds is less than $150 million.[314]

In the case of an adviser with a principal office and place of business outside of the United States (a ''non-U.S. adviser''), the exemption is available as long as all of the adviser's clients that are United States persons are qualifying private funds.[315] As a consequence, a non-U.S. adviser may enter the U.S. market and take advantage of the exemption without regard to the type or number of its non-U.S. clients or the amount of assets it manages outside of the United States. Under the rule, a non-U.S. adviser would not lose the private fund adviser exemption as a result of the size or nature of its advisory or other business activities outside of the United States. The rule reflects our long-held view that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and that this territorial approach is in keeping with general principles of international comity.[316] Commenters supported the proposed rule's treatment of non-U.S. advisers.[317]

Some commenters urged that the rule should also permit U.S. advisers relying on the exemption to advise other types of clients.[318] Section 203(m) directs us to provide an exemption to advisers that act *solely* as advisers to private funds.[319] Our treatment of non-U.S. advisers with respect to their non-U.S. clients, as we note above, establishes certain appropriate limits on the extraterritorial application of the Advisers Act.[320] In contrast, permitting U.S. advisers with additional types of clients to rely on the exemption would appear to directly conflict with section 203(m), and we therefore are not revising the rule as the commenters proposed.

Some commenters suggested that the rule permit advisers to combine other exemptions with rule 203(m)–1 so that, for example, an adviser could advise venture capital funds with assets under management in excess of $150 million in addition to other types of private funds with less than $150 million in assets under management.[321] We believe that the commenters' proposed interpretation runs contrary to the language of section 203(m), which limits advisers relying on the exemption to advising solely private funds with assets under management in the United States of less than $150 million or solely venture capital funds in the case of section 203(l).[322]

A few commenters also asked us to address whether a fund with a single investor could be a ''private fund'' for purposes of the exemption.[323] Whether a single-investor fund could be a private fund for purposes of the exemption depends on the facts and circumstances. We are concerned that an adviser simply could convert client accounts to single-investor funds in order to avoid registering under the Advisers Act. These ''funds'' would be tantamount to separately managed accounts. Section 208(d) of the Advisers Act anticipates these and other artifices and thus prohibits a person from doing, indirectly or through or by another person, any act or thing which it would be unlawful for such person to do directly.[324] We recognize, however, that

[313] *See* rule 203(m)–1(a) and (b). Section 202(a)(29) of the Advisers Act defines the term ''private fund'' as ''an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.'' A ''private fund'' includes a private fund that invests in other private funds. *See also supra* note 294; Proposing Release, *supra* note 26, at n.175 and accompanying text.

[314] We note, however, that depending on the facts and circumstances, we may view two or more separately formed advisory entities that each has less than $150 million in private fund assets under management as a single adviser for purposes of assessing the availability of exemptions from registration. *See infra* note 506. *See also* section 208(d), which prohibits a person from doing, indirectly or through or by another person, any act or thing which it would be unlawful for such person to do directly.

[315] Rule 203(m)–1(b)(1). As discussed below, we also are adding a note to rule 203(m)–1 that clarifies that a client will not be considered a United States person if the client was not a United States person at the time of becoming a client. *See infra* note 403.

[316] These considerations have, for example, been incorporated in our rules permitting a non-U.S. adviser relying on the private adviser exemption to count only clients that are U.S. persons when determining whether it has 14 or fewer clients. Rule 203(b)(3)–1(b)(5) (''If you have your principal office and place of business outside the United States, you are not required to count clients that are not United States residents, but if your principal office and place of business is in the United States, you must count all clients.''). *See infra* note 392. The Dodd-Frank Act repeals the private adviser exemption as of July 21, 2011, and we are rescinding rule 203(b)(3)–1 in the Implementing Adopting Release. *See* Implementing Adopting Release, *supra* note 32, at section II.D.2.a.

[317] *See, e.g.,* ABA Letter; Comment Letter of Debevoise & Plimpton LLP (Jan. 24, 2011) (''Debevoise Letter''); Comment Letter of Dechert LLP (on behalf of Foreign Adviser) (Jan. 24, 2011) (''Dechert Foreign Adviser Letter''); Gunderson Dettmer Letter; Merkl Letter; Comment Letter of Katten Muchin Rosenman LLP (on behalf of Certain Non-U.S. Advisers) (Jan. 24, 2011) (''Katten Foreign Advisers Letter''); Comment Letter of MAp Airports Limited (Jan. 24, 2011) (''MAp Airports Letter''); Comment Letter of Wellington Financial LP (Jan. 24, 2011) (''Wellington Letter'').

[318] *See, e.g.,* Letter of Sadis & Goldberg (Jan. 11, 2011) (submitted in connection with the Implementing Proposing Release, avail. at *http://www.sec.gov/comments/s7-36-10/s73610.shtml*) (''Sadis & Goldberg Implementing Release Letter'') (exemption should be available to advisers who, in addition to advising private funds, also have five or fewer clients that are separately managed accounts); Comment Letter of Seward & Kissel LLP (Jan. 31, 2011) (''Seward Letter'') (advisers should be permitted to rely on multiple exemptions and advisers relying on the private fund adviser exemption should be permitted to engage in ''some activities that do not involve advising clients and have no effect on assets under management,'' such as providing research to institutional investors).

[319] One commenter argued that a U.S. adviser should be permitted to treat as a private fund for purposes of rule 203(m)–1 a non-U.S. fund that has not made an offering to U.S. persons. *See* Comment Letter of Fox Horan & Camerini LLP (Dec. 22, 2010). *See also supra* notes 294 and 313. We agree.

[320] In contrast to the foreign private adviser exemption discussed in Section II.C, a non-U.S. adviser relying on the private fund adviser exemption may have a U.S. place of business, but a non-U.S. adviser need not have a U.S. place of business to rely on the private fund adviser exemption.

[321] NASBIC/SBIA Letter; Seward Letter.

[322] The same analysis also would apply to non-U.S. advisers, which may not for example combine the private fund adviser exemption and the foreign private adviser exemption (*e.g.,* a non-U.S. adviser could not advise private funds that are United States persons with assets in excess of $25 million in reliance on the private fund adviser exemption and also advise other clients in the United States that are not private funds in reliance on the foreign private adviser exemption). We also note that depending on the facts and circumstances, we may view two or more separately formed advisory entities, each of which purports to rely on a separate exemption from registration, as a single adviser for purposes of assessing the availability of exemptions from registration. *See infra* note 506. *See also* section 208(d), which prohibits a person from doing, indirectly or through or by another person, any act or thing which it would be unlawful for such person to do directly.

[323] *See* ABA Letter (single-investor funds formed at the request of institutional investors should be considered private funds if they are managed in a manner similar to the adviser's related multi-investor private funds, have audited financial statements, and are treated as private funds for purposes of the custody rule); Comment Letter of Alternative Investment Management Association (Jan. 24, 2011) (''AIMA Letter'') (sought guidance concerning single-investor funds and managed accounts structured as funds); Commenter Letter of Managed Funds Association (Jan. 24, 2011) (''MFA Letter'') (asserted that single-investor funds are ''private funds'').

[324] We would view a structure with no purpose other than circumvention of the Advisers Act as inconsistent with section 208(d). *See, e.g., Custody*

Continued

there are circumstances in which it may be appropriate for an adviser to treat a single-investor fund as a private fund for purposes of rule 203(m)–1.[325]

One commenter argued that advisers should be permitted to treat as a private fund for purposes of rule 203(m)–1 a fund that also qualifies for another exclusion from the definition of ''investment company'' in the Investment Company Act in addition to section 3(c)(1) or 3(c)(7), such as section 3(c)(5)(C), which excludes certain real estate funds.[326] These funds would not be private funds, because a ''private fund'' is a fund that would be an investment company as defined in section 3 of the Investment Company Act but for section 3(c)(1) or 3(c)(7) of that Act.[327]

The commenter argued, and we agree, that an adviser should nonetheless be permitted to advise such a fund and still rely on the exemption. Otherwise, for example, an adviser to a section 3(c)(1) or 3(c)(7) fund would lose the exemption if the fund also qualified for another exclusion, even though the adviser may be unaware of the fund so qualifying and the fund does not purport to rely on the other exclusion. We do not believe that Congress intended that an adviser would lose the exemption in these circumstances. Accordingly, the definition of a ''qualifying private fund'' in rule 203(m)–1 permits an adviser to treat as a private fund for purposes of the exemption a fund that qualifies for an exclusion from the definition of investment company as defined in section 3 of the Investment Company Act in addition to the exclusions provided by section 3(c)(1) or 3(c)(7).[328]

An adviser relying on this provision must treat the fund as a private fund under the Advisers Act and the rules thereunder for all purposes.[329] This is to ensure that an adviser relying on the exemption as a result of our modification of the definition of a ''qualifying private fund'' is subject to the same Advisers Act requirements as other advisers relying on the exemption. Therefore, an adviser to a fund that also qualifies for another exclusion in addition to section 3(c)(1) or 3(c)(7) may treat the fund as a private fund and rely on rule 203(m)–1 if the adviser meets the rule's other conditions, provided that the adviser treats the fund as a private fund under the Advisers Act and the rules thereunder for all purposes including, for example, reporting on Form ADV, which requires advisers to report certain information about the private funds they manage.[330]

2. Private Fund Assets

a. Method of Calculation

Under rule 203(m)–1, an adviser must aggregate the value of all assets of private funds it manages to determine if the adviser is below the $150 million threshold.[331] Rule 203(m)–1 requires advisers to calculate the value of private fund assets pursuant to instructions in Form ADV, which provide a uniform method of calculating assets under management for regulatory purposes under the Advisers Act.[332]

In the Implementing Adopting Release, we are revising the instructions to Form ADV to provide a uniform method to calculate assets under management for regulatory purposes, including determining eligibility for Commission, rather than state, registration; reporting assets under management for regulatory purposes on Form ADV; and determining eligibility for two of the new exemptions from registration under the Advisers Act discussed in this Release.[333] Under the revised Form ADV instructions, as relevant here, advisers must include in their calculations proprietary assets and assets managed without compensation as well as uncalled capital commitments.[334] In addition, an adviser must determine the amount of its private fund assets based on the market value of those assets, or the fair value of those assets where market value is unavailable,[335] and must calculate the assets on a gross basis, *i.e.,* without deducting liabilities, such as accrued fees and expenses or the amount of any borrowing.[336]

Use of this uniform method will, we believe, result in more consistent asset calculations and reporting across the industry and, therefore, in a more coherent application of the Advisers Act's regulatory requirements and assessment of risk.[337] In addition, the uniform method of calculation is designed to ensure that, to the extent possible, advisers with similar amounts of assets under management will be treated similarly for regulatory purposes, including their ability to rely

of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2968 (Dec. 30, 2009) [75 FR 1456 (Jan. 11, 2010)] at n.132 (the use of a special purpose vehicle in certain circumstances could constitute a violation of section 208(d) of the Advisers Act). Thus, for example, an adviser would not be eligible for the exemption if it advises what is nominally a ''private fund'' but that in fact operates as a means for providing individualized investment advice directly to the investors in the ''private fund.'' In this case, the investors would also be clients of the adviser. *Cf.* Advisers Act rule 202(a)(30)–1(b)(1) (an adviser ''must count an owner [of a legal organization] as a client if [it] provide[s] investment advisory services to the owner separate and apart from the investment advisory services [it] provide[s] to the legal organization'').

[325] For example, a fund that seeks to raise capital from multiple investors but has only a single, initial investor for a period of time could be a private fund, as could a fund in which all but one of the investors have redeemed their interests.

[326] Dechert General Letter. *See also* Comment Letter of Baker McKenzie LLP (Jan. 26, 2011) (submitted in connection with the Implementing Proposing Release, avail. at *http://www.sec.gov/comments/s7-36-10/s73610.shtml*) (recommended that the Commission revise the calculation of assets under management on Form ADV to exclude assets in certain funds relying on section 3(c)(5)(C) of the Investment Company Act); Comment Letter of DLA Piper LLP (US) (submitted by John H. Heuberger and Hal M. Brown) (similarly sought to exempt advisers to certain funds relying on section 3(c)(5)(C)).

[327] Section 202(a)(29) of the Advisers Act (defining the term ''private fund'').

[328] Rule 203(m)–1(d)(5). This provision may also apply to non-U.S. funds that seek to comply with section 7(d) of the Investment Company Act and exclusions in addition to those provided by section 3(c)(1) or 3(c)(7) of that Act.

[329] Rule 203(m)–1(d)(5).

[330] *See* Item 7.B of Form ADV, Part 1A.

[331] Rule 203(m)–1(d)(4).

[332] *See* rules 203(m)–1(a)(2); 203(m)–1(b)(2); 203(m)–1(d)(1) (defining ''assets under management'' to mean ''regulatory assets under management'' in item 5.F of Form ADV, Part 1A); 203(m)–1(d)(4) (defining ''private fund assets'' to mean the ''assets under management'' attributable to a ''qualifying private fund''). In the case of a subadviser, an adviser must count only that portion of the private fund assets for which it has responsibility. *See* Form ADV: Instructions for Part 1A, instr. 5.b.(2) (explaining that, if an adviser provides continuous and regular supervisory or management services for only a portion of a securities portfolio, it should include only that portion of the securities portfolio for which it provides such services, and that an adviser should exclude, for example, the portion of an account under management by another person).

[333] *See* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3 (discussing the rationale underlying the new instructions for calculating assets under management for regulatory purposes).

[334] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(1), (4). Advisers also must include in their ''regulatory assets under management'' assets of non-U.S. clients. *See* Implementing Adopting Release, *supra* note 32, at n.76 (explaining that a domestic adviser dealing exclusively with non-U.S. clients must register with the Commission if it uses any U.S. jurisdictional means in connection with its advisory business unless the adviser qualifies for an exemption from registration or is prohibited from registering with the Commission). *See also infra* note 415.

[335] This valuation requirement is described in terms similar to the definition of ''value'' in the Investment Company Act, which looks to market value when quotations are readily available and, if not, then to fair value. *See* Investment Company Act section 2(a)(41). *See also* Implementing Adopting Release, *supra* note 32, at n.91 and accompanying text. Other standards also may be expressed as requiring that a determination of fair value be based on market quotations where they are readily available. *Id.*

[336] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(2), (4). *See also* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

[337] *See* Proposing Release, *supra* note 26, discussion at section II.B.2. *See also* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

on the private fund adviser exemption and the foreign private adviser exemption, both of which refer to an adviser's assets under management.[338]

Many commenters expressed general support for a uniform method of calculating assets under management in order to maintain consistency for registration and risk assessment purposes.[339] The proposals to use fair value of private fund assets and to include uncalled capital commitments in private fund assets also received support.[340] As discussed below, however, a number of commenters disagreed with or sought changes to one or more of the elements of the proposed method of calculating assets under management for regulatory purposes set forth in Form ADV.[341] None of the commenters, however, suggested alternative approaches that could accommodate the specific changes they sought and achieve our goals of consistent asset calculations and reporting discussed above, and we are not aware of such an alternative approach.

For example, some commenters sought to exclude from the calculation proprietary assets and assets managed without compensation because such a requirement would be inconsistent with the statutory definition of ''investment adviser.'' [342] Although a person is not an ''investment adviser'' for purposes of the Advisers Act unless it receives compensation for providing advice to others, once a person meets that definition (by receiving compensation from *any* client to which it provides advice), the person is an adviser, and the Advisers Act applies to the relationship between the adviser and any of its clients (whether or not the adviser receives compensation from them).[343] Both the private fund adviser exemption and the foreign private adviser exemption are conditioned upon an adviser not exceeding specified amounts of ''assets under management.'' [344] Neither statutory exemption limits the types of assets that should be included in this term, and we do not believe that such limits would be appropriate.[345] In our view, the source of the assets managed should not affect the availability of the exemptions.

We also do not expect that advisers' principals (or other employees) generally will cease to invest alongside the advisers' clients as a result of the inclusion of proprietary assets, as some commenters suggested.[346] If private fund investors value their advisers' co-investments as suggested by these commenters, we expect that the investors will demand them and their advisers will structure their businesses accordingly.[347]

Other commenters objected to calculating regulatory assets under management on the basis of gross, rather than net, assets.[348] They argued, among other things, that gross asset measurements would be confusing,[349] complex,[350] and inconsistent with industry practice.[351] However, nothing in the current instructions suggests that liabilities should be deducted from the calculation of an adviser's assets under management. Indeed, since 1997, the instructions have stated that an adviser should not deduct securities purchased on margin when calculating its assets

[338] *See* Proposing Release, *supra* note 26, discussion at section V.B.1 (explaining that, because the instructions to Form ADV previously permitted advisers to exclude certain types of managed assets, ''it is not possible to conclude that two advisers reporting the same amount of assets under management are necessarily comparable because either adviser may elect to exclude all or some portion of certain specified assets that it manages'').

[339] *See, e.g.,* AFL-CIO Letter (''We support the SEC's proposal to require funds to use a uniform standard to calculate their assets under management and agree that it is important that the calculation account for asset appreciation.''); AFR Letter (''AFR supports the SEC's proposal to require funds to use a uniform standard to calculate their assets under management, and to account for asset appreciation in those calculations''); AIMA Letter (''We agree that a clear and unified approach for calculation of AUM is necessary and we believe that using as a standard the assets for which an adviser has 'responsibility' is appropriate.''); Dechert General Letter (commented on particular aspects of the proposed uniform method but stated ''[w]e generally agree with the Commission's initiative in creating a single uniform method of calculating an adviser's assets under management ('AUM') for purposes of determining an adviser's registration status ('Regulatory AUM')''). *See also* Implementing Adopting Release, *supra* note 32, at n.68 and accompanying text.

[340] *See* ABA Letter (supported use of fair value); AIMA Letter (supported including uncalled capital commitments, provided that the adviser has full contractual rights to call that capital and would be given responsibility for management of those assets).

[341] *See also* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

[342] *See, e.g.,* Dechert General Letter; Seward Letter. *See also* ABA Letter; AIMA Letter (suggested a 12-month exclusion for seed capital consistent with the Volcker rule); Dechert Foreign Adviser Letter; EFAMA Letter; Katten Foreign Advisers Letter; MFA Letter. Under section 202(a)(11) of the Advisers Act, the definition of ''investment adviser'' includes, among others, ''any person who, for compensation, engages in the business of advising others * * * as to the value of securities or as to the advisability of investing in, purchasing, or selling securities * * *.'' One commenter argued that including proprietary assets would deter non-U.S. advisers that manage large amounts of proprietary assets from establishing U.S. operations. Katten Foreign Advisers Letter. Such an adviser, however, would not be ineligible for the private fund adviser exemption merely because it established U.S. operations. As discussed below, a non-U.S. adviser may rely on the private fund adviser exemption while also having one or more U.S. places of business, provided it complies with the exemption's conditions. *See infra* Section II.B.3.

[343] *See* Implementing Adopting Release, *supra* note 32, at n.74 and accompanying text. Several commenters also asserted that including proprietary assets as proposed would in effect require a wholly owned control affiliate to register as an investment adviser. *See, e.g.,* Comment Letter of American Insurance Association (Jan. 24, 2011) (''AIA Letter''); Comment Letter of Katten Muchin Rosenman LLP (on behalf of APG Asset Management US Inc.) (Jan. 21, 2011); Comment Letter of Katten Muchin Rosenman LLP (Jan. 24, 2011) (on behalf of Certain Non-U.S. Insurance Companies) (''Katten Foreign Insurance Letter''). Whether a control affiliate is deemed to be an ''investment adviser'' under the Advisers Act because, among other things, it ''engages in the business of advising others'' will depend on the particular facts and circumstances. The calculation of regulatory assets under management, including the mandatory or optional inclusion of specified assets in that calculation, is applicable after the entity is determined to be an investment adviser.

[344] *See* sections 203(m) and 202(a)(30) of the Advisers Act.

[345] *See also* Implementing Adopting Release, *supra* note 32, at n.75 and accompanying text (explaining that ''the management of 'proprietary' assets or assets for which the adviser may not be compensated, when combined with other client assets, may suggest that the adviser's activities are of national concern or have implications regarding the reporting for the assessment of systemic risk'').

[346] *See, e.g.,* ABA Letter; Katten Foreign Advisers Letter; Seward Letter.

[347] Moreover, we note that an adviser seeking to rely on rule 203(m)–1 may have only private fund clients and must include the assets of all of its private fund clients when determining if it remains under the rule's $150 million threshold.

[348] ABA Letter; Dechert General Letter; Merkl Letter; MFA Letter; Seward Letter; Shearman Letter.

[349] Dechert General Letter. *See also* Implementing Adopting Release, *supra* note 32, at n.80 and accompanying text.

[350] MFA Letter.

[351] *See, e.g.,* Merkl Letter; Shearman Letter. One commenter asserted that the ''inclusion of borrowed assets may create an incentive for an adviser to reduce client borrowings to qualify for an exemption from registration even though reducing leverage may not be in the best interest of its clients,'' and that it ''could encourage advisers to use methods other than borrowing to obtain financial leverage for their clients (*e.g.,* through swaps or other derivative products, which could be disadvantageous to clients due to the counterparty risks and increased costs that they entail).'' Seward Letter. *See also* Gunderson Dettmer Letter. We note that advisers, as fiduciaries, may not subordinate clients' interests to their own such as by altering their investing behavior in a way that is not in the client's best interest in an attempt to remain under the exemption's $150 million threshold. Another commenter argued that a gross assets calculation would make calculations of regulatory assets under management more volatile. *See* Dechert General Letter. As discussed in more detail below, we are permitting advisers relying on rule 203(m)–1 to calculate their private fund assets annually, rather than quarterly as proposed, and are extending the period during which certain advisers may file their registration applications if their private fund assets exceed the exemption's $150 million threshold. *See infra* Section II.B.2.b. We believe these measures will substantially mitigate or eliminate any volatility that may be caused by using a gross assets measurement, as well as potential volatility in currency exchange rates identified by some commenters. *See* CompliGlobe Letter; EVCA Letter; O'Melveny Letter.

under management.[352] Whether a client has borrowed to purchase a portion of the assets managed does not seem to us a relevant consideration in determining the amount an adviser has to manage, the scope of the adviser's business, or the availability of the exemptions.[353]

Moreover, we are concerned that the use of net assets could permit advisers to highly leveraged funds to avoid registration under the Advisers Act even though the activities of such advisers may be significant and the funds they advise may be appropriate for systemic risk reporting.[354] One commenter argued, in contrast, that it would be ''extremely unlikely that a net asset limit of $150,000,000 in private funds could be leveraged into total investments that would pose any systemic risk.'' [355] But a comprehensive view of systemic risk requires information about certain funds that may not present systemic risk concerns when viewed in isolation, but nonetheless are relevant to an assessment of systemic risk across the economy. Moreover, because private funds are not subject to the leverage restrictions in section 18 of the Investment Company Act, a private fund with less than $150 million in net assets could hold assets far in excess of that amount as a result of its extensive use of leverage. In addition, under a net assets test such a fund would be treated similarly for regulatory purposes as a fundamentally different fund, such as one that did not make extensive use of leverage and had $140 million in net assets.

The use of gross assets also need not cause any investor confusion, as some commenters suggested.[356] Although an adviser will be required to use gross (rather than net) assets for purposes of determining whether it is eligible for the private fund adviser or the foreign private adviser exemptions (among other purposes), we would not preclude an adviser from holding itself out to its clients as managing a net amount of assets as may be its custom.[357]

One commenter opposed the requirement that advisers include in the calculation of private fund assets uncalled capital commitments, asserting that the uncalled capital remains under the management of the fund investor.[358] As we noted in the Proposing Release, in the early years of a private fund's life, its adviser typically earns fees based on the total amount of capital commitments, which we presume reflects compensation for efforts expended on behalf of the fund in preparation for the investments.[359]

A number of commenters objected to the requirement to determine private fund assets based on fair value, generally arguing that the requirement would cause those advisers that did not use fair value methods to incur additional costs, especially if the private funds' assets that they manage are illiquid and therefore difficult to fair value.[360] We noted in the Proposing Release that we understood that many private funds already value assets in accordance with U.S. generally accepted accounting principles (''GAAP'') or other international accounting standards that require the use of fair value, citing letters we had received in connection with other rulemaking initiatives.[361] We are sensitive to the costs this new requirement will impose. We believe, however, that this approach is warranted in light of the unique regulatory purposes of the calculation under the Advisers Act. We estimated these costs in the Proposing Release [362] and we have taken several steps to mitigate them.[363]

While many advisers will calculate fair value in accordance with GAAP or another international accounting standard,[364] other advisers acting consistently and in good faith may utilize another fair valuation standard.[365] While these other standards may not provide the quality of information in financial reporting (for example, of private fund returns), we expect these calculations will provide sufficient consistency for the purposes that regulatory assets under management serve in our rules, including rule 203(m)–1.[366]

Commenters also suggested alternative approaches to valuation, including the use of local accounting principles; [367] the methodology used to report to the private fund's investors; [368] the methodologies described in a client's governing documents or offering materials; [369] historical cost; [370] and aggregate capital raised by a private

[352] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(2), as in effect before it was amended by the Implementing Adopting Release (''Do not deduct securities purchased on margin.''). Instruction 5.b.(2), as amended in the Implementing Adopting Release, provides ''Do not deduct any outstanding indebtedness or other accrued but unpaid liabilities.'' *See* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

[353] *See id.*

[354] *See id.,* at n.82 and preceding and accompanying text.

[355] ABA Letter.

[356] *See, e.g.,* Dechert General Letter. *See also* Implementing Adopting Release, *supra* note 32, at n.80 and accompanying text.

[357] In addition, in response to commenters seeking clarification of the application of the gross assets calculation to mutual funds, short positions and leverage, we expect that advisers will continue to calculate their gross assets as they do today, even if they currently only calculate gross assets as an intermediate step to compute their net assets. *See* Implementing Adopting Release, *supra* note 32, at n.83. In the case of pooled investment vehicles with a balance sheet, for instance, an adviser could include in the calculation the total assets of the entity as reported on the balance sheet. *Id.*

[358] *See* Merkl Letter.

[359] Proposing Release, *supra* note 26, discussion at section II.B.2. *See also* Implementing Adopting Release, supra note 32, at n.90 and accompanying text.

[360] *See, e.g.,* Gunderson Dettmer Letter; Merkl Letter; O'Melveny Letter; Seward Letter; Wellington Letter.

[361] *See* Proposing Release, *supra* note 26, at n.196 and accompanying text.

[362] *See id.,* at n.326 and accompanying text.

[363] We recognize that although these steps will provide advisers greater flexibility in calculating the value of their private fund assets, they also will result in valuations that are not as comparable as they could be if we specified a fair value standard (*e.g.,* as specified in GAAP).

[364] Several commenters asked that we not require advisers to fair value private fund assets in accordance with GAAP for purposes of calculating regulatory assets under management because many funds, particularly offshore ones, do not use GAAP and such a requirement would be unduly burdensome. *See, e.g.,* EFAMA Letter; Katten Foreign Advisers Letter. We did not propose such a requirement, nor are we adopting one. *See* Implementing Adopting Release, *supra* note 32, at n.98.

[365] *See id.,* at n.99 and accompanying text. Consistent with this good faith requirement, we would expect that an adviser that calculates fair value in accordance with GAAP or another basis of accounting for financial reporting purposes will also use that same basis for purposes of determining the fair value of its regulatory assets under management. *Id.*

[366] *See id.,* at n.100 and accompanying text. In addition, the fair valuation process need not be the result of a particular mandated procedure and the procedure need not involve the use of a third-party pricing service, appraiser or similar outside expert. An adviser could rely on the procedure for calculating fair value that is specified in a private fund's governing documents. The fund's governing documents may provide, for example, that the fund's general partner determines the fair value of the fund's assets. Advisers are not, however, required to fair value real estate assets only in those limited circumstances where real estate assets are not required to be fair valued for financial reporting purposes under accounting principles that otherwise require fair value for assets of private funds. For example, in those cases, an adviser may instead value the real estate assets as the private fund does for financial reporting purposes. We note that the Financial Accounting Standards Board (''FASB'') has a current project related to investment property entities that may require real estate assets subject to that accounting standard to be measured by the adviser at fair value. *See* FASB Project on *Investment Properties*. We also note that certain international accounting standards currently permit, but do not require, fair valuation of certain real estate assets. *See* International Accounting Standard 40, *Investment Property*. To the extent that an adviser follows GAAP or another accounting standard that requires or in the future requires real estate assets to be fair valued, this limited exception to the use of fair value measurement for real estate assets would not be available.

[367] Dechert Foreign Adviser Letter; EFAMA Letter.

[368] Merkl Letter; Wellington Letter.

[369] AIMA Letter; MFA Letter; Seward Letter.

[370] O'Melveny Letter.

fund.[371] Use of these approaches would limit our ability to compare data from different advisers and thus would be inconsistent with our goal of achieving more consistent asset calculations and reporting across the industry, as discussed above, and also could result in advisers managing comparable amounts of assets under management being subject to different registration requirements. Moreover, these alternative approaches could permit advisers to circumvent the Advisers Act's registration requirements. Permitting the use of any valuation standard set forth in the governing documents of the private fund other than fair value could effectively yield to the adviser the choice of the most favorable standard for determining its registration obligation as well as the application of other regulatory requirements.

For these reasons and as we proposed, rule 203(m)–1 requires advisers to calculate the value of private fund assets pursuant to the instructions in Form ADV.

b. Frequency of Calculation and Transition Period

An adviser relying on the exemption provided by rule 203(m)–1 must annually calculate the amount of the private fund assets it manages and report the amount in its annual updating amendments to its Form ADV.[372] If an adviser reports in its annual updating amendment that it has $150 million or more of private fund assets under management, the adviser is no longer eligible for the private fund adviser exemption.[373] Advisers thus may be required to register under the Advisers Act as a result of increases in their private fund assets that occur from year to year, but changes in the amount of an adviser's private fund assets between annual updating amendments will not affect the availability of the exemption.

We proposed to require advisers relying on the exemption to calculate their private fund assets each quarter to determine if they remain eligible for the exemption. Commenters persuaded us, however, that requiring advisers to calculate their private fund assets annually in connection with their annual updating amendments to Form ADV would be more appropriate because it would likely result in the same advisers becoming registered each year while reducing the costs and burdens associated with quarterly calculations.[374] In addition, annual calculations provide a range of dates on which an adviser may calculate its private fund assets, addressing concerns raised by commenters about shorter-term fluctuations in assets under management.[375] The rule as adopted also is consistent with the timeframes for valuing assets under management and registering with the Commission applicable to state-registered advisers switching from state to Commission registration.[376]

As noted above, if an adviser reports in its annual updating amendment that it has $150 million or more of private fund assets under management, the adviser is no longer eligible for the exemption and must register under the Advisers Act unless it qualifies for another exemption. An adviser that has complied with all Commission reporting requirements applicable to an exempt reporting adviser as such, however, may apply for registration with the Commission up to 90 days after filing the annual updating amendment, and may continue to act as a private fund adviser, consistent with the requirements of rule 203(m)–1, during this transition period.[377] This 90-day transition period is not available to advisers that have failed to comply with all Commission reporting requirements applicable to an exempt reporting adviser as such or that have accepted a client that is not a private fund.[378] These advisers therefore should plan to register before becoming ineligible for the exemption.

Commenters who addressed the issue generally supported the proposed transition period, but requested that we extend the transition period beyond one calendar quarter as proposed or otherwise make it more broadly available.[379] Requiring annual calculations extends the transition period, as commenters recommended, and is consistent with the amount of time provided to state-registered advisers switching to Commission registration. Advisers to whom the transition period is available will have up to 180 days after the end of their fiscal years to register.[380]

One commenter argued that the transition period should be available to all advisers relying on rule 203(m)–1, including those that had not complied with their reporting requirements.[381] The transition period is a safe harbor that provides advisers flexibility in

[371] Gunderson Dettmer Letter.

[372] An adviser relying on rule 203(m)–1 must file an annual updating amendment to its Form ADV within 90 days after the end of its fiscal year, and must calculate its private fund assets in the manner described in the instructions to Form ADV within 90 days prior to the date it makes the filing. *See* rule 203(m)–1(c); rule 204–4(a); General Instruction 4 to Form ADV; Form ADV: Instructions for Part 1A, instr. 5.b. The adviser must report its private fund assets on Section 2.B of Schedule D to Form ADV. Advisers also must report their private fund assets when they file their initial reports as exempt reporting advisers. *See* Implementing Adopting Release, *supra* note 32, discussion at section II.B.

[373] Under Item 2.B of Part 1A of Form ADV, an adviser relying on rule 203(m)–1 must complete Section 2.B of Schedule D, which requires the adviser to provide the amount of the ''private fund assets'' it manages. A note to Section 2.B of Schedule D provides that ''private fund assets'' has the same meaning as under rule 203(m)–1, and that non-U.S. advisers should only include private fund assets that they manage at a place of business in the United States. *See also infra* notes 377–378 and accompanying text.

[374] A number of commenters argued, among other things, that calculating private fund assets quarterly would: (i) Impose unnecessary costs and burdens on advisers, some of whom might not otherwise perform quarterly valuations; and (ii) inappropriately permit shorter-term fluctuations in assets under management to require advisers to register. *See* ABA Letter; AIMA Letter; Dechert Foreign Adviser Letter; Dechert General Letter; EFAMA Letter; Katten Foreign Advisers Letter; Merkl Letter; NASBIC/SBIA Letter; Seward Letter.

[375] As discussed above, an adviser relying on rule 203(m)–1 must calculate its private fund assets in the manner described in the instructions to Form ADV within 90 days prior to the date it files its annual updating amendment to its Form ADV.

[376] *See* General Instruction 4 to Form ADV; Form ADV: Instructions for Part 1A, instr. 5.b.; rule 203A–1(b). *See also* ABA Letter (''We believe an annual measurement would be most appropriate, especially since advisers exempt from registration because they do not meet the $100,000,000 asset threshold will calculate their assets for this purpose annually, and an annual test for both purposes has a compelling consistency.'').

[377] General Instruction 15 to Form ADV. *See also* Implementing Adopting Release, *supra* note 32, discussion at section II.B.5. We removed what was proposed rule 203(m)–1(d), which contained the proposed transition period, and renumbered the final rule accordingly. The transition period as adopted is described in General Instruction 15 to Form ADV. Rule 203(m)–1(c) refers advisers to this instruction. This transition period is available to an adviser that has complied with ''all [Commission] reporting requirements applicable to an exempt reporting adviser as such,'' rather than ''all applicable Commission reporting requirements,'' as proposed. This condition reflects the importance of the Advisers Act reporting requirements applicable to advisers relying on the private fund adviser exemption.

[378] General Instruction 15 to Form ADV. *See also* Implementing Adopting Release, *supra* note 32, discussion at section II.B.5. An adviser would lose the exemption immediately upon accepting a client that is not a private fund. Accordingly, for the adviser to comply with the Advisers Act, the adviser's Commission registration must be approved before the adviser accepts a client that is not a private fund. Moreover, even an adviser to whom the transition period is available could not, consistent with the Advisers Act, accept a client that is not a private fund until the Commission approves its registration. These same limitations apply to non-U.S. advisers with respect to their clients that are United States persons.

[379] ABA Letter; AIMA Letter; CompliGlobe Letter; Gunderson Dettmer Letter; Katten Foreign Advisers Letter; Sadis & Goldberg Implementing Release Letter; Seward Letter; Shearman Letter.

[380] An adviser must file its annual Form ADV updating amendment within 90 days after the end of its fiscal year and, if the transition period is available, may apply for registration up to 90 days after filing the amendment. *See also supra* note 378.

[381] Shearman Letter.

complying with rule 203(m)–1, and we continue to believe that it would be inappropriate to extend this benefit to advisers that have not met their reporting requirements.[382]

3. Assets Managed in the United States

Under rule 203(m)–1, all of the private fund assets of an adviser with a principal office and place of business in the United States are considered to be ''assets under management in the United States,'' even if the adviser has offices outside of the United States.[383] A non-U.S. adviser, however, need only count private fund assets it manages at a place of business in the United States toward the $150 million asset limit under the exemption.[384]

As discussed in the Proposing Release, the rule deems all of the assets managed by an adviser to be managed ''in the United States'' if the adviser's ''principal office and place of business'' is in the United States. This is the location where the adviser controls, or has ultimate responsibility for, the management of private fund assets, and therefore is the place where all the adviser's assets are managed, although day-to-day management of certain assets may also take place at another location.[385] For most advisers, this approach will avoid difficult attribution determinations that would be required if assets are managed by teams located in multiple jurisdictions, or if portfolio managers located in one jurisdiction rely heavily on research or other advisory services performed by employees located in another jurisdiction.

Most commenters who addressed the issue supported our proposal to treat ''assets under management in the United States'' for non-U.S. advisers as those assets managed at a U.S. place of business.[386] One commenter did, however, urge us to presume that a non-U.S. adviser's assets are managed from its principal office and place of business to avoid the inherent difficulties in determining the location from which any particular assets of a private fund are managed if an adviser operates in multiple jurisdictions.[387] As we stated in the Proposing Release, this commenter's approach ignores situations in which day-to-day management of some assets of the private fund does in fact take place ''in the United States.'' [388] It also would permit an adviser engaging in substantial advisory activities in the United States to escape our regulatory oversight merely because the adviser's principal office and place of business is outside of the United States. This consequence is at odds not only with section 203(m), but also with the foreign private adviser exemption discussed below in which Congress specifically set forth circumstances under which a non-U.S. adviser may be exempt provided it does not have any place of business in the United States, among other conditions.[389]

In addition, some commenters supported an alternative approach under which we would interpret ''assets under management in the United States'' by reference to the source of the assets (*i.e.,* U.S. private fund investors).[390] One of the commenters argued that our interpretation would disadvantage U.S.-based advisers by permitting non-U.S. advisers to accept substantial amounts of money from U.S. investors without having to comply with certain U.S. regulatory requirements, and cause U.S. advisers to move offshore or close U.S. offices to avoid regulation.[391]

As we explained in the Proposing Release, we believe that our interpretation recognizes that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and is in keeping with general principles of international comity.[392] The rule also is designed to encourage the participation of non-U.S. advisers in the U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on a non-U.S. adviser's non-U.S. advisory business.[393] Non-U.S. advisers relying on rule 203(m)–1 will remain subject to the Advisers Act's antifraud provisions and will become subject to the requirements applicable to exempt reporting advisers.

One commenter proposed an additional interpretation under which we would determine the ''assets under management in the United States'' for U.S. advisers only by reference to the amount of assets invested, or ''in play,'' in the United States.[394] We decline to adopt this approach because it would be difficult for advisers to ascertain and monitor which assets are invested in the United States, and this approach thus could be confusing and difficult to apply on a consistent basis. For example, an adviser might invest in the American Depositary Receipts of a company incorporated in Bermuda that: (i) Engages in mining operations in Canada, the principal trading market for its common stock; and (ii) derives the majority of its revenues from exports to the United States. It is not clear whether

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[382] *See* Proposing Release, *supra* note 26, discussion at n.223 and accompanying text.

[383] Rule 203(m)–1(a). The rule defines the ''United States'' to have the same meaning as in rule 902(l) of Regulation S under the Securities Act, which is ''the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.'' Rule 203(m)–1(d)(7); 17 CFR 230.902(l).

[384] Rule 203(m)–1(b). Any assets managed at a U.S. place of business for clients other than private funds would make the exemption unavailable. *See also supra* note 378. We revised this provision to refer to assets managed ''at'' a place of business in the United States, rather than ''from'' a place of business in the United States as proposed. The revised language is intended to reflect more clearly the rule's territorial focus on the location at which the asset management takes place.

[385] This approach is similar to the way we have identified the location of the adviser for regulatory purposes under our current rules, which define an adviser's principal office and place of business as the location where it ''directs, controls and coordinates'' its advisory activities, regardless of the location where some of the advisory activities might occur. *See* rule 203A–3(c); rule 222–1.

[386] ABA Letter; Comment Letter of Association Française de la Gestion financière (Jan. 24, 2011) (''AFG Letter'') (sought clarification that assets managed from non-U.S. offices are exempted); AIMA Letter; Comment Letter of Avoca Capital Holdings (Dec. 21, 2010) (''Avoca Letter''); Debevoise Letter; Dechert Foreign Adviser Letter; EFAMA Letter; Gunderson Dettmer Letter; Katten Foreign Advisers Letter; MAp Airports Letter; Merkl Letter; Comment Letter of Non-U.S. Adviser (Jan. 24, 2011) (''Non-U.S. Adviser Letter''). *Cf.* Sen. Levin Letter (advisers managing assets in the United States of funds incorporated outside of the United States ''are exactly the type of investment advisers to which the Dodd-Frank Act's registration requirements are intended to apply'').

[387] Katten Foreign Advisers Letter.

[388] *See* Proposing Release, *supra* note 26, at nn.204–205 and accompanying text.

[389] *See infra* Section II.C.

[390] Comment Letter of Portfolio Manager (Jan. 24, 2011) (''Portfolio Manager Letter''); Merkl Letter (suggested that it ''may be useful'' to look both to assets managed from a U.S. place of business and assets contributed by U.S. private fund investors to address both investor protection and systemic risk concerns).

[391] Portfolio Manager Letter. *See also* Comment Letter of Tuttle (Nov. 30, 2010) (submitted in connection with the Implementing Adopting Release, avail. at *http://www.sec.gov/comments/s7–35–10/s73510.shtml*) (''Tuttle Implementing Release Letter'') (argued that businesses may move offshore if they become too highly regulated in the United States).

[392] *See* Proposing Release, *supra* note 26, at n.207 (identifying Regulation S and Exchange Act rule 15a–6 as examples of Commission rules that adopt a territorial approach).

[393] *See generally* Division of Investment Management, SEC, *Protecting Investors: A Half Century of Investment Company Regulation,* May 1992 (''1992 Staff Report''), at 223–227 (recognizing that non-U.S. advisers that registered with the Commission were arguably subject to all of the substantive provisions of the Advisers Act with respect to their U.S. and non-U.S. clients, which could result in inconsistent regulatory requirements or practices imposed by the regulations of their local jurisdiction and the U.S. securities laws; in response, advisers could form separate and independent subsidiaries but this could result in U.S. clients having access to a limited number of advisory personnel and reduced access by the U.S. subsidiary to information or research by non-U.S. affiliates).

[394] Comment Letter of Richard Dougherty (Dec. 14, 2010) (''Dougherty Letter'').

these investments should be considered ''in play'' in the United States.

Another commenter urged us to exclude assets managed by a U.S. adviser at its non-U.S. offices.[395] This, the commenter argued, would allow more U.S. advisers to rely on the exemption and allow us to focus our resources on larger advisers more likely to pose systemic risk. But the management of assets at these non-U.S. offices could have investor protection implications in the United States, such as by creating conflicts of interest for an adviser between assets managed abroad and those managed in the United States.

In addition, we sought comment as to whether, under the approach we are adopting today, some or most U.S. advisers with non-U.S. branch offices would re-organize those offices as subsidiaries in order to avoid attributing assets managed to the non-U.S. office.[396] No commenter suggested this would occur. We continue to believe that rule 203(m)–1 will have only a limited effect on multi-national advisory firms, which for tax or business reasons keep their non-U.S. advisory activities organizationally separate from their U.S. advisory activities. For these reasons, and our substantial interest in regulating all of the activities of U.S. advisers, we decline to revise rule 203(m)–1 as this commenter suggested.

Several commenters asked that we clarify whether certain U.S. activities or arrangements would result in an adviser having a ''place of business'' in the United States.[397] Commenters also sought guidance as to whether limited-purpose U.S. offices of non-U.S. advisers would be considered U.S. places of business (*e.g.,* offices conducting research or due diligence).[398]

Under rule 203(m)–1, if a non-U.S. adviser relying on the exemption has a place of business in the United States, all of the clients whose assets the adviser manages at that place of business must be private funds and the assets managed at that place of business must have a total value of less than $150 million. Rule 203(m)–1 defines a ''place of business'' by reference to rule 222–1(a) as any office where the adviser ''regularly provides advisory services, solicits, meets with, or otherwise communicates with clients,'' and ''any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.''

Whether a non-U.S. adviser has a place of business in the United States depends on the facts and circumstances, as discussed below in connection with the foreign private adviser exemption.[399] For purposes of rule 203(m)–1, however, the analysis frequently will turn not on whether a non-U.S. adviser has a U.S. place of business, but on whether the adviser manages assets, or has ''assets under management,'' at such a U.S. place of business. Under the Advisers Act, ''assets under management'' are the securities portfolios for which an adviser provides ''continuous and regular supervisory or management services.'' [400] This is an inherently factual determination. We would not, however, view providing research or conducting due diligence to be ''continuous and regular supervisory or management services'' at a U.S. place of business if a person outside of the United States makes independent investment decisions and implements those decisions.[401]

4. United States Person

Under rule 203(m)–1(b), a non-U.S. adviser may not rely on the exemption if it has any client that is a United States person other than a private fund.[402] Rule 203(m)–1 defines a ''United States person'' generally by incorporating the definition of a ''U.S. person'' in Regulation S under the Securities Act.[403] Regulation S looks generally to the residence of an individual to determine whether the individual is a United States person,[404] and also addresses the circumstances under which a legal person, such as a trust, partnership or a corporation, is a United States person.[405] Regulation S generally treats legal partnerships and corporations as United States persons if they are organized or incorporated in the United States, and analyzes trusts by reference to the residence of the trustee.[406] It treats discretionary accounts generally as United States persons if the fiduciary is a resident of the United States.[407] Commenters generally supported defining ''United States person'' by reference to Regulation S because, among other reasons, the definition is well developed and understood by advisers.[408]

Rule 203(m)–1 also contains a special rule that requires an adviser relying on the exemption to treat a discretionary or other fiduciary account as a United States person if the account is held for the benefit of a United States person by a non-U.S. fiduciary who is a related person of the adviser.[409] One

[395] Comment Letter of T.A. McKay & Co., Inc. (Nov. 23, 2010).

[396] *See* Proposing Release, *supra* note 26, at discussion following n.208.

[397] *See, e.g.,* EFAMA Letter.

[398] AIMA Letter; Dechert General Letter; EFAMA Letter. *See also* ABA Letter; Vedanta Letter.

[399] *See infra* Section II.C.4.

[400] Section 203A(a)(2) of the Advisers Act. The instructions to Item 5 of Form ADV provide guidance on the circumstances under which an adviser would be providing ''continuous and regular supervisory or management services with respect to an account.'' Form ADV: Instructions for Part 1A, instr. 5.b. The calculation of an adviser's assets under management at a U.S. place of business turns on whether the adviser is providing those services with respect to a particular account or accounts at a U.S. place of business.

[401] *See* Form ADV: Instructions for Part 1A, instr. 5.b(3)(b) (an adviser provides continuous and regular supervisory or management services with respect to an account if it has ''ongoing responsibility to select or make recommendations, based upon the needs of the client, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the client, [it is] responsible for arranging or effecting the purchase or sale''). These research or due diligence services, while not ''continuous and regular supervisory or management services,'' may be investment advisory services that, if performed at a U.S. location, would cause the adviser to have a place of business in the United States. *See infra* note 493 and accompanying text.

[402] In response to commenters seeking clarity on this point, we note that a non-U.S. adviser need not have one or more private fund clients that are United States persons in order to rely on the exemption.

[403] Rule 203(m)–1(d)(8). We are adding a note to rule 203(m)–1 that clarifies that a client will not be considered a United States person if the client was not a United States person at the time of becoming a client of the adviser. This will permit a non-U.S. adviser to continue to rely on rule 203(m)–1 if a non-U.S. client that is not a private fund, such as a natural person client residing abroad, relocates to the United States or otherwise becomes a United States person. As one commenter recognized, this also will establish similar treatment in these circumstances for non-U.S. advisers relying on rule 203(m)–1 or the foreign private adviser exemption, which contains an analogous note. *See* EFAMA Letter. *See also* Comment Letter of Investment Funds Institute of Canada (Jan. 24, 2011) (''IFIC Letter''). The note applicable to the foreign private adviser exemption generally describes the time when an adviser must determine if a person is ''in the United States'' for purposes of that exemption. *See infra* Section II.C.3.

[404] 17 CFR 230.902(k)(1)(i).

[405] *See, e.g.,* 17 CFR 230.902(k)(1) and (2).

[406] 17 CFR 230.902(k)(1)(ii) and (iv).

[407] 17 CFR 230.902(k)(1)(vii).

[408] AIMA Letter; CompliGlobe Letter; Debevoise Letter; Dechert General Letter; Gunderson Dettmer Letter; Katten Foreign Advisers Letter; O'Melveny Letter. As we explained in the Proposing Release, advisers to private funds and their counsel must today be familiar with the definition of ''U.S. person'' under Regulation S in order to comply with other provisions of the Federal securities laws. *See* Proposing Release, *supra* note 26, at n.217 and accompanying text.

[409] Rule 203(m)–1(d)(8) provides that a ''United States person means any person that is a 'U.S. person' as defined in [Regulation S], except that any discretionary account or similar account that is held for the benefit of a United States person by a dealer or other professional fiduciary is a United States person if the dealer or professional fiduciary is a related person of the investment adviser relying on [rule 203(m)–1] and is not organized, incorporated,

Continued

commenter expressed concern that the special rule is unnecessary while another who supported the special rule as proposed noted that the special rule should be ''narrowly drawn'' to avoid frustrating legitimate subadvisory relationships between non-U.S. advisers and their U.S. adviser affiliates.[410] We believe that the special rule is narrowly drawn and necessary to prevent advisers from purporting to rely on the exemption and establishing discretionary accounts for the benefit of U.S. clients with an offshore affiliate that would then delegate the actual management of the account back to the adviser.[411]

Another commenter suggested the rule apply a different approach with respect to business entities than that under Regulation S, which as noted above generally treats legal partnerships and corporations as U.S. persons if they are organized or incorporated in the United States.[412] The commenter suggested that advisers should instead look to a business entity's principal office and place of business in certain instances because an entity organized under U.S. law should not necessarily be treated as a United States person if it was formed by a non-United States person to pursue the entity's investment objectives.[413]

We decline to adopt this suggestion because we believe it is most appropriate to incorporate the definition of ''U.S. person'' in Regulation S with as few modifications as possible. As noted above, Regulation S provides a well-developed body of law with which advisers to private funds and their counsel must today be familiar in order to comply with other provisions of the Federal securities laws. Incorporating this definition in rule 203(m)–1, therefore, makes rule 203(m)–1 easier to apply and fosters consistency across the Federal securities laws. Deviations from the definition used in Regulation S, including an entirely different approach to defining a ''United States person,'' would detract from these benefits. Moreover, a test that looks to a business entity's principal office and place of business, as suggested by the commenter, would be difficult for advisers to apply. It frequently is unclear where an investment fund maintains its ''principal office and place of business'' because investment funds typically have no physical presence or employees other than those of their advisers.

C. Foreign Private Advisers

Section 403 of the Dodd-Frank Act replaces the current private adviser exemption from registration under the Advisers Act with a new exemption for a ''foreign private adviser,'' as defined in new section 202(a)(30).[414] The new exemption is codified as amended section 203(b)(3).

Under section 202(a)(30), a foreign private adviser is any investment adviser that: (i) Has no place of business in the United States; (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the investment adviser;[415] (iii) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25 million;[416] and (iv) does not hold itself out generally to the public in the United States as an investment adviser.[417] Section 202(a)(30) authorizes the Commission to increase the $25 million threshold ''in accordance with the purposes of this title.''[418]

Today we are adopting, substantially as proposed, new rule 202(a)(30)–1, which defines certain terms in section 202(a)(30) for use by advisers seeking to avail themselves of the foreign private adviser exemption, including: (i) ''investor;'' (ii) ''in the United States;'' (iii) ''place of business;'' and (iv) ''assets under management.''[419] We are also including in rule 202(a)(30)–1 the safe harbor and many of the client counting rules that appeared in rule 203(b)(3)–1.

1. Clients

Rule 202(a)(30)–1 includes a safe harbor for advisers to count clients for purposes of the definition of ''foreign private adviser'' that is similar to the safe harbor that has been included in rule 203(b)(3)–1.[420] The commenter that generally addressed this aspect of our proposed rule agreed with our approach,[421] which was designed to apply a well-developed body of law to

or (if an individual) resident in the United States.'' In contrast, under Regulation S, a discretionary account maintained by a non-U.S. fiduciary (such as an investment adviser) is not a ''U.S. person'' even if the account is owned by a U.S. person. *See* 17 CFR 230.902(k)(1)(vii); 17 CFR 230.902(k)(2)(i).

[410] Katten Foreign Advisers Letter; AIMA Letter (noting that the special rule should be narrowly drawn but also stating that ''[w]e understand the rationale for the special rule proposed by the Commission for discretionary accounts maintained outside the US for the benefit of US persons and we believe that that is an appropriate safeguard against avoidance of the registration requirement'').

[411] *See* Proposing Release, *supra* note 26, discussion at section II.B.4.

[412] Debevoise Letter (noted that, for example, ''a private fund, or an entity that is organized as part of a private fund, may be organized under Delaware law to meet certain regulatory and tax objectives, but the fund's principal office and place of business in fact may be outside the U.S.'').

[413] The commenter asserted that this approach ''would not be inconsistent with Regulation S itself, which treats a partnership or corporation organized under the laws of a foreign jurisdiction as a U.S. person if it was '[f]ormed by a U.S. person principally for the purpose of investing in securities not registered under the [Securities] Act, unless it is organized or incorporated, and owned, by accredited investors * * * who are not natural persons, estates or trusts.'' *See also* Comment Letter of Fulbright & Jaworski L.L.P. (on behalf of a German asset manager) (Jun. 15, 2011) (''Fulbright Letter'').

[414] Section 402 of the Dodd-Frank Act (providing a definition of ''foreign private adviser,'' to be codified at section 202(a)(30) of the Advisers Act). *See supra* notes 22 and 23 and accompanying text.

[415] One commenter suggested that a non-U.S. adviser with no place of business in the United States would not be subject to the Advisers Act unless the adviser has at least one direct U.S. client. *See* Katten Foreign Advisers Letter. *See also* ABA Letter. We note that section 203(a) of the Advisers Act provides that an adviser may not, unless registered, make use of any means or instrumentality of interstate commerce in connection with its business as an investment adviser. Hence, whether a non-U.S. adviser with no place of business in the United States and no U.S. clients would be subject to registration depends on whether there is sufficient use of U.S. jurisdictional means. *See also supra* note 334.

[416] Subparagraph (B) of section 202(a)(30) refers to the number of ''clients and investors in the United States in private funds,'' while subparagraph (C) refers to assets of ''clients *in the United States* and investors in the United States in private funds'' (emphasis added). As noted in the Proposing Release, we interpret these provisions consistently so that only clients *in the United States* and investors in the United States would be counted for purposes of subparagraph (B). *See* Proposing Release, *supra* note 26, at n.225.

[417] In addition, the exemption is not available to an adviser that ''acts as (I) an investment adviser to any investment company registered under the [Investment Company Act]; or (II) a company that has elected to be a business development company pursuant to section 54 of [that Act], and has not withdrawn its election.'' Section 202(a)(30)(D)(ii). As noted in the Proposing Release, we interpret subparagraph (II) to prohibit an adviser *that advises* a business development company from relying on the exemption. *See* Proposing Release, *supra* note 26, at n.226.

[418] Section 202(a)(30)(C).

[419] Rule 202(a)(30)–1(c).

[420] Rule 203(b)(3)–1, which we are rescinding with the Implementing Adopting Release, provided a safe harbor for determining who may be deemed a single client for purposes of the private adviser exemption. We are not, however, carrying over from rule 203(b)(3)–1 a provision that distinguishes between advisers whose principal places of business are inside or outside of the United States. *See* rule 203(b)(3)–1(b)(5). Under the definition of ''foreign private adviser,'' an adviser relying on the exemption may not have any place of business in the United States. *See* section 402 of the Dodd-Frank Act (defining ''foreign private adviser''). We are also not including rule 203(b)(3)–1(b)(7), which specifies that a client who is an owner of a private fund is a resident where the client resides at the time of the client's investment in the fund. The provision was vacated by a Federal court in *Goldstein, supra* note 14. As discussed below, we are including a provision in rule 202(a)(30)–1 that addresses when an adviser must determine if a client or investor is ''in the United States'' for purposes of the exemption. *See infra* note 476 and accompanying text.

[421] *See* Katten Foreign Advisers Letter.

give effect to a statutory provision with a similar purpose.

New rule 202(a)(30)–1 allows an adviser to treat as a single client a natural person and: (i) That person's minor children (whether or not they share the natural person's principal residence); (ii) any relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent of the natural person who has the same principal residence;[422] (iii) all accounts of which the natural person and/or the person's minor child or relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent who has the same principal residence are the only primary beneficiaries; and (iv) all trusts of which the natural person and/or the person's minor child or relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent who has the same principal residence are the only primary beneficiaries.[423] Rule 202(a)(30)–1 also permits an adviser to treat as a single ''client'' (i) a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization to which the adviser provides investment advice based on the legal organization's investment objectives, and (ii) two or more legal organizations that have identical shareholders, partners, limited partners, members, or beneficiaries.[424]

As proposed, we are omitting the ''special rule'' providing advisers with the option of not counting as a client any person for whom the adviser provides investment advisory services without compensation.[425] Some commenters argued that an adviser should not have to count such persons, who may be employees and principals of the firm and their family members.[426] But as we explained in the Proposing Release, allowing an adviser not to count as clients persons in the United States who do not compensate the adviser would allow certain advisers to avoid registration through reliance on the foreign private adviser exemption despite the fact that, as those commenters acknowledge, the adviser provides advisory services to those persons.[427]

The new rule includes two provisions that clarify that advisers need not double-count private funds and their investors under certain circumstances.[428] One provision, as proposed, specifies that an adviser need not count a private fund as a client if the adviser counted any investor, as defined in the rule, in that private fund as an investor in that private fund for purposes of determining the availability of the exemption.[429] The other provision, recommended by commenters,[430] clarifies that an adviser is not required to count a person as an investor if the adviser counts such person as a client of the adviser.[431] Thus, a client who is also an investor in a private fund advised by the adviser would only be counted once.

2. Private Fund Investor

Section 202(a)(30) provides that a ''foreign private adviser'' eligible for the new registration exemption cannot have more than 14 clients ''or investors in the United States in private funds'' advised by the adviser. Rule 202(a)(30)–1 defines an ''investor'' in a private fund as any person who would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act, or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act.[432] In addition, a beneficial owner of short-term paper issued by the private fund also is an ''investor,'' notwithstanding that holders of short-term paper need not be counted for purposes of section 3(c)(1).[433] Finally, in order to avoid double-counting, the rule clarifies that an adviser may treat as a single investor any person who is an investor in two or more private funds advised by the investment adviser.[434] We are adopting rule 202(a)(30)–1 substantially as proposed. In a modification to the proposal, however, we are not including knowledgeable employees in the definition of ''investor.''[435]

The term ''investor'' is not currently defined under the Advisers Act or the rules under the Advisers Act. We are adopting the new definition to provide for consistent application of the statutory provision and to prevent non-U.S. advisers from circumventing the limitations in section 203(b)(3). As discussed in the Proposing Release, we believe that defining the term ''investor'' by reference to sections 3(c)(1) and 3(c)(7) of the Investment Company Act will best achieve these purposes.

Commenters who addressed the issue agreed with our decision to define investor for purposes of this rule by reference to the well-developed understanding of ownership under

[422] As suggested by a commenter, we incorporated in rule 202(a)(30)–1(a)(1) the concept of a ''spousal equivalent,'' which we define by reference to rule 202(a)(11)(G)–1(d)(9) as ''a cohabitant occupying a relationship generally equivalent to that of a spouse.'' *See* ABA Letter.

[423] Rule 202(a)(30)–1(a)(1). If a client relationship involving multiple persons does not fall within the rule, whether the relationship may appropriately be treated as a single ''client'' depends on the facts and circumstances.

[424] Rule 202(a)(30)–1(a)(2). In addition, rule 202(a)(30)–1(b)(1) through (3) contain the following related ''special rules:'' (1) An adviser must count a shareholder, partner, limited partner, member, or beneficiary (each, an ''owner'') of a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization, as a client if the adviser provides investment advisory services to the owner separate and apart from the investment advisory services provided to the legal organization; (2) an adviser is not required to count an owner as a client solely because the adviser, on behalf of the legal organization, offers, promotes, or sells interests in the legal organization to the owner, or reports periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters; and (3) any general partner, managing member or other person acting as an investment adviser to a limited partnership or limited liability company must count the partnership or limited liability company as a client.

[425] *See* rule 203(b)(3)–1(b)(4).

[426] *See* Dechert General Letter (''In many instances, advisers manage the assets of employees and principals of the firm and their family members, and use such services as a legitimate compensation arrangement to retain talented employees.''); Katten Foreign Advisers Letter (''Such persons are likely to be in a special relationship with the adviser that allows them to benefit from the advisers' investment advice without having to pay.''). *See also* ABA Letter.

[427] *Cf.* Form ADV: Glossary (stating that for purposes of Form ADV, the term ''client'' ''includes clients from which [an adviser] receives no compensation * * *.''). We also are adopting in the Implementing Adopting Release a uniform method for calculating assets under management for regulatory purposes, including availability of the foreign private adviser exemption, that requires advisers to include in that calculation assets they manage without compensation. *See* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3. Requiring foreign private advisers to treat as clients persons from whom they receive no compensation is consistent with the use of this new uniform method of calculating assets under management for regulatory purposes.

[428] *See* rule 202(a)(30)–1(b)(4)–(5).

[429] *See* rule 202(a)(30)–1(b)(4); 202(a)(30)–1(c)(2). *See also infra* Section II.C.2 (discussing the definition of investor). This provision is applicable only for purposes of determining whether an adviser has fewer than 15 clients in the United States and investors in the United States in private funds it advises under section 202(a)(30)(B) of the foreign private adviser exemption. It does not apply to the determination of the assets under management relevant for purposes of that exemption under section 202(a)(30)(C). As a result, an adviser must include the assets of a private fund that is a client in the United States even if the adviser may exclude the private fund when determining whether the adviser has fewer than 15 clients or investors in the United States. *See also infra* note 499.

[430] *See* ABA Letter; Katten Foreign Advisers Letter.

[431] *See* rule 202(a)(30)–1(b)(5).

[432] *See* rule 202(a)(30)–1(c)(2)(i); *supra* notes 10 and 12 and accompanying text. We note that the definition of ''investor'' in rule 202(a)(30)–1 is for purposes of the foreign private adviser exemption and does not limit the scope of that term for purposes of rule 206(4)–8.

[433] *See* rule 202(a)(30)–1(c)(2)(ii).

[434] *See* rule 202(a)(30)–1(c)(2), at note to paragraph (c)(2).

[435] *See* rule 202(a)(30)–1(c)(2). *See also infra* notes 448–452 and accompanying text.

sections 3(c)(1) and 3(c)(7).[436] Funds and their advisers must determine who is a beneficial owner for purposes of section 3(c)(1) or whether an owner is a qualified purchaser for purposes of section 3(c)(7).[437] More importantly, defining the term ''investor'' by reference to sections 3(c)(1) and 3(c)(7) places appropriate limits on the ability of a non-U.S. adviser to avoid application of the registration provisions of the Advisers Act by setting up intermediate accounts through which investors may access a private fund and not be counted for purposes of the exemption. Advisers must ''look through'' nominee and similar arrangements to the underlying holders of private fund-issued securities to determine whether they have fewer than 15 clients and private fund investors in the United States.[438] Holders of both equity and debt securities must be counted as investors.[439]

Under the new rule, an adviser will determine the number of investors in a private fund based on the facts and circumstances and in light of the applicable prohibition not to do indirectly, or through or by any other person, what is unlawful to do directly.[440] Depending upon the facts and circumstances, persons other than the nominal holder of a security issued by a private fund may be counted as the beneficial owner under section 3(c)(1), or be required to be a qualified purchaser under section 3(c)(7).[441] An adviser relying on the exemption would have to count such a person as an investor.

For example, the adviser to a master fund in a master-feeder arrangement would have to treat as investors the holders of the securities of any feeder fund formed or operated for the purpose of investing in the master fund rather than the feeder funds, which act as conduits.[442] In addition, an adviser would need to count as an investor an owner of a total return swap on the private fund because that arrangement effectively provides the risks and rewards of investing in the private fund to the swap owner.[443] Whether an owner of another type of instrument referencing a private fund would be counted as the beneficial owner under section 3(c)(1), or be required to be a qualified purchaser under section 3(c)(7), would depend on the facts and circumstances.

Several commenters generally disagreed that advisers should be required to ''look through'' total return swaps or similar instruments or master-feeder arrangements in at least certain circumstances, arguing among other things that these instruments or arrangements serve legitimate business purposes.[444] As we explain above, however, the requirement to count as investors persons other than the nominal holder of a security issued by a private fund is derived from provisions in both the Advisers Act and the Investment Company Act prohibiting a person from doing indirectly, or through or by any other person, what is unlawful to do directly, and from sections 3(c)(1) and 3(c)(7).[445]

Some commenters also argued that ''looking through'' a total return swap or similar instrument would be impractical or unduly burdensome in certain circumstances, including situations in which the adviser did not participate in the swap's creation or know of its existence.[446] An issuer relying on section 3(c)(7) may treat as a qualified purchaser any person whom the issuer reasonably believes is a qualified purchaser, and the definition of investor that we are adopting today provides that an adviser counts as investors those persons who must be qualified purchasers under section 3(c)(7). Therefore, an adviser may treat as an investor a person the adviser reasonably believes is the actual investor.[447] Similarly, if an adviser reasonably believes that an investor is not ''in the United States,'' the adviser may treat the investor as not being ''in the United States.''

The final rule, unlike the proposal, does not treat as investors beneficial owners who are ''knowledgeable employees'' with respect to the private fund, and certain other persons related to such employees (we refer to them, collectively, as ''knowledgeable employees'').[448] In formulating our

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[436] *See* ABA Letter; Dechert General Letter; Katten Foreign Advisers Letter.

[437] *See supra* notes 10 and 12 and accompanying text. In the Proposing Release, we noted that typically a prospective investor in a private fund must complete a subscription agreement that includes representations or confirmations that it is qualified to invest in the fund and whether it is a U.S. person. This information is designed to allow the adviser (on behalf of the fund) to make the above determination. Therefore, an adviser seeking to rely on the foreign private adviser exemption will have ready access to this information.

[438] Rule 202(a)(30)–1(c)(2). *See generally* sections 3(c)(1) and 3(c)(7) of the Investment Company Act.

[439] Sections 3(c)(1) and 3(c)(7) of the Investment Company Act refer to beneficial owners and owners, respectively, of ''securities'' (which is broadly defined in section 2(a)(36) of that Act to include debt and equity).

[440] *See* section 208(d) of the Advisers Act; section 48(a) of the Investment Company Act.

[441] As noted above, we have recognized that in certain circumstances it is appropriate to ''look through'' an investor (*i.e.,* attribute ownership of a private fund to another person who is the ultimate owner). *See, e.g., Privately Offered Investment Companies,* Investment Company Act Release No. 22597 (Apr. 3, 1997) [62 FR 17512 (Apr. 9, 1997)] (''NSMIA Release'') (''The Commission understands that there are other forms of holding investments that may raise interpretative issues concerning whether a Prospective Qualified Purchaser 'owns' an investment. For instance, when an entity that holds investments is the 'alter ego' of a Prospective Qualified Purchaser (as in the case of an entity that is wholly owned by a Prospective Qualified Purchaser who makes all the decisions with respect to such investments), it would be appropriate to attribute the investments held by such entity to the Prospective Qualified Purchaser.'').

[442] A ''master-feeder fund'' is an arrangement in which one or more funds with the same or consistent investment objectives (''feeder funds'') invest all or substantially all of their assets in a single fund (''master fund'') with the same or consistent investment objective and strategies. We have taken the same approach within our rules that require a private fund to ''look through'' any investor that is formed or operated for the specific purpose of investing in a private fund. *See* rule 2a51–3(a) under the Investment Company Act (17 CFR 270.2a51–3(a)) (a company is not a qualified purchaser if it is ''formed for the specific purpose of acquiring the securities'' of an investment company that is relying on section 3(c)(7) of the Investment Company Act, unless each of the company's beneficial owners is also a qualified purchaser). *See also* NSMIA Release, *supra* note 441 (explaining that rule 2a51–3(a) would limit the possibility that ''a company will be able to do indirectly what it is prohibited from doing directly [by organizing] * * * a 'qualified purchaser' entity for the purpose of making an investment in a particular Section 3(c)(7) Fund available to investors that themselves did not meet the definition of 'qualified purchaser' '').

[443] One commenter argued that the swap counterparty is not required to hedge its exposure by investing the full notional amount in the private fund. *See* Dechert General Letter. We do not find this distinction persuasive in situations in which the adviser knows or should know of the existence of the swap. *See infra* discussion accompanying and following note 447.

[444] *See, e.g.,* ABA Letter; Dechert General Letter; EFAMA Letter.

[445] *See supra* notes 440–443 and accompanying text.

[446] *See, e.g.,* Dechert General Letter; EFAMA Letter.

[447] Rule 202(a)(30)–1(c)(2) defines the term ''investor'' generally to include persons that must be counted for purposes of section 3(c)(1) of the Investment Company Act or qualified purchasers for purposes of section 3(c)(7) of that Act. *See supra* notes 432–443 and accompanying text. Advisers to private funds relying on section 3(c)(7) may under Investment Company Act rule 2a51–1(h) treat as qualified purchasers those persons they reasonably believe are qualified purchasers. Persons who must be qualified purchasers for purposes of section 3(c)(7) generally would be the same as those who must be counted for purposes of section 3(c)(1). Accordingly, advisers may, for purposes of determining their investors in the United States under rule 202(a)(30)–1, treat as an investor a person the adviser reasonably believes is the actual investor.

[448] *See* proposed rule 202(a)(30)–1(c)(1)(i) (referencing rule 3c–5 under the Investment Company Act (17 CFR 270.3c–5(b)), which excludes from the determinations under sections 3(c)(1) and 3(c)(7) of that Act any securities beneficially owned by knowledgeable employees of a private fund; a company owned exclusively by knowledgeable employees; and any person who acquires securities originally acquired by a knowledgeable employee through certain transfers of interests, such as a gift or a bequest).

proposal to include knowledgeable employees in the definition of investor, we were concerned that excluding knowledgeable employees from the definition of investor would allow certain advisers to avoid registration by relying on the foreign private adviser exemption.[449] A number of commenters opposed our proposal.[450] In particular, they argued that the proposed approach was inconsistent with Congressional and prior Commission determinations that such employees do not need the protections of the Investment Company Act.[451]

Upon further consideration, we have determined that the same policy considerations that justify disregarding knowledgeable employees for purposes of other provisions provide a valid basis for excluding them from the definition of ''investor'' under the foreign private adviser exemption.[452] Treating knowledgeable employees in the same manner for purposes of the definition of investor and sections 3(c)(1) and 3(c)(7) will also simplify compliance with regulatory requirements imposed by both the Advisers Act and the Investment Company Act.

The new rule requires advisers to treat as investors beneficial owners of ''short-term paper'' [453] issued by the private fund.[454] These persons are not counted as beneficial owners for purposes of section 3(c)(1) but must be qualified purchasers under section 3(c)(7).[455] Some commenters opposed this approach, arguing that holders of short-term paper do not make an investment decision but rather are creditors making a credit risk evaluation.[456] We disagree. The acquisition of those instruments involves an investment decision, although the considerations involved in that decision might differ from the considerations involved in a decision to make an equity investment.

One commenter asserted that treating holders of short-term paper as investors could result in a U.S. commercial lender to a fund being treated as an investor, leading non-U.S. advisers to avoid U.S. lenders.[457] Unless the extension of credit by a fund's broker-dealer or custodian bank results in the issuance of a security by the fund to its creditor, the creditor would not be considered an investor for purposes of the foreign private adviser exemption.[458]

As we stated in the Proposing Release, there appears to be no valid reason to treat as investors all debt holders except holders of short-term paper.[459] Certain issuers continually roll over short-term paper and effectively use it as a permanent source of capital, further supporting our view that there appears to be no reason to treat holders of short-term paper differently than other longer-term debt holders for purposes of the exemption.[460] Moreover, a private fund's losses directly affect the interests of holders of short-term paper in the fund just as they affect the interests of other debt holders in the fund.[461] In contrast to the treatment of knowledgeable employees, holders of short-term paper must be qualified purchasers under section 3(c)(7), the more recent of the two exclusions under the Investment Company Act on which private funds rely.[462] Thus, we are requiring advisers to count as investors all debt holders, *including* holders of short-term paper.

Some commenters expressed concern that the look-through requirement contained in the statutory definition of a ''foreign private adviser'' could impose significant burdens on advisers to non-U.S. funds, including non-U.S. retail funds publicly offered outside of the United States.[463] Two of these commenters stated, for example, that in their view a non-U.S. fund could be considered a private fund as a result of independent actions of U.S. investors, such as if a non-U.S. shareholder of a non-U.S. fund moves to the United States and purchases additional shares.[464] If these funds were ''private

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[449] *See* Proposing Release, *supra* note 26, at n.250 and accompanying text.

[450] *See* Dechert General Letter; Katten Foreign Advisers Letter; Seward Letter; Shearman Letter.

[451] *See, e.g.,* Dechert General Letter (''[The] Commission promulgated the knowledgeable employee safe-harbors for sections 3(c)(1) and 3(c)(7) in response to the Congressional mandate in the National Securities Markets Improvement Act of 1996 to allow certain informed insiders to invest in a private fund without causing the fund to lose its exception under the 1940 Act.''); Shearman Letter (the proposed approach is ''contrary to a long history of recognizing that knowledgeable employees should be treated differently than other investors and that their privileged status with their organizations in terms of influence and access to information reasonably limits the public's interest in their protection'').

[452] *See* Advisers Act rule 205–3(d)(1)(iii) (specifying that knowledgeable employees are included among the types of clients to whom the adviser may charge performance fees); Advisers Act rule 202(a)(11)(G)–1 (permitting a family office excluded from the definition of investment adviser under the Advisers Act to provide investment advice to its knowledgeable employees). These provisions reflect a policy determination that knowledgeable employees are likely to be in a position or have a level of knowledge and experience in financial matters sufficient to be able to evaluate the risks and take steps to protect themselves.

[453] *See* rule 202(a)(30)–1(c)(2)(ii) (referencing the definition of ''short-term paper'' contained in section 2(a)(38) of the Investment Company Act, which defines ''short-term paper'' to mean ''any note, draft, bill of exchange, or banker's acceptance payable on demand or having a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof payable on demand or having a maturity likewise limited; and such other classes of securities, of a commercial rather than an investment character, as the Commission may designate by rules and regulations'').

[454] *See* rule 202(a)(30)–1(c)(2)(ii).

[455] *See* sections 3(c)(1) and 3(c)(7) of the Investment Company Act.

[456] *See* ABA Letter (''[H]olders of short-term securities do not view themselves as making an investment decision in connection with their extension of credit, but rather assess the risk of holding a private fund's short-term paper based on credit risk.''); Shearman Letter (''[A] lender to a fund, while it makes a 'credit analysis,' does not deploy capital based on the perceived skill of the fund manager and so is not an investor by any traditional measure.'').

[457] *See* Shearman Letter.

[458] *See Reves* v. *Ernst & Young,* 494 U.S. 56 (1990).

[459] *See* Proposing Release, *supra* note 26, at n. 251 and accompanying text. One commenter agreed that we should not treat short- and longer-term debt holders differently for purposes of the exemption. *See* ABA Letter (asking that we exclude all holders of conventional debt from the definition of investor).

[460] As we noted in the Proposing Release, because commercial paper issuers often refinance the repayment of maturing commercial paper with newly issued commercial paper, they may face roll-over risk, *i.e.,* the risk that investors may not be willing to refinance maturing commercial paper. *See* Proposing Release, *supra* note 26, at n. 134. These risks became particularly apparent for issuers of asset-backed commercial paper beginning in August 2007. At that time, structured investment vehicles (''SIVs''), which are off-balance sheet funding vehicles sponsored by financial institutions, issued commercial paper to finance the acquisition of long-term assets, including residential mortgages. As a result of problems in the residential home mortgage market, short-term investors began to avoid asset-backed commercial paper tied to residential mortgages, regardless of whether the securities had substantial exposure to sub-prime mortgages. Unable to roll over their commercial paper, SIVs suffered severe liquidity problems and significant losses. *See Money Market Fund Reform,* Investment Company Act Release No. 28807 (June 30, 2009) [74 FR 32688 (July 8, 2009)] (''Money Market Fund Reform Release'') at nn. 37–39 and preceding and accompanying text; *Marcin Kacperczyk And Philipp Schnabl, When Safe Proved Risky: Commercial Paper During the Financial Crisis Of 2007–2009* (Nov. 2009).

[461] As discussed in the Proposing Release, various types of investment vehicles make significant use of short-term paper for financing purposes so holders of this type of security are, in practice, exposed to the investment results of the security's issuer. *See* Proposing Release, *supra* note 26, at n. 251. *See also* Money Market Fund Reform Release, *supra* note 460, at nn. 37–39 and preceding and accompanying text (discussing how money market funds were exposed to substantial losses during 2007 as a result of exposure to debt securities issued by structured investment vehicles).

[462] Congress added section 3(c)(7) to the Investment Company in 1996 as part of the National Securities Markets Improvement Act of 1996. Section 3(c)(1) was included in the Investment Company Act when it was enacted in 1940.

[463] *See* AFG Letter; Dechert Foreign Adviser Letter; EFAMA Letter; Shearman Letter.

[464] Dechert Foreign Adviser Letter; EFAMA Letter. *See also* Comment Letter of Association Française de la Gestion financière (Jun. 14, 2011) (recommended that ''investment funds that already are strictly regulated and supervised by European Union regulators should be excluded from the

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funds,'' their advisers would, if seeking to rely on the foreign private adviser exemption, be required to determine the number of private fund investors in the United States and the assets under management attributable to them.

As we explain above, if an adviser reasonably believes that an investor is not ''in the United States,'' the adviser may treat the investor as not being ''in the United States.'' Moreover, we understand that non-U.S. private funds currently count or qualify their U.S. investors in order to avoid regulation under the Investment Company Act.[465] A non-U.S. adviser would need to count the same U.S. investors (except for holders of short-term paper with respect to a fund relying on section 3(c)(1)) in order to rely on the foreign private adviser exemption. In this respect, therefore, the look-through requirement of the foreign private adviser exemption will generally not impose any new burden on advisers to non-U.S. funds.

3. In the United States

Section 202(a)(30)'s definition of ''foreign private adviser'' employs the term ''in the United States'' in several contexts, including: (i) Limiting the number of—and assets under management attributable to—an adviser's ''clients'' ''in the United States'' and ''investors in the United States'' in private funds advised by the adviser; (ii) exempting only those advisers without a place of business ''in the United States;'' and (iii) exempting only those advisers that do not hold themselves out to the public ''in the United States'' as an investment adviser.[466] Today, we are defining the term ''in the United States'' to clarify the term for all of the above purposes as well as to provide specific instructions as to the relevant time for making the related determination.

New rule 202(a)(30)–1 defines ''in the United States,'' as proposed, generally by incorporating the definition of a ''U.S. person'' and ''United States'' under Regulation S.[467] In particular, we are defining ''in the United States'' to mean: (i) With respect to any place of business, any such place that is located in the ''United States,'' as defined in Regulation S;)[468] (ii) with respect to any client or private fund investor in the United States, any person who is a ''U.S. person'' as defined in Regulation S,[469] except that any discretionary account or similar account that is held for the benefit of a person ''in the United States'' by a non-U.S. dealer or other professional fiduciary is deemed ''in the United States'' if the dealer or professional fiduciary is a related person of the investment adviser relying on the exemption; and (iii) with respect to the public, in the ''United States,'' as defined in Regulation S.[470]

We believe that the use of Regulation S is appropriate for purposes of the foreign private adviser exemption because Regulation S provides more specific rules when applied to various types of legal structures.[471] Advisers, moreover, already apply the Regulation S definition of U.S. person with respect to both clients and investors for other purposes and therefore are familiar with the definition.[472] The references to Regulation S with respect to a place of business ''in the United States'' and the public in the ''United States'' also allows us to maintain consistency across our rules. Two commenters specifically supported our approach.[473]

Similar to our approach in new rule 203(m)–1(d)(8) and as we proposed,[474] we are treating as persons ''in the United States'' for purposes of the foreign private adviser exemption certain persons that would not be considered ''U.S. persons'' under Regulation S. For example, we are treating as ''in the United States'' any discretionary account owned by a U.S. person and managed by a non-U.S. affiliate of the adviser in order to discourage non-U.S. advisers from creating such discretionary accounts with the goal of circumventing the exemption's limitation with respect to advising assets of persons in the United States.[475]

We also are including the note to paragraph (c)(3)(i) specifying that for purposes of that definition, a person who is ''in the United States'' may be treated as not being ''in the United States'' if the person was not ''in the United States'' at the time of becoming a client or, in the case of an investor in a private fund, each time the investor acquires securities issued by the fund.[476] As we explained in the Proposing Release, the note is designed to reduce the burden of having to monitor the location of clients and investors on an ongoing basis, and to avoid placing an adviser in a position whereby it might have to choose between registering with the Commission or terminating the relationship with any client that moved to the United States, or redeeming the interest in the private fund of any investor that moved to the United States.[477]

Several commenters supported the inclusion of the note.[478] Some commenters, however, advocated expanding the note to treat a private

scope of Title IV of the Dodd Frank Act and should not be considered as 'private funds''' because, among other reasons, the commenter's management company members ''very often'' do not know the identities of their funds' investors, and ''therefore should not [] be held responsible if, unbeknownst to them, US persons decide to invest in their funds'').

[465] This practice is consistent with positions our staff has taken in which the staff has stated it would not recommend enforcement action in certain circumstances. *See, e.g.,* Goodwin Procter No-Action Letter, *supra* note 294; Touche Remnant No-Action Letter, *supra* note 294. *See also* sections 7(d), 3(c)(1), and 3(c)(7) of the Investment Company Act. *See also, e.g.,* Canadian Tax-Deferred Retirement Savings Accounts Release, *supra* note 294, at n. 23 (''The Commission and its staff have interpreted section 7(d) to generally prohibit a foreign fund from making a U.S. private offering if that offering would cause the securities of the fund to be beneficially owned by more than 100 U.S. residents.'').

[466] *See* section 402 of the Dodd-Frank Act.

[467] Rule 202(a)(30)–1(c)(3). As discussed above, we are also referencing Regulation S's definition of a ''U.S. person'' for purposes of the definition of ''United States person'' in rule 203(m)–1. *See supra* Section II.B.4.

[468] *See* 17 CFR 230.902(l).

[469] *See* 17 CFR 230.902(k).

[470] *See* 17 CFR 230.902(l).

[471] *See supra* notes 404–407 and accompanying text.

[472] As we noted in the Proposing Release, many non-U.S. advisers identify whether a client is a ''U.S. person'' under Regulation S in order to determine whether the client may invest in certain private funds and certain private placement offerings exempt from registration under the Securities Act. *See* Proposing Release, *supra* note 26, at n. 259. With respect to ''investors,'' our staff has generally taken the interpretive position that an investor that does not meet that definition is not a U.S. person when determining whether a non-U.S. private fund meets the section 3(c)(1) and 3(c)(7) counting or qualification requirements. *See id.,* at n. 217. Many non-U.S. advisers, moreover, currently determine whether a private fund investor is a ''U.S. person'' under Regulation S for purposes of the safe harbor for offshore offers and sales.

[473] Dechert Foreign Adviser Letter; Dechert General Letter. Commenters generally addressed our proposal to rely on Regulation S to identify U.S. persons within the context of the private fund adviser exemption. *See supra* Section II.B.4.

[474] *See supra* Section II.B.4 (discussing the definition of United States persons and the treatment of discretionary accounts).

[475] Rule 202(a)(30)–1(c)(3)(i). *See supra* note 409.

[476] Rule 202(a)(30)–1, at note to paragraph (c)(3)(i) (''A person who is in the United States may be treated as not being in the United States if such person was not in the United States at the time of becoming a client or, in the case of an investor in a private fund, each time the investor acquires securities issued by the fund.''). We revised the note to provide that it applies ''each time'' the investor acquires securities issued by the fund. *Cf.* proposed rule 202(a)(30)–1, at note to paragraph (c)(2)(i). This change to the note as proposed more clearly reflects the note's intended operation.

[477] *See* Proposing Release, *supra* note 26, at n.257 and accompanying and following text.

[478] *See, e.g.,* Dechert General Letter (''The note provides helpful relief at a time when advisory clients often move across international borders while keeping an existing relationship with a financial institution.''). *See also* ABA Letter; Dechert Foreign Adviser Letter.

fund investor in the same way as a client so that additional investments in a fund made after moving to the United States would not cause the investor to become a U.S. person.[479] They argued that, as discussed above, advisers to non-U.S. funds should not be required to ''look through'' these funds to ensure that their investors who purchased shares while outside of the United States did not subsequently relocate to the United States and purchase additional shares.

As we explain above, if an adviser reasonably believes that an investor is not ''in the United States,'' the adviser may treat the investor as not being ''in the United States.'' In addition, we understand that, based on no-action positions taken by our staff, non-U.S. funds do not consider for purposes of section 3(c)(1) beneficial owners who were not U.S. persons at the time they invested in the fund, but do consider those beneficial owners if they make additional purchases in the same fund after relocating to the United States.[480] The note is consistent with the funds' current practices, and thus generally should not impose any new burdens on non-U.S. funds. The note also is consistent with section 3(c)(7), which requires an investor to be a qualified purchaser at the time the investor acquires the securities.

The Investment Funds Institute of Canada (IFIC) and the Investment Industry Association of Canada (IIAC) urged that, for purposes of the look-through provision, the Commission allow non-U.S. advisers not to count persons (and their assets) who invest in a foreign private fund through certain Canadian retirement accounts (''Participants'') after having moved to the United States.[481] The commenters noted that this treatment would be consistent with rule 7d–2 under the Investment Company Act and certain related rules.[482] We agree. A non-U.S. fund sold to Participants would be deemed a private fund if it conducted a private offering in the United States,[483] but we have previously stated that Participants need not be counted toward the 100-investor limit for purposes of section 3(c)(1).[484] As a result, and based on the same policy considerations embodied in rule 7d–2, we believe that a non-U.S. adviser should not be required to treat Participants as investors in the United States under rule 202(a)(30)–1 with respect to investments they make after moving to the United States if the fund is in compliance with rule 7d–2.[485]

4. Place of Business

New rule 202(a)(30)–1, by reference to rule 222–1,[486] defines ''place of business'' to mean any office where the investment adviser regularly provides advisory services, solicits, meets with, or otherwise communicates with clients, and any location held out to the public as a place where the adviser conducts any such activities.[487] We are adopting this provision as proposed because we believe the definition appropriately identifies a location where an adviser is doing business for purposes of section 202(a)(30) of the Advisers Act and thus provides a basis for an adviser to determine whether it can rely on the exemption in section 203(b)(3) of the Advisers Act for foreign private advisers. As discussed in the Proposing Release, because both the Commission and the state securities authorities use this definition to identify an unregistered foreign adviser's place of business for purposes of determining regulatory jurisdiction,[488] we believe it is logical as well as efficient to use the rule 222–1(a) definition of ''place of business'' for purposes of the foreign private adviser exemption. The two commenters that considered the proposed definition of ''place of business'' by reference to rule 222–1 agreed with this analysis.[489]

Some commenters asked us to clarify that a ''place of business'' would not include an office in the United States where a non-U.S. adviser solely conducts research, communicates with non-U.S. clients, or performs administrative services and back-office books and recordkeeping activities.[490] Under rule 202(a)(30)–1, as under rule 203(m)–1, an adviser must determine whether it has a place of business, as defined in rule 222–1, in the United States in light of the relevant facts and circumstances.[491] For example, any office from which an adviser regularly communicates with its clients, whether U.S. or non-U.S., would be a place of business.[492] In addition, an office or other location where an adviser regularly conducts research would be a place of business because research is intrinsic to the provision of investment advisory services.[493] A place of business would not, however, include an office where an adviser solely performs administrative services and back-office activities if they are not activities intrinsic to providing investment advisory services and do not involve communicating with clients.

A number of commenters sought guidance as to whether the activities of U.S. affiliates of non-U.S. advisers would be deemed to constitute places of business in the United States of the non-U.S. advisers.[494] There is no presumption that a non-U.S. adviser has a place of business in the United States solely because it is affiliated with a U.S. adviser.[495] A non-U.S. adviser might be deemed to have a place of business in

[479] *See* Dechert Foreign Adviser Letter; Dechert General Letter; EFAMA Letter.

[480] *See* Investment Funds Institute of Canada, SEC Staff No-Action Letter (Mar. 4, 1996) (staff also stated its belief that, to the extent that a dividend reinvestment plan of a non-U.S. fund is consistent with the requirements of Securities Act Release No. 929 (July 29, 1936), such a plan would not involve an offer for purposes of Section 7(d) of the Investment Company Act). *See also* Goodwin Procter No-Action Letter, *supra* note 294; Touche Remnant No-Action Letter, *supra* note 294.

[481] *See* IFIC Letter; Comment Letter of Investment Industry Association of Canada (Jan. 18, 2011) (''IIAC Letter'').

[482] We adopted rule 7d–2, along with rule 237 under the Securities Act, in order to allow Participants who move to the United States to continue to manage their Canadian retirement accounts. *See Offer and Sale of Securities to Canadian Tax-Deferred Retirement Savings Accounts,* Securities Act Release No. 7860 (June 7, 2000) [65 FR 37672 (June 15, 2000)]. U.S. registration requirements were affecting those Participants' ability to purchase or exchange securities for such accounts. Rule 7d–2 generally allows non-U.S. funds to treat as a private offering certain offerings to Participants who are in the United States.

[483] *See supra* notes 294 and 313.

[484] *See* Canadian Tax-Deferred Retirement Savings Accounts Release, *supra* note 294, at n.23.

[485] This interpretation only applies with respect to Participants' investments in Eligible Securities issued by a Qualified Company, as these terms are defined in rule 7d–2.

[486] Rule 222–1(a) (defining ''place of business'' of an investment adviser as: ''(1) An office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and (2) Any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.'').

[487] Rule 202(a)(30)–1(c)(4).

[488] *See* Proposing Release, *supra* note 26, at n.265 (explaining that, under section 222(d) of the Advisers Act, a state may not require an adviser to register if the adviser does not have a ''place of business'' within, and has fewer than six clients resident in, the state).

[489] *See* ABA Letter (''[W]e believe that the definition of place of business set forth in Rule 222–1 is appropriate * * *''); AIMA Letter (''We consider the definition of 'place of business' by reference to Rule 222–1 of the Advisers Act both logical and appropriate.'').

[490] *See, e.g.,* ABA Letter; AIMA Letter.

[491] As discussed above, investment advisers will also apply this provision for purposes of the private fund adviser exemption. *See supra* Section II.B.3.

[492] Rule 222–1 does not distinguish between U.S. and non-U.S. clients.

[493] That would include, for example, research conducted in order to produce non-public information relevant to the investments of, or the investment recommendations for, any of the adviser's clients.

[494] *See, e.g.,* Debevoise Letter; Dechert Foreign Adviser Letter; EFAMA Letter.

[495] S*ee infra* note 506.

the United States, however, if the non-U.S. adviser's personnel regularly conduct activities at an affiliate's place of business in the United States.[496]

5. Assets Under Management

For purposes of rule 202(a)(30)–1 we are defining ''assets under management,'' as proposed, by reference to the calculation of ''regulatory assets under management'' for Item 5 of Form ADV.[497] As discussed above, in Item 5 of Form ADV we are implementing a uniform method of calculating assets under management that can be used for several purposes under the Advisers Act, including the foreign private adviser exemption and the private fund adviser exemption.[498] Because the foreign private adviser exemption is also based on assets under management, we believe that all advisers should use the same method for calculating assets under management to determine if they are required to register or may be eligible for the exemption.[499]

We believe that uniformity in the method for calculating assets under management will result in more consistent asset calculations and reporting across the industry and, therefore, in a more coherent application of the Advisers Act's regulatory requirements and assessment of risk.[500] One commenter specifically agreed that the uniform method should be applied for purposes of the foreign private adviser exemption.[501] Most commenters addressed the components of the new method of calculation in reference to the calculation of ''regulatory assets under management'' under Form ADV, or with respect to the calculation of private fund assets for purposes of the private fund adviser exemption.[502] We address these comments in the Implementing Adopting Release and in Section II.B.2.[503]

D. Subadvisory Relationships and Advisory Affiliates

We generally interpret advisers as including subadvisers,[504] and therefore believe it is appropriate to permit subadvisers to rely on each of the new exemptions, provided that subadvisers satisfy all terms and conditions of the applicable rule.

We are aware that in many subadvisory relationships a subadviser has contractual privity with a private fund's primary adviser rather than the private fund itself. Although both the private fund and the fund's primary adviser may be viewed as clients of the subadviser, we would consider a subadviser eligible to rely on rule 203(m)–1 if the subadviser's services to the primary adviser relate solely to private funds and the other conditions of the rule are met. Similarly, a subadviser may be eligible to rely on section 203(l) if the subadviser's services to the primary adviser relate solely to venture capital funds and the other conditions of the rule are met.

We anticipated that an adviser with advisory affiliates could encounter interpretative issues as to whether it may rely on any of the exemptions discussed in this Release without taking into account the activities of its affiliates. The adviser, for example, might have advisory affiliates that are registered or that provide advisory services that the adviser itself could not provide while relying on an exemption. In the Proposing Release, we requested comment on whether any proposed rule should provide that an adviser must take into account the activities of its advisory affiliates when determining eligibility for an exemption, by having the rule, for example, specify that the exemption is not available to an affiliate of a registered investment adviser.

Commenters that responded to our request for comment generally supported treating each advisory entity separately without regard to the activities of, or relationships with, its affiliates.[505] This approach, however, would for example permit an adviser managing $200 million in private fund assets simply to reorganize as two separate advisers, each of which could purport to rely on the private fund adviser exemption. Such a result would in our view be inconsistent with the intent of Congress in establishing the exemption's $150 million threshold and would violate section 208(d) of the Advisers Act, which prohibits any person from doing indirectly or through or by any other person any act or thing which would be unlawful for such person to do directly. Accordingly, we would treat as a single adviser two or more affiliated advisers that are separately organized but operationally integrated, which could result in a requirement for one or both advisers to register.[506] Some commenters

[496] We have provided guidance as to whether certain activities would result in an investment adviser representative having a place of business as defined in rule 203A–3(b), which we believe also is applicable to an adviser's determination as to whether it has a U.S. place of business under rule 222–1 (and therefore under rule 203(m)–1 or rule 203(a)(30)–1). We have explained that the definition in rule 203A–3(b) ''encompasses permanent and temporary offices as well as other locations at which an adviser representative may provide advisory services, such as a hotel or auditorium.'' *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)]. We further explained that whether a temporary office or location is a place of business ''will turn on whether the adviser representative has let it generally be known that he or she will conduct advisory business at the location, rather than on the frequency with which the adviser representative conducts advisory business there.'' *Id. See also infra* Section II.D.

[497] *See* rule 202(a)(30)–1(c)(1); instructions to Item 5.F of Form ADV, Part 1A. As discussed above, we are taking the same approach under rule 203(m)–1. *See supra* Section II.B.2.a.

[498] *See supra* Section II.B.2.a; Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

[499] According to the statutory definition of ''foreign private adviser,'' a non-U.S. adviser calculating the assets relevant for purposes of the foreign private adviser exemption would only include those assets under management (*i.e.,* regulatory assets under management) that are ''attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser.'' *See supra* notes 416 and 429 and accompanying text and note 417.

[500] *See supra* Section II.B.2.a; Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

[501] *See* Seward Letter.

[502] *See supra* Section II.B.2.a; Implementing Adopting Release, *supra* note 32, discussion at section II.A.3. A few commenters raised the same arguments in favor of revising the method of calculation also with respect to the calculation under the foreign private adviser exemption. *See, e.g.,* ABA Letter; EFAMA Letter; Katten Foreign Advisers Letter (arguing that the method should exclude proprietary and knowledgeable employee assets, and assets for which the adviser receives no compensation).

[503] *See* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3. In addition, several commenters requested that we exercise our authority to increase the $25 million asset threshold applicable to the foreign private adviser exemption. *See, e.g.,* ABA Letter ($100 million); AFG Letter ($150 million); AIMA Letter (at least $100 million); Comment Letter of Autorité des Marchés Financiers (Jan. 18, 2011) ($150 million); EVCA Letter ($100 or $150 million); DLA Piper VC Letter ($250 million); Fulbright Letter ($500 million). We acknowledged in the Proposing Release that Section 204 of the Advisers Act provides us with the authority to raise the threshold, but we did not propose to do so. Therefore, we have not considered raising the threshold in connection with this rulemaking, but we will evaluate whether doing so may be appropriate in the future, consistent with a comment we received. *See* ABA Letter (asked that we ''monitor this issue * * * undertake dialogue with foreign regulators with respect to their supervisory regimes over investment advisers, and * * * consider proposing an increase in the exemption amount in the near future'').

[504] *See, e.g.,* Pay to Play Release, *supra* note 9, at nn.391–94 and accompanying and following text; Hedge Fund Adviser Registration Release, *supra* note 14, at n.243.

[505] *See, e.g.,* AFG Letter (in determining exemption thresholds, each entity's assets should be determined separately; does not support combining different entities with different business activities); Debevoise Letter (in the context of rule 203(m)–1).

[506] Generally, a separately formed advisory entity that operates independently of an affiliate may be eligible for an exemption if it meets all of the criteria set forth in the relevant rule. However, the existence of separate legal entities may not by itself be sufficient to avoid integration of the affiliated entities. The determination of whether the advisory

acknowledged this, but urged that, in the case of a non-U.S. advisory affiliate, the Commission affirm the staff's positions developed in the *Unibanco* line of no-action letters (''*Unibanco* letters'').[507] In the *Unibanco* letters,[508] the staff provided assurances that it would not recommend enforcement action, subject to certain conditions, against a non-U.S. unregistered adviser that is affiliated with a Commission-registered adviser, despite sharing personnel and resources.[509]

The *Unibanco* letters grew out of recommendations in a 1992 staff study, and sought to limit the extraterritorial application of the Advisers Act while also protecting U.S. investors and markets.[510] In these letters, the staff provided assurances that it would not recommend enforcement action of the substantive provisions of the Advisers Act with respect to a non-U.S. adviser's relationships with its non-U.S. clients.[511] In addition, and as relevant here, the staff agreed not to recommend enforcement action if a non-U.S. advisory affiliate of a registered adviser, often termed a ''participating affiliate,'' shares personnel with, and provides certain services through, the registered adviser affiliate, without such affiliate registering under the Advisers Act.[512] Many commenters asserted that affirming these positions would accommodate established business practices of global advisory firms without reducing the Commission's ability to protect U.S. markets and investors, because the Commission would continue to have access to records and personnel of unregistered non-U.S. advisory entities that are involved in the U.S. advisory business of an affiliated and registered adviser.[513]

A number of commenters asserted that the staff positions in the *Unibanco* letters are consistent with our approach to the territorial application of the Advisers Act with respect to non-U.S. advisers.[514] As we stated in 2004, we do not apply most of the substantive provisions of the Advisers Act to the non-U.S. clients of a non-U.S. adviser registered with the Commission.[515] However, the *Unibanco* letters were developed by the staff in the context of the private adviser exemption,[516] which Congress repealed. Nothing in the rules we are today adopting in this Release is intended to withdraw any prior statement of the Commission or the views of the staff as expressed in the *Unibanco* letters. We expect that the staff will provide guidance, as appropriate, based on facts that may be presented to the staff regarding the application of the *Unibanco* letters in the context of the new foreign private adviser exemption and the private fund adviser exemption.

III. Certain Administrative Law Matters

The effective date for rules 203(l)–1, 203(m)–1 and 202(a)(30)–1 is July 21, 2011. The Administrative Procedure Act generally requires that an agency publish a final rule in the Federal Register not less than 30 days before its effective date.[517] This requirement does not apply, however, if the rule is a substantive rule which grants or recognizes an exemption or relieves a restriction or is an interpretative rule.[518]

As discussed above, effective July 21, 2011, the Dodd-Frank Act amends the Advisers Act to eliminate the private adviser exemption in pre-existing section 203(b)(3), which will require advisers relying on that exemption to register with the Commission as of July 21, 2011 unless another exemption is available.[519] Also effective July 21, 2011, are the Dodd-Frank Act amendments to the Advisers Act that are described immediately below.

Sections 203(l) and 203(b)(3) of the Advisers Act provide exemptions from

businesses of two separately formed affiliates may be required to be integrated is based on the facts and circumstances. Our staff has taken this position in Richard Ellis, Inc., SEC Staff No-Action Letter (Sept. 17, 1981) (discussing the staff's views of factors relevant to the determination of whether a separately formed advisory entity operates independently of an affiliate). *See also* discussion *infra* following note 515.

[507] *See, e.g.,* AIMA Letter, Commenter Letter of Bank of Montreal, Royal Bank of Canada and The Toronto-Dominion Bank (Jan. 24, 2011) (''Canadian Banks Letter''); CompliGlobe Letter; Debevoise Letter; Dechert General Letter (also supported extending the *Unibanco* letters to U.S. advisers); Dechert Foreign Adviser Letter; EFAMA Letter; Katten Foreign Advisers Letter; McGuireWoods Letter; MFA Letter; Comment Letter of MFS Investment Management (Jan. 24, 2011) (''MFS Letter''); Comment Letter of Ropes & Gray LLP (Jan. 24, 2011).

[508] *See, e.g.,* ABA Subcommittee on Private Investment Entities, SEC Staff No-Action Letter (Dec. 8, 2005) (''ABA No-Action Letter''); Royal Bank of Canada, SEC Staff No-Action Letter (Jun. 3, 1998); ABN AMRO Bank, N.V., SEC Staff No-Action Letter (Jul. 7, 1997); Murray Johnstone Holdings Limited, SEC Staff No-Action Letter (Oct. 7, 1994); Kleinwort Benson Investment Management Limited, SEC Staff No-Action Letter (Dec. 15, 1993); Mercury Asset Management plc, SEC Staff No-Action Letter (Apr. 16, 1993); and Uniao de Bancos de Brasileiros S.A., SEC Staff No-Action Letter (Jul. 28, 1992) (''Unibanco No-Action Letter''). *See also* 1992 Staff Report, *supra* note 393, at Section III.D.

[509] Generally, the staff has provided assurances that it will not recommend enforcement action in situations in which the unregistered non-U.S. adviser, often termed a ''participating affiliate'' in these letters, and its registered affiliate are separately organized; the registered affiliate is staffed with personnel (located in the U.S. or abroad) who are capable of providing investment advice; all personnel of the participating affiliate involved in U.S. advisory activities are deemed ''associated persons'' of the registered affiliate; and the Commission has adequate access to trading and other records of the participating affiliate and to its personnel to the extent necessary to enable it to identify conduct that may harm U.S. clients or markets. *See supra* note 508; Hedge Fund Adviser Registration Release, *supra* note 14, at n.211 and accompanying text.

[510] *See* 1992 Staff Report, *supra* note 393, at section III.D. In enacting the private fund adviser exemption and the foreign private adviser exemption, both of which focus on an adviser's activities in, or contacts with, the United States, Congress has addressed issues similar to those described in the 1992 Staff Report. *See* section 408 of the Dodd-Frank Act (directing the Commission to exempt private fund advisers with less than ''$150 million in assets under management *in the United States''*) (emphasis added); sections 402 and 403 of the Dodd-Frank Act (exempting from registration foreign private advisers with no *place of business in the United States* that have a limited number of *clients in the United States and investors in the United States* in private funds and a limited amount of assets attributable to these clients and investors, among other conditions).

[511] *See supra* note 508. *See also infra* note 515.

[512] *See supra* note 508.

[513] *See, e.g.,* Canadian Banks Letter; CompliGlobe Letter; MFA Letter; MFS Letter.

[514] *See, e.g.,* Canadian Banks Letter; MFA Letter. *See also supra* notes 510 and 316 and accompanying text.

[515] *See* Hedge Fund Adviser Registration Release, *supra* note 14, at nn.211 and 216–222 and accompanying text (noting that this policy was first set forth in the Unibanco No-Action Letter). Although the rules contained in the Hedge Fund Adviser Registration Release were vacated by a Federal court in *Goldstein, supra* note 14, the court's decision did not address our statement in that release that we do not apply most of the substantive provisions of the Advisers Act to the non-U.S. clients of a non-U.S. adviser registered with the Commission. In addition, our staff expressed this view in a 2006 no-action letter issued in response to a request for the staff's views on matters affecting investment advisers to certain private funds that arose as a result of the *Goldstein* decision. *See* ABA Subcommittee on Private Investment Companies, SEC Staff No-Action Letter (Aug. 10, 2006) (Commission staff expressed the view that the substantive provisions of the Advisers Act do not apply to offshore advisers with respect to such advisers' dealings with offshore funds and other offshore clients to the extent described in prior staff no-action letters and the Hedge Fund Adviser Registration Release, *supra* note 14. The staff noted, however, that an offshore adviser registered with the Commission under the Advisers Act must comply with the Advisers Act and the Commission's rules thereunder with respect to any U.S. clients (and any prospective U.S. clients) it may have.).

[516] Our staff has provided assurances that it would not recommend enforcement action when no participating affiliate has any U.S. clients other than clients of the registered affiliate, consistent with the private adviser exemption, which was conditioned on the number of a non-U.S. adviser's U.S. clients. *See supra* notes 508–509; Hedge Fund Adviser Registration Release, *supra* note 14, at n.211 and accompanying text. Under the *Unibanco* letters, participating affiliates only share personnel with, and provide certain services through, their registered adviser affiliates. *See supra* notes 508–509.

[517] *See* 5 U.S.C. 553(d).

[518] The statute also provides an exception if the agency finds good cause to make the rule effective less than 30 days after its date of publication in the **Federal Register**. *Id.*

[519] *See* sections 403 of the Dodd-Frank Act; sections 203(b)(3) of the Advisers Act; Section I *supra.*

registration for advisers to venture capital funds and foreign private advisers, respectively. Rule 203(l)–1 defines venture capital fund, and rule 202(a)(30)–1 defines several terms in the definition of ''foreign private adviser'' in section 202(a)(30).[520] Thus, these interpretive rules implement the new venture capital and foreign private adviser exemptions added to the Advisers Act by the Dodd-Frank Act.

Section 203(m) of the Advisers Act, as amended by the Dodd-Frank Act, directs the Commission to provide an exemption for advisers solely to private funds with assets under management in the United States of less than $150 million. Rule 203(m)–1, which implements section 203(m), grants an exemption and relieves a restriction and in part has interpretive aspects. Accordingly, we are making the rules effective on July 21, 2011.

IV. Paperwork Reduction Analysis

The rules do not contain a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995.[521] Accordingly, the Paperwork Reduction Act is not applicable.

V. Cost-Benefit Analysis

As discussed above, we are adopting rules 203(l)–1, 203(m)–1 and 202(a)(30)–1 to implement certain provisions of the Dodd-Frank Act. As a result of the Dodd-Frank Act's repeal of the private adviser exemption, some advisers that previously were eligible to rely on that exemption will be required to register under the Advisers Act unless they are eligible for a new exemption. Thus, the benefits and costs associated with registration for advisers that are not eligible for an exemption are attributable to the Dodd-Frank Act.[522] Moreover, the Dodd-Frank Act provides that, unlike an adviser that is specifically exempt pursuant to section 203(b), an adviser relying on an exemption provided by section 203(l) of the Advisers Act or rule 203(m)–1 thereunder may be subject to reporting and recordkeeping requirements.[523] Hence, the benefits and costs associated with being an exempt reporting adviser, relative to being an adviser that is registered or specifically exempted by reason of section 203(b), are attributable to the Dodd-Frank Act. The Commission has discretion, however, to adopt rules to define the terms used in the Advisers Act, and we undertake below to discuss the benefits and costs of the rules that we are adopting to implement the exemptions discussed in this Release.[524]

We are sensitive to the costs and benefits imposed by our rules, and understand that there will be costs and benefits associated with complying with the rules we are adopting today. We recognize that certain aspects of these rules may place burdens on advisers that seek to qualify for the various exemptions discussed in this Release. We believe that these rules, as modified from the proposals, offer flexibility and clarity for advisers seeking to qualify for the exemptions. We have designed the rules to balance these concerns with respect to potential costs and burdens with what we understand was intended by Congress.

In the Proposing Release, we identified possible costs and benefits of the proposed rules and requested comment on the analysis, including identification and assessment of any costs and benefits not discussed in the analysis. We requested that commenters provide analysis and empirical data to support their views on the costs and benefits associated with the proposals. In addition, we requested confirmation of our understanding of how advisers that may seek to rely on the exemptions operate and manage private funds and how the proposals may affect them and their businesses.

A. Definition of Venture Capital Fund

We define a venture capital fund as a private fund that: (i) Holds no more than 20 percent of the fund's capital commitments in non-qualifying investments (other than short-term holdings) (''qualifying investments'' generally consist of equity securities of ''qualifying portfolio companies'' and are discussed below); (ii) does not borrow or otherwise incur leverage, other than limited short-term borrowing (excluding certain guarantees of qualifying portfolio company obligations by the fund); (iii) does not offer its investors redemption or other similar liquidity rights except in extraordinary circumstances; (iv) represents itself as pursuing a venture capital strategy to investors; and (v) is not registered under the Investment Company Act and has not elected to be treated as a BDC.[525]

We define ''qualifying investments'' as: (i) Directly acquired equities; (ii) equity securities issued by a qualifying portfolio company in exchange for directly acquired equities issued by the same qualifying portfolio company; and (iii) equity securities issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, or a predecessor, and is received in exchange for directly acquired equities of the qualifying portfolio company (or securities exchanged for such directly acquired equities).[526] We define a ''qualifying portfolio company'' as any company that: (i) Is not a reporting company and does not have a control relationship with a reporting company; (ii) does not borrow or issue debt obligations in connection with the investment by the private fund and distribute proceeds of the borrowing or issuance to the private fund in exchange for the private fund investment; and (iii) is not itself a fund (*i.e.,* is an operating company).[527]

The final rule also grandfathers existing funds by including in the definition of ''venture capital fund'' any private fund that: (i) Represented to investors and potential investors at the time the fund offered its securities that it pursues a venture capital strategy; (ii) prior to December 31, 2010, has sold securities to one or more investors that are not related persons of any investment adviser of the venture capital fund; and (iii) does not sell any securities to, including accepting any additional capital commitments from, any person after July 21, 2011 (the ''grandfathering provision'').[528] An adviser seeking to rely on the exemption under section 203(l) of the Advisers Act would be eligible for the venture capital exemption only if it exclusively advised venture capital funds that satisfy all of the elements of the definition of venture capital fund or the grandfathering provision.

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[520] As discussed above, the Dodd-Frank Act amended the Advisers Act to define ''foreign private adviser'' in section 202(a)(30).

[521] 44 U.S.C. 3501.

[522] As we discuss above, although most venture capital advisers agreed with our proposed approach to the definition of venture capital fund, a number of commenters disagreed with our approach to the proposed definition, and argued that it should be expanded to include investments in small companies (regardless of whether they satisfy our definition of qualifying portfolio company) and investments in other private funds. *See, e.g.,* NASBIC/SBIA Letter; PEI Funds/Willowbridge Letter; VIA Letter. We do not believe that these more expansive positions are consistent with the intended scope of the venture capital exemption as expressed by Congress. *See supra* note 204 and accompanying text. Thus, we believe that the costs of registration for advisers to funds that would not satisfy the definition because they hold such investments are attributable to the Dodd-Frank Act.

[523] *See supra* note 5.

[524] The benefits and costs of the reporting requirements applicable to advisers relying on the venture capital exemption and the private fund adviser exemption are discussed in greater detail in the Implementing Adopting Release, *supra* note 32, discussion at sections V.A.2 and V.B.2.

[525] Rule 203(l)–1(a).

[526] Rule 203(l)–1(c)(3).

[527] Rule 203(l)–1(c)(4). *See also* text accompanying note 148.

[528] Rule 203(l)–1(b).

We have identified certain costs and benefits, discussed below, that may result from our definition of venture capital fund, including modifications to the proposal. As we discussed in the Proposing Release, the proposed rule was designed to: (i) Implement the directive from Congress to define the term venture capital fund in a manner that reflects Congress' understanding of what venture capital funds are, and as distinguished from other private funds such as private equity funds and hedge funds; and (ii) facilitate the transition to the new exemption.[529] As discussed above, we have modified the proposed rule to give qualifying funds greater flexibility with respect to their investments, partly in response to comments we received.[530] The final rule defines the term venture capital fund consistently with what we believe Congress understood venture capital funds to be,[531] and in light of other concerns expressed by Congress with respect to the intended scope of the venture capital exemption.[532]

Approximately 26 comment letters addressed the costs and benefits of the proposed rule defining venture capital fund.[533] As discussed below, most of these commenters did not provide empirical data to support their views. However, a number of venture capital advisers commenting on the proposed rule offered observations based upon their experiences managing venture capital funds and presented views on the potential impact of the proposed rule on their businesses and business practices.

1. Benefits

In the Proposing Release, we stated that based on the testimony presented to Congress and our research, we believed that venture capital funds currently in existence would meet most, if not all, of the elements of our proposed definition of venture capital fund.[534] Several commenters agreed that the proposed rule is consistent with Congressional intent.[535] Many venture capital advisers and related industry groups acknowledged that the proposed definition would generally encompass most venture capital investing activity that typically occurs,[536] but expressed the concern that a venture capital fund may, on occasion, deviate from its typical investing pattern with the result that the fund could not satisfy all of the definitional criteria under the proposed rule with respect to each investment all of the time.[537] Several commenters also expressed the concern that the final rule should provide sufficient flexibility to accommodate future business practices that are not known or contemplated today.[538]

For the reasons discussed above, we have modified the definition of venture capital fund. Our modifications include specifying a non-qualifying basket [539] and excluding from the 120-day limit with respect to leverage certain guarantees of portfolio company obligations by a qualifying fund.[540] For the reasons discussed in greater detail above, we are adopting a limit of 20 percent for non-qualifying investments.[541] In summary, the non-qualifying basket is designed to address commenters' concerns regarding occasional deviations from typical venture capital investing activity,[542] inadvertent violations of the definitional criteria [543] and flexibility to address evolving or future business practices.[544] We considered these comments in light of our concerns that the exemption not be expanded beyond what we believe was the intent of Congress [545] and that the definition not operate to foreclose investment funds from investment opportunities that would benefit investors but would not change the character of the fund.[546] We concluded that a non-qualifying basket limit of 20 percent would provide the flexibility sought by many venture capital fund commenters while appropriately limiting the scope of the exemption.[547]

We believe that the final rule (including the modifications from the proposal) better describes the existing venture capital industry and provides venture capital advisers with greater flexibility to accommodate existing (and potentially evolving or future) business practices and take advantage of investment opportunities that may arise. We also believe that the criteria under the final rule will facilitate transition to the new exemption, because it minimizes the extent to which an adviser seeking to rely on the venture capital exemption would need to alter its existing business practices, thus, among other things, reducing the likelihood of inadvertent non-compliance.[548]

As we discuss in greater detail above, many commenters arguing in favor of the modifications that we are adopting generally cited these benefits to support their views.[549] Specifically, several commenters asserted that providing a limited basket for non-qualifying investments would benefit venture capital advisers relying on the venture capital exemption, and the U.S. economy, by facilitating job creation and capital formation [550] and minimizing the extent to which a venture capital fund would need to alter

[529] *See* Proposing Release, *supra* note 26, discussion at text immediately preceding text accompanying n.273.

[530] *See generally* Section II.A.1.

[531] *See supra* notes 36–37 and accompanying and following text. *See also infra* note 535.

[532] *See supra* discussion at Section II.A.

[533] *See, e.g.,* NVCA Letter; NYSBA Letter; Oak Investments Letter; Sevin Rosen Letter; SVB Letter; Trident Letter.

[534] Proposing Release, *supra* note 26, at section IV.A.1.

[535] AFL–CIO Letter (''[T]he SEC has * * * generally provided appropriate definitions for each of the factors.''); AFR Letter (''[W]e believe that the exemption ultimately created in the [Dodd-Frank Act] for venture capital funds must be narrowly defined so as to prevent it from undermining the requirement all other fund managers register. We believe that the language in the proposed rule meets this goal * * *''); Sen. Levin Letter (''[T]he proposed definition captures the essence of venture capital firms whose mission is to encourage the development and expansion of new business.''). *See also* DuFauchard Letter (''Congressional directives require the SEC to exclude private equity funds, or any fund that pivots its investment strategy on the use of debt or leverage, from the definition of VC Fund.'').

[536] *See, e.g.,* Cook Children's Letter (''The Commission's definition of a venture capital fund does a thorough job capturing many of the aspects that differentiate venture capital funds from other types of private investment funds.''); Leland Fikes Letter; NVCA Letter (''[T]he Proposed Rules are generally consistent with existing venture capital industry practice * * *''). *See also* CompliGlobe Letter; DLA Piper VC Letter.

[537] *See, e.g.,* ATV Letter; BIO Letter; NVCA Letter; Sevin Rosen Letter.

[538] *See, e.g.,* NVCA Letter; Oak Investments Letter.

[539] Rule 203(l)–1(a)(2).

[540] Rule 203(l)–1(a)(3).

[541] *See generally* Section II.A.

[542] *See supra* note 56.

[543] *See supra* note 58.

[544] *See supra* note 56.

[545] *See supra* notes 45 and 61 and accompanying text.

[546] *See supra* note 60.

[547] *See supra* note 72 and following text.

[548] For example, the final rule does not specify that a qualifying fund must provide managerial assistance or control each qualifying portfolio company in which the fund invests. A number of commenters indicated that venture capital funds may not provide sufficient assistance or exercise sufficient control in order to satisfy this element of the proposed definition. *See, e.g.,* ESP Letter; Merkl Letter. The final rule also allows a qualifying fund to exclude investments in money market funds from the non-qualifying basket. A number of commenters indicated that money market funds are typically used by venture capital funds for cash management purposes. *See, e.g.,* NVCA Letter. We expect that these modifications to the rule would avoid the cost of altering an adviser's existing business practices.

[549] *See, e.g.,* NVCA Letter; Oak Investments Letter; Quaker BioVentures Letter. *See also supra* discussion at Section II.A.1.

[550] *See, e.g.,* NVCA Letter (stating that a low level of 15% would ''allow innovation and job creation to flourish within the venture capital industry''); Sevin Rosen Letter (a 20% limit would be ''flexible enough not to severely impair the operations of bona fide [venture capital funds], a critically important resource for American innovation and job creation'').

its typical business practices.[551] Other commenters maintained that an approach providing advisers some flexibility on occasion to take advantage of promising investment opportunities that might not be typical of most venture capital activity would benefit those funds and their investors.[552]

We anticipate that a number of benefits, described by commenters, may result from allowing qualifying funds limited investments in non-qualifying investments, including publicly traded securities, securities that are not equity securities (*e.g.,* non-convertible debt instruments) and interests in other private funds.[553] For example, increasing the potential pool of investors that could provide financing to publicly traded companies to include venture capital funds could facilitate access to capital for a portfolio company's expansion and growth.[554] Including investments that are not equity securities could offer funds seeking to qualify as venture capital funds the flexibility to structure an investment in a manner that is most appropriate for the fund (and its investors), including for example to obtain favorable tax treatment, manage risks (such as bankruptcy protection), maintain the value of the fund's equity investment or satisfy the specific financing needs of a portfolio company.[555] Including non-convertible bridge financing also would enable a portfolio company to seek such financing from venture capital funds if it is unable to obtain financing from traditional lending sources.[556] In addition, permitting qualifying funds to invest in other underlying private funds could facilitate capital formation and enhance liquidity for the underlying private funds.[557] Under the final rule, qualifying funds also would have increased flexibility to invest in portfolio companies through secondary market transactions. Commenters asserted that this would help align the interests of portfolio company founders with the interests of venture capital funds[558] and prevent dilution of the venture capital fund's investment in the portfolio company.[559]

Under the final rule, the non-qualifying basket is determined as a percentage of a qualifying fund's capital commitments, and compliance with the 20 percent limit is determined each time a qualifying fund makes any non-qualifying investment (excluding short-term holdings). We expect that calculating the size of the non-qualifying basket as a percentage of a qualifying fund's capital commitments, which will remain relatively constant during the fund's term, will provide advisers with a degree of predictability when managing the fund's portfolio and determining how much of the basket remains available for new investments. Moreover, we believe that by applying the 20 percent limit as of the time of acquisition of each non-qualifying investment, a fund is able to determine prospectively how much it can invest in the non-qualifying basket. We believe that this approach to determining the non-qualifying basket will appropriately limit a qualifying fund's non-qualifying investments and ease the burden of determining compliance with the criterion under the rule.

As discussed above, a qualifying fund can only invest up to 20 percent of its capital commitments in non-qualifying investments, as measured immediately after it acquires any non-qualifying investment.[560] The final rule treats as a qualifying investment any equity security of a qualifying portfolio company, or a company acquiring the qualifying portfolio company, that is exchanged for directly acquired equities issued by the qualifying portfolio company. This definition should benefit venture capital funds because it allows funds to participate in the reorganization of the capital structure of a portfolio company.[561] It also provides qualifying funds with liquidity and an opportunity to take profits from their investments because they can acquire securities in connection with the acquisition (or merger) of a qualifying portfolio company by another company—typical means by which venture capital funds exit an investment.[562]

The final rule excludes from the 120-day limit with respect to leverage any venture capital fund guarantees of portfolio company indebtedness, up to the value of the fund's investment in the company.[563] We agree with several commenters who stated that guarantees of portfolio company indebtedness under these circumstances will facilitate a portfolio company's ability to obtain credit for working capital or business operations.[564] Thus, we believe this provision, which is designed to accommodate existing business practices typical of venture capital funds, may contribute to efficiency, competition and capital formation.

The final rule excludes from the definition of qualifying portfolio company any company that borrows or issues debt if the proceeds of such borrowing or debt are distributed to the venture capital fund in exchange for the fund's investment in the company. This will allow qualifying funds to provide financing on a short-term basis to portfolio companies as a ''bridge'' between funding rounds.[565] In addition, a portfolio company can obtain financing for working capital or expansion needs from typical lenders, effect shareholder buyouts and conclude a simultaneous debt and equity offering, without affecting the adviser's eligibility for the venture capital exemption. For the foregoing reasons, commenters maintained, and we agree, that this approach would facilitate compliance with the rule without restricting a portfolio company's access to financing or other capital.[566] We believe that this provision of the final rule will benefit venture capital funds and their investors because it restricts a portfolio company's ability to incur debt that may implicate Congressional concerns regarding the use of leverage and effectively distinguishes advisers to venture capital funds from advisers to leveraged buyout private equity funds for which Congress did not provide an exemption.[567]

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[551] *See, e.g.,* McDonald Letter; Pine Brook Letter.

[552] *See, e.g.,* DuFauchard Letter; Merkl Letter.

[553] Rule 203(l)–1(a)(2) (specifying that a qualifying fund must hold, immediately after the acquisition of any asset (excluding short-term holdings) no more than 20% of its committed capital in assets that are not qualifying investments); rule 203(l)–1(c)(3) (defining ''qualifying investment'').

[554] *See, e.g.,* Lowenstein Letter; McDonald Letter; Mesirow Letter; Quaker BIO Letter; Trident Letter.

[555] *See, e.g.,* Merkl Letter; Oak Investments Letter; Sevin Rosen Letter; Vedanta Capital Letter.

[556] NVCA Letter; Trident Letter.

[557] *See, e.g.,* Cook Children's Letter; Leland Fikes Letter; Merkl Letter; SVB Letter.

[558] Sevin Rosen Letter.

[559] SVB Letter.

[560] The rule requires a qualifying fund at the time it acquires an asset, to have no more than 20% of its capital commitments invested in assets that are not qualifying investments. Rule 203(l)–1(a)(2).

[561] *See supra* note 109 and following text.

[562] *See, e.g.,* NVCA Letter; PTV Sciences Letter. The final rule defines equity securities broadly to cover many types of equity securities in which venture capital funds typically invest, rather than limit the definition solely to common stock. *See supra* notes 95–96 and accompanying text. Our definition of qualifying portfolio company is similarly broad because it does not restrict qualifying companies to ''small or start-up'' companies. As we have noted in the Proposing Release and above, we believe that such definitions would be too restrictive and provide venture capital fund advisers with too little flexibility and limited options with respect to potential portfolio company investments. *See supra* discussion in Section II.A.1.a.

[563] Rule 203(l)–1(a)(3).

[564] Oak Investments Letter; SVB Letter.

[565] *See, e.g., supra* note 181 and accompanying and following text.

[566] *See, e.g.,* NVCA Letter; SVB Letter.

[567] As discussed above, we have imposed this limitation on qualifying portfolio companies

Our final rule clarifies that an adviser seeking to rely on the venture capital exemption may treat as a private fund any non-U.S. fund managed by the adviser that does not offer its securities in the United States or to U.S. persons.[568] This treatment will enable an adviser to rely on the exemption when it manages only funds that satisfy the venture capital fund definition, regardless of the funds' jurisdiction of formation and investor base. We believe that this treatment facilitates capital formation and competition because it would allow an adviser to sponsor and advise funds in different jurisdictions in order to meet the different tax or regulatory needs of the fund's investors without risking the availability of the exemption.

The final rule includes several other characteristics that provide additional flexibility to venture capital advisers and their funds. For example, a qualifying fund cannot provide its investors with redemption or other liquidity rights except in extraordinary circumstances. Although venture capital funds typically do not permit investors to redeem their interests during the life of the fund,[569] the approach of the final rule allows a venture capital fund to respond to extraordinary events, including redeeming investors from the fund, without resulting in a registration obligation for the fund's adviser. Under the final rule, a venture capital fund must affirmatively represent itself as pursuing a venture capital strategy to its investors, a criterion designed to preclude advisers to certain private funds from claiming an exemption from registration for which they are not eligible. We believe that this element will allow the Commission and the investing public (particularly potential investors) to determine and confirm an adviser's rationale for remaining unregistered with the Commission.[570]

Because it takes into account existing business practices of venture capital funds and permits some flexibility for venture capital funds (and their managers) to adopt, or adapt to, new or evolving business practices, we believe that the final rule will facilitate advisers' transition to the new exemption. The rule generally limits investments of a qualifying fund, but creates a basket that will allow these funds flexibility to make limited investments that may vary from typical venture capital fund investing practices. The final rule also provides an adviser flexibility and discretion to structure transactions in underlying portfolio companies to meet the business objectives of the fund without creating significant risks of the kind that Congress suggested should require registration of the fund's adviser. We expect that this flexibility will benefit investment advisers that seek to rely on the venture capital exemption because they will be able more easily to structure and operate funds that meet the definition now and in the future, but will not permit reliance on the exemption by private fund advisers that Congress did not intend to exclude from registration.

Our final rule also should benefit advisers of existing venture capital funds that fail to meet the definition of venture capital fund. Our grandfathering provision permits an adviser to rely on the exemption provided that each fund that does not satisfy the definition (i) has represented to investors that it pursues a venture capital strategy, (ii) has initially sold interests by December 31, 2010, and (iii) does not sell any additional interests after July 21, 2011.[571] We expect that most advisers to existing venture capital funds that currently rely on the private adviser exemption would be exempt from registration in reliance on the grandfathering provision.[572] As a result of this provision, we expect that advisers to existing venture capital funds that do not meet our definition will benefit because they can continue to manage existing funds without having to (i) weigh the relative costs and benefits of registration and modification of fund operations to conform existing funds with our definition and (ii) incur the costs associated with registration with the Commission or modification of existing funds. Advisers to venture capital funds that were launched by December 31, 2010 and meet the July 21, 2011 deadline for sales of all securities also would benefit from the grandfathering provision because they would not have to incur these costs. We believe that the grandfathering provision will promote efficiency because it will allow advisers to existing venture capital funds to continue to rely on the exemption without having to restructure funds that may not meet the definition.[573] It also will allow advisers to funds that were launched by December 31, 2010 and can meet the other requirements of the grandfathering provision to rely on the exemption without the potential costs of having to renegotiate with potential investors and restructure those funds within the limited period before the rule is effective. After the effective date, advisers that seek to form new funds will have sufficient time and notice to structure those funds to meet the definition should they seek to rely on the exemption in section 203(l) of the Advisers Act.

Finally, we believe that our definition would include an additional benefit for investors and regulators. Section 203(l) of the Advisers Act provides an exemption specifically for advisers that ''solely'' advise venture capital funds. Currently none of our rules requires that an adviser exempt from registration specify the basis for the exemption. We are adopting, however, rules that would require exempt reporting advisers to identify the exemption(s) on which they are relying.[574] Requiring that venture capital funds represent themselves as such to investors should allow the Commission and the investing public (particularly potential investors in venture capital funds) to determine, and confirm, an adviser's rationale for remaining unregistered with the Commission. This element is designed to deter advisers to private funds other than venture capital funds from claiming to rely on an exemption from registration for which they are not eligible.

We believe that existing venture capital funds would meet most, if not all, of the elements of the final definition of venture capital fund. Nevertheless, we recognize that some advisers to existing venture capital funds that seek to rely on the exemption in section 203(l) of the Advisers Act might have to structure new funds differently to satisfy the definitional criteria under the final rule. To the extent that advisers choose not to

because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee Report, and the testimony before Congress that stressed the lack of leverage in venture capital investing. *See supra* notes 174 and 175.

[568] *See* note accompanying rule 203(l)–1.

[569] *See supra* notes 255–256 and accompanying text.

[570] *See* Merkl Letter (stating that a description of the investment strategy is a key element of any private placement memorandum).

[571] Rule 203(l)–1(b).

[572] A number of commenters specifically inquired about the scope of the holding out criterion and noted that under existing business practice venture capital funds may refer to themselves as private equity funds. As we discuss in greater detail above, we do not believe that the name used by a fund is the sole dispositive factor, and that satisfying the holding out criterion will depend on all of the facts and circumstances. *See supra* Section II.A.7. This criterion is similar to our general approach to antifraud provisions under the Federal securities laws and our rules.

[573] Many commenters supported the grandfathering provision, and one specifically cited the benefit of avoiding the need to alter fund terms to the potential detriment of fund investors. AV Letter.

[574] *See* Implementing Adopting Release, *supra* note 32, at n.175 and accompanying text.

change how they structure or manage new funds they launch, those advisers would have to register with the Commission,[575] which offers many benefits to the investing public and facilitates our mandate to protect investors. Registered investment advisers are subject to periodic examinations by our staff and are also subject to our rules including rules on recordkeeping, custody of client funds and compliance programs. We believe that in general Congress considered registration to be beneficial to investors because of, among other things, the added protections offered by registration. Accordingly, Congress limited the section 203(l) exemption to advisers solely to venture capital funds.

As noted above, we proposed, and are retaining in the final rule, certain elements in the portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report,[576] and the testimony before Congress that stressed the lack of leverage in venture capital investing.[577] We expect that distinguishing between venture capital funds and other private funds that pursue investment strategies involving financial leverage that Congress highlighted for concern would benefit financial regulators mandated by the Dodd-Frank Act (such as the Financial Stability Oversight Council) with monitoring and assessing potential systemic risks. Because advisers that manage funds with these characteristics would be required to register, we expect that financial regulators could more easily obtain information and data regarding these financial market participants, which should benefit those regulators to the extent it helps to reduce the overall cost of systemic risk monitoring and assessment.[578] We believe that investors will benefit from enhanced disclosure and oversight of the activities of private fund advisers by regulators, which in turn could contribute to a more efficient allocation of capital.

2. Costs

Costs for advisers to existing venture capital funds. As we discussed in the Proposing Release and above, we do not expect that the definition of venture capital fund would result in significant costs for unregistered advisers to venture capital funds currently in existence and operating.[579] We estimate that currently there are 791 advisers to venture capital funds.[580] We expect that all these advisers, which we assume currently are not registered in reliance on the private adviser exemption, would continue to be exempt after the repeal of that exemption on July 21, 2011 in reliance on the grandfathering provision.[581] We anticipate that such advisers to grandfathered funds will incur minimal costs, if any, to confirm that existing venture capital funds managed by the adviser meet the conditions of the grandfathering provision. We estimate that these costs would be no more than $800 to hire outside counsel to assist in this determination.[582]

We recognize, however, that advisers to funds that were launched by December 31, 2010 but have not concluded offerings to investors may incur costs to determine whether they qualify for the grandfathering provision. For example, these advisers may need to assess the impact on the fund of selling interests to initial third-party investors by December 31, 2010 and selling interests to all investors no later than July 21, 2011.[583] We do not expect that the cost of evaluating the grandfathering provision would be significant, however, because we believe that most funds in formation represent themselves as funds that pursue a venture capital strategy to their potential investors [584] and the typical fundraising period for a venture capital fund is approximately 12 months.[585] Thus, we do not anticipate that venture capital fund advisers would have to alter typical business practices to structure or raise capital for venture capital funds being formed. Nevertheless, we recognize that after the final rule goes into effect, exempt advisers of such funds in formation may forgo the opportunity to accept investments from investors that may seek to invest after July 21, 2011 in order to comply with the grandfathering provision.

To the extent that an existing adviser could not rely on the grandfathering provision with respect to funds in formation, we also expect that the adviser would not be required to modify its business practices significantly in order to rely on the exemption. Our final rule includes many modifications requested by commenters, such as the non-qualifying basket, and as a result, we expect that these modifications would reduce some of the costs associated with modifying current business practices to satisfy the proposed definitional criteria that commenters addressed.[586] As we

[575] *See infra* text following notes 585, 597–600 and accompanying text for a discussion of potential costs for advisers that would have to choose between registering or restructuring venture capital funds formed in the future.

[576] *See supra* note 174.

[577] *See supra* note 175.

[578] *See* S. Rep. No. 111–176, *supra* note 6, at 39 (explaining the requirement that private funds disclose information regarding their investment positions and strategies, including information on fund size, use of leverage, counterparty credit risk exposure, trading and investment positions and any other information that the Commission in consultation with the Financial Stability Oversight Council determines is necessary and appropriate to protect investors or assess systemic risk).

[579] Proposing Release, *supra* note 26, at text immediately preceding text accompanying n.273.

[580] *See* NVCA Yearbook 2011, *supra* note 152, at Fig. 1.04 (providing the number of ''active'' venture capital advisers, as of December 2010, that have raised a venture capital fund within the past eight years; 456 of the total number of venture capital advisers manage less than $100 million in capital).

[581] We estimate that these advisers (and any other adviser that seeks to remain unregistered in reliance on the exemption under section 203(l) of the Advisers Act or rule 203(m)–1 thereunder) would incur, on average, $2,311 per year to complete and update related reports on Form ADV, including Schedule D information relating to private funds. *See* Implementing Adopting Release, *supra* note 32, at section V.B.2. This estimate includes internal costs to the adviser of $2,032 to prepare and submit an initial report on Form ADV and $279 to prepare and submit annual amendments to the report. These estimates are based on the following calculations: $2,032 = ($4,064,000 aggregate costs ÷ 2000 advisers); $279 = ($558,800 aggregate costs ÷ 2,000 advisers). *Id.* at nn.579–581 and accompanying text. We estimate that approximately two exempt reporting advisers would file Form ADV–H annually at a cost of $189 per filing. *Id.,* at n.596 and accompanying text. We further estimate that three exempt reporting advisers would file Form ADV–NR per year at a cost of $188 per year. *Id.,* at nn.598–602 and accompanying text. We anticipate that filing fees for exempt reporting advisers would be the same as those for registered investment advisers. *See infra* note 598. These estimates, some of which differ from the estimates included in the Proposing Release, *supra* note 26, are discussed in more detail in the Implementing Adopting Release, *supra* note 32, at section V.B.2.

[582] As discussed in the Proposing Release, we expect that a venture capital adviser would need no more than 2 hours of legal advice to learn the differences between its current business practices and the conditions for reliance on the proposed grandfathering provision. We estimate that this advice would cost $400 per hour per firm based on our understanding of the rates typically charged by outside consulting or law firms. *See* Proposing Release, *supra* note 26, at n.293. We did not receive any comments on these cost estimates.

[583] We did not receive any comments on the dates specified in the grandfathering provision. *See also supra* note 307.

[584] *See supra* note 572.

[585] *See* Breslow & Schwartz, *supra* note 241, at 2–22 (''Once the first closing [of a private equity fund] has occurred, subsequent closings are typically held over a defined period of time [the marketing period] of approximately six to twelve months.''). *See also* Dow Jones Report, *supra* note 242, at 22.

[586] *See, e.g.,* Charles River Letter; Gunderson Dettmer Letter; NVCA Letter (arguing that as proposed the rule would have required venture capital fund advisers to modify their business practices in order to be eligible for the exemption). *See also* ABA Letter; Davis Polk Letter; Oak Investment Letter; SVB Letter (discussing the potential costs associated with complying with various elements of the proposed rule such as managerial assistance, venture capital fund leverage

discuss above, we believe that the final rule better reflects venture capital activity conducted by venture capital advisers that are likely to seek to rely on the exemption, and provides flexibility that will allow these funds to take advantage of new investment opportunities. To the extent that some commenters expressed concerns that they would have to divert personnel time from other functions to monitoring inadvertent failures to meet the definitional elements, we believe that the greater investment flexibility provided by the rule would offset most of these compliance costs.

Our rule does not provide separate definitional criteria for non-U.S. advisers seeking to rely on the exemption. These advisers might incur costs to the extent that cash management instruments they typically acquire may not be ''short-term holdings'' for purposes of the definition.[587] We expect that these costs would be mitigated, however, to the extent that these advisers can continue to acquire these instruments using the non-qualifying basket.

Costs for new advisers and advisers to new venture capital funds. We expect that existing advisers that seek to form new venture capital funds and investment advisory firms that seek to enter the venture capital industry will incur one-time ''learning costs'' to determine how to structure new funds they may manage to meet the elements of our definition. We estimate that on average, there are 23 new advisers to venture capital funds each year.[588] We expect that the one-time learning costs would be no more than between $2,800 and $4,800 on average for an adviser if it hires an outside consulting or law firm to assist in determining how the elements of our definition may affect intended business practices.[589] Thus, we estimate the aggregate cost to existing advisers of determining how the definition would affect funds they plan to launch would be from $64,400 to $110,400.[590] As they launch new funds and negotiate with potential investors, these advisers would have to determine whether it is more cost effective to register or to structure the venture capital funds they manage to meet the definition. Such considerations of legal or other requirements, however, comprise a typical business and operating expense of conducting new business. New advisers that enter into the business of managing venture capital funds also would incur such ordinary costs of doing business in a regulated industry.[591]

In the Proposing Release, we stated that we believed that existing advisers to venture capital funds would meet most, if not all, of the elements of the proposed definition.[592] As discussed above, most commenters generally acknowledged that the proposed definition would generally encompass most venture capital investing activity that typically occurs.[593] Several noted, however, that they might deviate from typical investing patterns on occasion or wanted the flexibility to invest small amounts of capital in investments that would be precluded by the proposed definition.[594] Under the final rule, venture capital funds that qualify for the definition may invest in non-qualifying investments subject to availability of the non-qualifying basket, including investments specified by some commenters. As a result of these modifications, the final definition is more closely modeled on current business practices of venture capital funds and provides advisers with flexibility to take advantage of investment opportunities. As a result, we do not anticipate that many venture capital fund advisers would have to change significantly the structure of new funds they launch.

We also recognize that some existing venture capital funds may have characteristics that differ from the criteria in our definition. To the extent that investment advisers seek to form new venture capital funds with these characteristics, those advisers would have to choose whether to structure new venture capital funds to conform to the definition, forgo forming new funds, or register with the Commission. In any case, each investment adviser would assess the costs associated with registering with the Commission relative to the costs of remaining unregistered (and hence structuring funds to meet our definition in order to be eligible for the exemption). We expect that this assessment would take into account many factors, including the size, scope and nature of an adviser's business and investor base. Such factors will vary from adviser to adviser, but each adviser would determine for itself whether registration, relative to other choices, is the most cost-effective or strategic business option.

The final rule may have effects on competition and capital formation. To the extent that advisers choose to structure new venture capital funds to conform to the definition, or choose not to form new funds in order to avoid registration, these choices could result in fewer investment choices for investors, less competition and less capital formation.[595] For example, to the extent that new venture capital funds do not invest in non-qualifying investments in excess of the 20 percent basket in order to meet the definition, the final rule could decrease competition and capital formation. If venture capital funds invest less in non-qualifying investments or more in qualifying portfolio company securities that are qualifying investments, this could increase competition among qualifying portfolio companies or private funds that invest in such companies. To the extent that funds invest more in less risky but lower yielding non-qualifying investments, this could decrease competition among investors that seek to invest in qualifying investments. To the extent that advisers choose to register in order to structure new venture capital funds without regard to the definitional criteria or in order to expand their businesses (*e.g.,* pursue additional investment strategies beyond venture capital investing or expand the potential investor base to include investors that are required to invest with registered advisers), these choices may result in greater investment choices for investors, greater competition and greater capital formation.[596]

Investment advisers to new venture capital funds that would not meet the definition would have to register and

and solely investing in qualifying portfolio companies).

[587] *See, e.g.,* EFAMA Letter (asserting that a non-U.S. fund could not invest in non-U.S. equivalent cash holdings under the proposed rule).

[588] This is the average annual increase in the number of venture capital advisers between 1981 and 2010. *See* NVCA Yearbook 2010, *supra* note 150, at Fig. 1.04; NVCA Yearbook 2011, *supra* note 152, at Fig. 1.04.

[589] We expect that a venture capital adviser would need between 7 and 12 hours of consulting or legal advice to learn the differences between its current business practices and the definition, depending on the experience of the firm and its familiarity with the elements of the rule. We estimate that this advice would cost $400 per hour per firm based on our understanding of the rates typically charged by outside consulting or law firms.

[590] This estimate is based on the following calculations: 23 × $2,800 = $64,400; 23 × $4,800 = $110,400. We did not receive any comments on these cost estimates.

[591] For estimates of the costs of registration for those advisers that would choose to register, *see infra* notes 597–600.

[592] Proposing Release, *supra* note 26, at Section V.A.1.

[593] *See supra* note 51.

[594] *See supra* note 52.

[595] *See, e.g.,* Lowenstein Letter; NVCA Letter; Venrock Letter.

[596] *See, e.g.,* ''Asia's Cash-Poor Small Hedge Funds Vulnerable to U.S. Rules,'' Bloomberg.com (Feb. 23, 2011) (identifying two fund of funds managers that either require or prefer to allocate client assets to advisers registered with the Commission).

incur the costs associated with registration (assuming the adviser could not rely on the private fund adviser exemption). We note that the costs of registration for advisers that do not qualify for the venture capital fund adviser exemption flow from the Dodd-Frank Act, which removed the private adviser exemption on which they currently rely.

We estimate that the internal cost to register with the Commission would be $15,077 on average for a private fund adviser,[597] excluding the initial filing fees and annual filing fees to the Investment Adviser Registration Depository (''IARD'') system operator.[598] These registration costs include the costs attributable to completing and periodically amending Form ADV, preparing brochure supplements, and delivering codes of ethics to clients.[599] In addition to the internal costs described above, we estimate that for an adviser choosing to use outside legal services to complete its brochure, such costs would be $5,000.[600]

New registrants would also face costs to bring their business operations into compliance with the Advisers Act and the rules thereunder. These costs, however, will vary significantly among advisers depending on the adviser's size, the scope and nature of its business, and the sophistication of its compliance infrastructure, but in any case would be an ordinary business and operating expense of entering into any business that is regulated.

We estimated in the Proposing Release that the one-time costs to new registrants to establish a compliance infrastructure would range from $10,000 to $45,000, while ongoing annual costs of compliance and examination would range from $10,000 to $50,000.[601] Some commenters suggested that these estimates are too low. Commenters identifying themselves as ''middle market private equity fund'' advisers estimated that they would incur one-time registration and compliance costs ranging from $50,000 to $600,000, followed by ongoing annual compliance costs ranging from $50,000 to $500,000.[602] Commenters identifying themselves as advisers to venture capital funds, however, provided much lower estimates for one-time registration and compliance costs ranging from $75,000 to $200,000, followed by ongoing annual compliance costs ranging from $50,000 to $150,000.[603]

Although some advisers may incur these costs, the costs of compliance for a new registrant can vary widely among advisers depending on their size, activities, and the sophistication of their existing compliance infrastructure. Advisers, whether registered with us or not, may have established compliance infrastructures to fulfill their fiduciary duties towards their clients under the Advisers Act. Generally, costs will likely be less for new registrants that have already established sound compliance practices and more for new registrants that have not yet established sound practices.

For example, some commenters specifically included in their cost estimates compensation costs for hiring a dedicated chief compliance officer (''CCO'').[604] Our compliance rule, however, does not require advisers to hire a new individual to serve as a full-time CCO, and the question of whether an adviser can look to existing staff to fulfill the CCO requirement internally is firm-specific.[605]

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[597] This estimate is based upon the following calculations: $15,077 = ($9,627,871 aggregate costs to complete Form ADV ÷ 750 advisers expected to register with the Commission) + ($8,509,000 aggregate costs to complete private fund reporting requirements ÷ 3,800 advisers expected to provide private fund reports). *See* Implementing Adopting Release, *supra* note 32, at nn.612–618 and accompanying text for a more detailed discussion of these costs. This also assumes that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager. *See id.,* at n.608. Data from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively.

[598] Filing fees paid for submitting initial and annual filings through the IARD currently range from $40 to $225 based on the amount of assets an adviser has under management. The current fee schedule for registered advisers may be found on our Web site at *http://www.sec.gov/divisions/investment/iard/iardfee.shtml. See* Implementing Adopting Release, *supra* note 32, at n.566–567 and accompanying text (assuming for purposes of the analysis that exempt reporting advisers will pay a fee of $225 per initial or annual report).

[599] Part 1 of Form ADV requires advisers to answer basic identifying information about their business, their affiliates and their owners, information that is readily available to advisers, and thus should not result in significant costs to complete. Registered advisers must also complete Part 2 of Form ADV and file it electronically with us. Part 2 requires disclosure of certain conflicts of interest and could be prepared based on information already contained in materials provided to investors, which could reduce the costs of compliance even further.

[600] *See* Implementing Adopting Release, *supra* note 32, at n.729.

[601] *See* Proposing Release, *supra* note 26, at n.303 and accompanying text. Our estimate was based on the expectation that most advisers that might choose to register for business reasons have already built compliance infrastructures as a matter of good business practice. Nevertheless, we expect advisers will incur costs for outside legal counsel to evaluate their compliance procedures initially and on an ongoing basis. We estimate that the costs to advisers to establish the required compliance infrastructure will be, on average, $20,000 in professional fees and $25,000 in internal costs including staff time. These estimates were prepared in consultation with attorneys who, as part of their private practice, have counseled private fund advisers establishing their registrations with the Commission. We included a range because we believe there are a number of unregistered advisers of private funds whose compliance operations are already substantially in compliance with the Advisers Act and that would therefore experience only minimal incremental ongoing costs as a result of registration. In connection with previous estimates we have made regarding compliance costs for registered advisers, we received comments from small advisers estimating that their annual compliance costs would be $25,000 and could be as high as $50,000. *See, e.g.,* Comment Letter of Joseph L. Vidich (Aug. 7, 2004). *Cf.* Comment Letter of Venkat Swarna (Sept. 14, 2004) (estimating costs of $20,000 to $25,000). These comment letters were submitted in connection with the Hedge Fund Adviser Registration Release, *supra* note 14, and are available on the Commission's Internet Web site at *http://www.sec.gov/rules/proposed/s73004.shtml.*

[602] *See, e.g.,* Comment Letter of Atlas Holdings (Jan. 21, 2011) (''Atlas Letter'') (estimating $500,000 in 2011 and $350,000 per year thereafter for compliance manuals and oversight, employee trading records, legal documentation, and the hiring of additional compliance employees); Comment Letter of Sentinel Capital Partners (Jan. 16, 2011) (''Sentinel Letter'') (estimating between $500,000–$600,000 in 2011 and more than $375,000 per year thereafter for compliance manuals and oversight, employee trading records, legal documentation, and the hiring of additional compliance employees); Comment Letter of Charlesbank Capital Partners (Jan. 21, 2011) (''Charlesbank Letter'') (''[A]lthough impossible to quantify at this point given the absence of regulations, we anticipate a substantial cost associated with ongoing compliance.''); Comment Letter of Crestview Advisors, LLC (Jan. 19, 2011) (''Crestview Letter'') (estimating annual costs of $300,000–$500,000); Comment Letter of Azalea Capital (Feb. 17, 2011) (''Azalea Letter'') (estimating $50,000 to $100,000 per year); Comment Letter of Gen Cap America, Inc. (Jan. 21, 2011) (''Gen Cap Letter'') (estimating $150,000–$250,000 per year). *See also* Memorandum to File No. S7–37–10, dated March 17, 2011, concerning a meeting with certain private fund representatives, avail. at *http://www.sec.gov/comments/s7-37-10/s73710-124.pdf* (''File Memorandum'') (estimating that costs for small firms range from $100,000–$200,000 (exclusive of salary costs for a CCO)).

[603] *See* VIA Letter (estimating an initial cost of $75,000 or more and ongoing costs of $50,000 to $150,000 per year); Pine Brook Letter (estimating initial costs of $125,000 to $200,000 and ongoing compliance costs of $100,000–150,000 per year).

[604] *See, e.g.,* Katten Foreign Insurance Letter (''In addition, there are added salary costs for hiring a chief compliance officer. In all, costs could be expected to total hundreds of thousands of dollars and hundreds of hours of personnel time for each new registrant.''); Comment Letter of Cortec Group (Jan. 14, 2011) (''Cortec Letter'') (''Furthermore, the Act requires we add a compliance officer (who has to be a senior-level executive), at a minimum annual compensation of $200,000, yet we do not engage in any activity the Act wishes to monitor.''). Other commenters may have included such costs in their estimates although they did not provide details on individual components. *See, e.g.,* Crestview Letter (''As part of these new regulations, we are required to develop a compliance program; hire a compliance officer; custody our private company stock certificates, which are worthless to any party not part of the original purchase agreement; and register with the SEC.'')

[605] *See* Advisers Act rule 206(4)–(7) (requiring, among other things, an adviser registered or

Although we recognize that some newly registering advisers will need to designate someone to serve as CCO on a full-time basis, we expect these will be larger advisers—those with many employees and a sizeable amount of investor assets under management. Because there is no currently-available comprehensive database of unregistered advisers, we cannot determine the number of these larger advisers in operation. These larger advisers that are not yet registered likely already have personnel who perform similar functions to a CCO, in order to address the adviser's liability exposure and protect its reputation.

In smaller advisers, the designated CCO will likely also fill another function in the adviser, and perform additional duties alongside compliance matters. Advisers designating a CCO from existing staff may experience costs that result from shifting responsibilities among staff or additional compensation, to the extent the individual is taking on additional compliance responsibilities or giving up other non-compliance responsibilities. Costs will vary from adviser to adviser, depending on the extent to which an adviser's staff is already performing some or all of the requisite compliance functions, the extent to which the CCO's non-compliance responsibilities need to be lessened to permit allocation of more time to compliance responsibilities, and the value to the adviser of the CCO's non-compliance responsibilities.[606]

Some commenters asserted that the costs of ongoing compliance would be substantial.[607] We anticipate that there may be a number of currently unregistered advisers whose operations are already substantially in compliance with the Advisers Act and that would therefore experience only minimal incremental ongoing costs as a result of registration. There likely are other currently unregistered advisers, however, who will face additional ongoing costs to conduct their operations in compliance with the Advisers Act, and these costs may be significant for some of these advisers.

We do not have access to information that would enable us to determine these additional ongoing costs, which are predominantly internal to the advisers themselves. Incremental ongoing compliance costs will vary from adviser to adviser depending on factors such as the complexity of each adviser's activities, the business decisions it makes in structuring its response to its compliance obligations, and the extent to which it is already conducting its operations in compliance with the Advisers Act. Indeed, the broad range of estimated costs we received reflects the individualized nature of these costs and the extent to which they may vary even among the relatively small number of commenters who provided cost estimates.[608]

Some commenters expressed concern that compliance costs would be prohibitive in comparison to their revenues or in relation to their size or activities.[609] We note, however, that an adviser is required to adopt policies and procedures that take into consideration the nature of that adviser's operations.[610] We have explained that, accordingly, we would expect smaller advisers without conflicting business interests to require much simpler policies and procedures than larger advisers that, for example, have multiple potential conflicts as a result of their other lines of business or their affiliations with other financial service firms.[611] The preparation of these simpler policies and procedures and their administration should be much less burdensome.[612]

We also note that approximately 570 smaller advisers currently are registered with us.[613] These advisers have absorbed the compliance costs associated with registration, notwithstanding the fact that their assets under management are likely to be smaller than those of an adviser managing one venture capital fund of average size (*e.g.,* with $107.8 million in venture capital under management[614]) that may be required to register because it cannot rely on the venture capital exemption or the private fund adviser exemption. Moreover, as we explained in the Proposing Release, in connection with previous estimates we have made regarding compliance costs for registered advisers, we received comments from small advisers estimating that their annual compliance costs would be $25,000 and could be as high as $50,000.[615] Finally, as we noted in the Proposing Release, to the extent there would be an increase in registered advisers, there are benefits to registration for both investors and the Commission.[616]

We do not believe that the definition of venture capital fund is likely to affect whether advisers to venture capital funds would choose to launch new funds or whether persons would choose to enter into the business of advising venture capital funds because, as noted above, we believe the definition, as revised, reflects the way most venture capital funds currently operate. Thus, for example, we eliminated the managerial assistance criterion in the proposed definition, expanded the short-term instruments in which venture capital funds can invest and provided for a non-qualifying basket. These elements in the proposal could have resulted in costs to advisers that manage venture capital funds with business or cash management practices inconsistent with those proposed criteria and that sought to rely on the exemption.[617] As a result, we expect that the definition is not likely to significantly affect the way in which investment advisers to these funds do

required to be registered under the Advisers Act to designate an individual (who is a supervised person) responsible for administering the policies and procedures). In determining whether existing staff can fulfill the CCO requirement, advisers may consider factors such as the size of the firm, the complexity of its compliance environment, and the qualifications of current staff.

[606] Although some commenters noted that requiring existing employees to assume compliance-related responsibilities would involve costs, they did not provide sufficient information on which we could estimate these costs.

[607] *See supra* note 602.

[608] *Compare* Azalea Letter (estimated ongoing compliance costs of $50,000 to $100,000 per year) *with* Crestview Letter (estimated ongoing compliance costs of $300,000 to $500,000 per year). *See also* Charlesbank Letter (stating that costs associated with ongoing compliance are impossible to quantify at this point).

[609] *See, e.g.,* Crestview Letter (''The cost of complying with these new regulations is estimated to be $300,000–$500,000 per year, which is a significant sum for a firm that invests in two to three private companies each year in relation to the benefit it provides.''); Azalea Letter (''The cost of complying with these new regulations is estimated to be $50,000 to $100,000 per year, which is a significant sum for a firm that invests in two to three private companies each year.''); Gen Cap Letter (''The cost of complying with these new regulations is estimated to be $150,000–$250,000 per year, which is a significant sum for a firm that invests in two to three private companies each year in relation to the benefit it provides.'').

[610] *See Compliance Programs of Investment Companies and Investment Advisers,* Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)], discussion at section II.A.1.

[611] *Id. See also id.* at n.13 (noting that even small advisers may have arrangements, such as soft dollar agreements, that create conflicts; advisers of all sizes, in designing and updating their compliance programs, must identify these arrangements and provide for the effective control of the resulting conflicts).

[612] *Id.,* discussion at section II.A.1.

[613] *See* Implementing Adopting Release, *supra* note 32, at n.823 and accompanying text (noting that, based on data from the Investment Adviser Registration Depository as of April 7, 2011, 572 advisers registered with the Commission were small advisers).

[614] *See* NVCA Yearbook 2011, *supra* note 152, at 9, Fig. 1.0.

[615] *See* Proposing Release, *supra* note 26, at n.303. *See also supra* note 601.

[616] *See supra* text following note 575.

[617] *See supra* notes 548, 586 and accompanying text.

business and thus compete. For the same reason, we do not believe that our rule is likely to have a significant effect on overall capital formation.

Other Costs. Some commenters argued in favor of a narrow definition of venture capital fund in order to preclude advisers to other types of funds from relying on the definition.[618] One commenter expressed the concern that the definition should be narrow so that advisers generally would be subject to a consistent regulatory regime,[619] and another supported incorporating substantive Advisers Act rules, such as custody, as a condition for reliance on the various exemptions in order to protect investors.[620] To the extent that our final rule includes broader criteria and results in fewer registrants under the Advisers Act, we acknowledge that this could have an adverse impact on investors.[621]

Moreover, to the extent that our final rule includes broader criteria and results in fewer registrants, this also could reduce the amount of information available to regulators with respect to venture capital advisers relying on the exemption. Under the final rule, immediately after it acquires any non-qualifying investment (excluding short-term holdings), no more than 20 percent of a qualifying fund's capital commitments may be held in non-qualifying investments (excluding short-term holdings). As a result, initially, and possibly for a period of time during the fund's term (subject to compliance with the other elements of the rule), it may be possible for non-qualifying investments to comprise most of a qualifying fund's investment portfolio. The proposal would have required a qualifying fund to be comprised entirely of qualifying investments, which would have enabled regulators and investors to confirm with relative ease at any point in time whether a fund satisfied the definition. Modifying the definition to include a non-qualifying basket determined as a percentage of a qualifying fund's capital commitments may increase the monitoring costs that regulators and investors may incur in order to verify that a fund satisfies the definition, depending on the length of the fund's investment period and the frequency with which the fund invests in non-qualifying investments.

A number of commenters expressed concerns with certain elements of the proposed rule, which we are not modifying. Several commenters suggested that the rule specify that the leverage limit of 15 percent be calculated without regard to uncalled capital commitments because they were concerned about the potential for excessive leverage.[622] We acknowledge that a leverage limitation which includes uncalled capital commitments could result in a fund incurring, in the early stages of the fund's life, a significant degree of leverage by the fund relative to the fund's overall assets. We believe, however, that the 120-day limit would mitigate the effects of any such leverage that is incurred by a venture capital fund seeking to satisfy the definition.

Several commenters also argued that the definition of qualifying portfolio company should include certain subsidiaries that may be owned by a publicly traded company, such as research and development subsidiaries, that may seek venture capital funding.[623] As a result of our final rule, these types of subsidiaries may have reduced access to capital investments by qualifying funds, although this cost would be mitigated by a qualifying fund's investments made through the non-qualifying basket.

Other commenters argued that the definition of venture capital fund should include funds of venture capital funds.[624] We have not modified the rule to reflect this request, because we do not believe that defining the term in this manner is consistent with the intent of Congress.[625] To the extent that an adviser to a fund of venture capital funds ceases business or ceases to offer new funds in order to avoid registration with the Commission, this could reduce the pool of potential investors investing in venture capital funds,[626] and potentially reduce capital formation for potential qualifying portfolio companies.

B. Exemption for Investment Advisers Solely to Private Funds With Less Than $150 Million in Assets Under Management

As discussed in Section II.B, rule 203(m)–1 exempts from registration under the Advisers Act any investment adviser solely to private funds that has less than $150 million in assets under management in the United States. The rule implements the private fund adviser exemption, as directed by Congress, in section 203(m) of the Advisers Act and includes provisions for determining the amount of an adviser's private fund assets for purposes of the exemption and when those assets are deemed managed in the United States.[627]

1. Benefits

Method of Calculating Private Fund Assets. As discussed in Section II.B.2 above and in the Implementing Adopting Release, we are revising the instructions to Form ADV to provide a uniform method for calculating assets under management that can be used for regulatory purposes, including determining eligibility for Commission, rather than state, registration; reporting assets under management for regulatory purposes on Form ADV; and determining eligibility for the private fund adviser exemption under section 203(m) of the Advisers Act and rule 203(m)–1 thereunder and the foreign private adviser exemption under section 203(b)(3) of the Advisers Act.[628] We believe that this uniform approach will benefit regulators (both state and Federal) as well as advisers, because only a single determination of assets under management is required for purposes of registration and exemption from Federal registration.

The instructions to Form ADV previously permitted, but did not require, advisers to exclude certain types of managed assets.[629] As a result, it was not possible to conclude that two advisers reporting the same amount of assets under management were necessarily comparable because either adviser could have elected to exclude all or some portion of certain specified assets that it managed. We expect that specifying in rule 203(m)–1 that assets under management must be calculated according to the instructions to Form ADV will increase administrative efficiencies for advisers because they will have to calculate assets under management only once for multiple purposes.[630] In addition, we believe this

[618] *See supra* note 43.

[619] CalPERS Letter. *See also* NASAA Letter (supported adding substantive requirements to the grandfathering provision).

[620] CPIC Letter.

[621] *See supra* text accompanying and following note 575 (discussing benefits that result from registration).

[622] AFR Letter; AFL–CIO Letter.

[623] BCLBE Letter; Dechert General Letter; Gunderson Dettmer Letter.

[624] *See, e.g.,* Cook Children's Letter; Merkl Letter; SVB Letter.

[625] *See supra* notes 204–206.

[626] *See generally* Merkl Letter; SVB Letter.

[627] *See supra* Sections II.B.2–3.

[628] *See supra* notes 332–336 and accompanying text.

[629] *See* Form ADV: Instructions to Part 1A, instr. 5.b(1), as in effect before the amendments adopted in the Implementing Adopting Release, *supra* note 32.

[630] *See supra* Section II.B.2. As discussed below, we are permitting advisers to calculate their private fund assets annually in connection with their annual updating amendments to their Forms ADV, rather than quarterly as proposed. Requiring annual, rather than quarterly, calculations will be less costly for advisers.

will minimize costs relating to software modifications, recordkeeping, and training required to determine assets under management for regulatory purposes. We also believe that the consistent calculation and reporting of assets under management will benefit investors and regulators because it will provide enhanced transparency and comparability of data, and allow investors and regulators to analyze on a more cost effective basis whether any particular adviser may be required to register with the Commission or is eligible for an exemption.

Many commenters generally expressed support for the implementation of a uniform method of calculating assets under management in order to maintain consistency for registration and risk assessment purposes.[631] Indeed, even some commenters who suggested that we revise aspects of the method of calculating regulatory assets under management nonetheless recognized the benefits provided by a uniform method of valuing assets for regulatory purposes.[632]

We believe that the valuation of private fund assets under rule 203(m)–1 will benefit advisers that seek to rely on the private fund adviser exemption. Under rule 203(m)–1, each adviser annually must determine the amount of its private fund assets, based on the market value of those assets, or the fair value of those assets where market value is unavailable.[633] We are requiring advisers to fair value private fund assets so that, for purposes of the exemption, advisers value private fund assets on a meaningful and consistent basis. As we stated in the Proposing Release, we understand that many, but not all, advisers to private funds value assets based on their fair value in accordance with GAAP or other international accounting standards that require the use of fair value.[634] We acknowledged in the Proposing Release that some advisers to private funds may not use fair value methodologies, which may be more difficult to apply when the fund holds illiquid or other types of assets that are not traded on organized markets.[635]

Frequency of Calculations and the Transition Period. Rule 203(m)–1(c) specifies that an adviser relying on the exemption must calculate its private fund assets annually, in accordance with General Instruction 15 to Form ADV, rather than quarterly, as proposed. Advisers registered with us and with the states, and now advisers relying on rule 203(m)–1, must calculate their assets under management for regulatory purposes annually in connection with their annual updating amendments to Form ADV. We expect that requiring these types of advisers to calculate their assets under management for regulatory purposes on the same schedule, and using the same method, will increase efficiencies for these advisers.

The annual calculation also will allow advisers that rely on the exemption to maintain the exemption despite short-term market value fluctuations that might result in the loss of the exemption if, for example, the rule required daily valuations or, to a less significant extent, quarterly valuations as proposed.[636] Annual calculations should benefit these advisers by allowing them to avoid the cost of more frequent valuations, including costs (such as third-party quotes) associated with valuing illiquid assets, which may be particularly difficult to value because of the lack of frequency with which such assets are traded.[637] Requiring annual, rather than quarterly, calculations thus responds to concerns expressed by commenters who argued that quarterly calculations would (i) impose unnecessary costs and burdens on advisers, some of whom might not otherwise perform quarterly valuations; and (ii) inappropriately permit shorter-term fluctuations in assets under management to require advisers to register.[638]

An adviser relying on the exemption that reports private fund assets of $150 million or more in its annual updating amendment to its Form ADV will not be eligible for the exemption and must register under the Advisers Act unless it qualifies for another exemption. If the adviser has complied with all Commission reporting requirements applicable to an exempt reporting adviser as such, however, it may apply for registration under the Advisers Act up to 90 days after filing the annual updating amendment, and may continue to act as a private fund adviser, consistent with the requirements of rule 203(m)–1, during this transition period.[639]

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[631] *See supra* note 339.

[632] *See, e.g.,* AIMA Letter (suggested modifications to the method of calculating regulatory assets under management but also stated ''[w]e agree that a clear and unified approach for calculation of AUM is necessary and we believe that using as a standard the assets for which an adviser has 'responsibility' is appropriate''); O'Melveny Letter (argued that the calculation of regulatory assets under management as proposed ''does not provide a suitable basis to determine whether a fund adviser should be subject to the SEC's regulation'' but also ''agree[s] with the SEC that 'uniformity in the method for calculating assets under management would result in more consistent asset calculations and reporting across the industry and, therefore, in more coherent application of the Advisers Act's regulatory requirements and of the SEC staff's risk assessment program'").

[633] *See* rule 203(m)–1(c) (requiring an adviser to calculate private fund assets annually, in accordance with General Instruction 15 to Form ADV, which together with rule 204–4 requires advisers relying on the exemption to determine their private fund assets annually, in connection with the adviser's annual updating amendments to its Form ADV). *See also* rules 203(m)–1(a)(2); 203(m)–1(b)(2); 203(m)–1(d)(1) (defining ''assets under management'' to mean ''regulatory assets under management'' in item 5.F of Form ADV, Part 1A); 203(m)–1(d)(4) (defining ''private fund assets'' to mean the ''assets under management'' attributable to a ''qualifying private fund''). As discussed above, advisers are not required to fair value real estate assets in certain limited circumstances. *See supra* note 366 and accompanying text.

[634] *See* Proposing Release, *supra* note 26, discussion at section V.B and n.196. *See also* ABA Letter (recommending that the Commission consider using a standard of ''fair value'' for valuing assets and further recommending that if assets were calculated on a net basis, private funds should be required to prepare audited annual financial statements in accordance with GAAP (or another accounting standard acceptable to the Commission), and to maintain such financial statements under section 203(m)(2)); O'Melveny Letter (agreeing with the statement in the Proposing Release that many private funds value assets based on fair value, and noting that private equity funds in particular are among the private funds that generally do not fair value).

[635] *See* Proposing Release, *supra* note 26, discussion at section V.B. *See also infra* Section V.B.2.

[636] *See, e.g.,* ABA Letter (''[A] semi-annual or annual measuring period would perhaps be more appropriate, and [] a longer measuring period would provide an adviser that is exempt from registration under the Private Fund Adviser Exemption assistance in avoiding issues arising from temporary increases in asset values.''); AIMA Letter (''Asset valuation is a substantial administrative task and is currently undertaken annually for other purposes (for example, Form ADV), so that a requirement for annual valuation would appear to strike a fair balance between ensuring that firms whose AUM is at or above the applicable threshold are 'captured' and avoiding both complications with short-term market value fluctuations and over-burdening investment advisers.'').

[637] *See, e.g.,* Dechert Foreign Adviser Letter (''[T]he Foreign Asset Manager submits that a yearly calculation (rather than a quarterly calculation) would be more appropriate, as some private funds may not provide for quarterly calculations of their NAV.''); Katten Foreign Advisers Letter (argued for annual calculations, noting that ''[m]any advisers only determine their aggregate assets under management on an annual basis''); NASBIC/SBIA Letter (''Unless sought by the adviser, evaluations on whether to register should be made no more often than an annual basis.''); Seward Letter (''We believe that annual measurement of assets for purposes of determining an adviser's ability to rely on the private fund adviser exemption would be consistent with the approach established under NSMIA.'').

[638] *See* AIMA Letter; Dechert Foreign Adviser Letter; Dechert General Letter; EFAMA Letter; Katten Foreign Advisers Letter; Merkl Letter; Seward Letter.

[639] *See supra* Section II.B.2.b; rule 203(m)-1(c) (requiring advisers to calculate their private fund assets annually, in accordance with General

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The transition period should benefit certain advisers. As discussed above, an adviser that has ''complied with all [Commission] reporting requirements applicable to an exempt reporting adviser as such'' may apply for registration with the Commission up to 90 days after filing an annual updating amendment reflecting that the adviser has private fund assets of $150 million or more, and may continue to act as a private fund adviser, consistent with the requirements of rule 203(m)–1, during this transition period.[640] In addition, by requiring annual calculations of private fund assets, we are allowing advisers to whom the transition period is available 180 days after their fiscal year-ends to register under the Advisers Act.[641] We expect that providing these advisers additional time to register will reduce the burdens associated with registration by permitting them to register in a more deliberate and cost-effective manner, as suggested by some commenters.[642]

Assets under Management in the United States. Under rule 203(m)–1(a), all of the private fund assets of an adviser with a principal office and place of business in the United States are considered to be ''assets under management in the United States,'' even if the adviser has offices outside of the United States.[643] A non-U.S. adviser must count only private fund assets it manages at a place of business in the United States toward the $150 million limit under the exemption.

As discussed below, we believe that this interpretation of ''assets under management in the United States'' offers greater flexibility to advisers and reduces many costs associated with compliance.[644] These costs could include difficult attribution determinations that would be required if assets are managed by teams located in multiple jurisdictions or if portfolio managers located in one jurisdiction rely heavily on research or other advisory services performed by employees located in another jurisdiction. Most commenters who addressed the issue supported the proposal to treat ''assets under management in the United States'' as those assets managed at a U.S. place of business.[645]

To the extent that this interpretation may increase the number of advisers subject to registration under the Advisers Act, we anticipate that our rule also will benefit investors by providing more information about those advisers (*e.g.,* information that would become available through Form ADV, Part I). We further believe that this will enhance investor protection by increasing the number of advisers registering pursuant to the Advisers Act and by improving our ability to exercise our investor protection and enforcement mandates over those newly registered advisers. As discussed above, registration offers benefits to the investing public, including periodic examination of the adviser and compliance with rules requiring recordkeeping, custody of client funds and compliance programs.[646]

Territorial Approach. Under rule 203(m)–1(b), a non-U.S. adviser with no U.S. place of business may avail itself of the exemption even if it advises non-U.S. clients that are not private funds, provided that it does not advise any U.S. clients other than private funds.[647] We believe that this aspect of the rule, which looks primarily to the principal office and place of business of an adviser to determine eligibility for the exemption, will increase the number of non-U.S. advisers that may be eligible for the exemption. As with other Commission rules that adopt a territorial approach, the private fund adviser exemption is available to a non-U.S. adviser (regardless of its non-U.S. advisory or other business activities) in recognition that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and in consideration of general principles of international comity. This aspect of the rule is designed to encourage the participation of non-U.S. advisers in the U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on a non-U.S. adviser's non-U.S. advisory business.[648]

We believe that our interpretation of the availability of the private fund adviser exemption for non-U.S. advisers, as reflected in the rule, will benefit those advisers by facilitating their continued participation in the U.S. market with limited disruption to their non-U.S. advisory or other business practices.[649] This approach also should benefit U.S. investors and facilitate competition in the market for advisory services to the extent that it maintains or increases U.S. investors' access to potential advisers. Furthermore, because non-U.S. advisers that elect to avail themselves of the exemption would be subject to certain reporting requirements,[650] we believe that our approach will increase the availability of information publicly available to U.S. investors who invest in the private funds advised by such exempt but reporting non-U.S. advisers.

Most of the commenters who considered this aspect of the rule supported it, citing, among other benefits, that this interpretation would effectively protect U.S. markets and investors and is consistent with the Commission's overall territorial

Instruction 15 to Form ADV); General Instruction 15 to Form ADV; rule 204–4.

[640] *See supra* note 378 (explaining that the transition period is available to an adviser that has complied with ''all [Commission] reporting requirements applicable to an exempt reporting adviser as such,'' rather than ''all applicable Commission reporting requirements,'' as proposed).

[641] An adviser must file its annual Form ADV updating amendment within 90 days after the end of its fiscal year and, if the transition period is available, may apply for registration up to 90 days after filing the amendment. We proposed, in contrast, to give advisers three months to register with us after becoming ineligible to rely on the exemption due to an increase in the value of their private fund assets as reflected in the proposed quarterly calculations.

[642] *See, e.g.,* Sadis & Goldberg Implementing Release Letter (''Three (3) months provides an insufficient amount of time for an investment adviser to (i) complete its ADV Parts 1, 2A and 2B, including the newly required narrative brochure and brochure supplement; (ii) submit its completed application to the Commission through IARD; and (iii) receive its approval from the Commission, which may take up to forty-five (45) days.''); Shearman Letter (''Our experience is that registering an investment adviser firm in a thoughtful and deliberate manner is often closer to a six-month task (that can sometimes take even longer depending on the need to engage new or additional service providers to the firm or its funds), so that an at least 180-day transition period would be more appropriate.'').

[643] As discussed above, the rule looks to an adviser's principal office and place of business as the location where it directs, controls and coordinates its advisory activities. Rule 203(m)-1(d)(3).

[644] *See, e.g.,* Merkl Letter (stated that this interpretation would be easier to apply than the alternative interpretation about which we sought comment which looks to the source of the assets).

[645] *See, e.g.,* Debevoise Letter (''In particular, it is our view that the discussion of the proposed definition of the term 'assets under management in the United States' is a fair reflection of the policy underlying Section 203(m) of the Advisers Act (as amended by the Dodd-Frank Act) and is consistent with prior Commission and Staff statements concerning the territorial scope of the Advisers Act.''); MAp Airports Letter; Non-U.S. Adviser Letter (''By adopting a very pragmatic and sensible jurisdictional approach to regulation, the Commission is appropriately recognizing general principles of international comity and the fact that activities of non-U.S. advisers outside the United States are less likely to implicate U.S. regulatory interests.''). *Cf.* Sen. Levin Letter (stated that advisers managing assets in the United States of funds incorporated outside of the United States ''are exactly the type of investment advisers to which the Dodd-Frank Act's registration requirements are intended to apply''). *See also supra* note 386.

[646] *See supra* text preceding, accompanying, and following note 575.

[647] By contrast, a U.S. adviser may ''solely advise private funds'' as specified in the statute. *Compare* rule 203(m)-1(a)(1) with rule 203(m)-1(b)(1).

[648] *See supra* note 393 and accompanying text.

[649] *See supra* Section II.B.3.

[650] *See* Implementing Adopting Release, *supra* note 32, discussion at section II.B.

approach to Advisers Act regulation.[651] For example, one commenter stated that the ''jurisdictional approach to only considering U.S. activities for non-U.S. advisors is prudent as it focuses on what causes systematic [sic] risks to the U.S.'' [652] Another noted that non-U.S. persons dealing with non-U.S. advisers would not expect to benefit from the protections provided by the Advisers Act.[653] Another stated that this approach, together with our interpretation of ''assets under management in the United States,'' will ''avoid the issues associated with conflicting and overlapping regulation.'' [654]

Rule 203(m)–1(b) uses the term ''United States person,'' which generally incorporates the definition of a ''U.S. person'' in Regulation S.[655] We believe that generally incorporating the definition of a ''U.S. person'' in Regulation S will benefit advisers, because Regulation S provides a well-developed body of law that, in our view, appropriately addresses many of the questions that will arise under rule 203(m)–1. Moreover, advisers to private funds and their counsel currently must be familiar with the definition of ''U.S. person'' under Regulation S in order to comply with other provisions of the Federal securities laws. Commenters generally supported defining ''United States person'' by reference to Regulation S, confirming that the definition is well developed and understood by advisers.[656]

We also are adding a note to rule 203(m)–1 that clarifies that a client will not be considered a United States person if the client was not a United States person at the time of becoming a client of the adviser.[657] This will benefit non-U.S. advisers, which might, absent this note, incur costs in trying to determine whether they would be permitted to rely on rule 203(m)–1 if one of their existing non-U.S. clients that is not a private fund becomes a United States person, for example if a natural person client residing abroad relocates to the United States.[658] The non-U.S. adviser could at that time be considered to have a United States person client other than a private fund.

Definition of a Qualifying Private Fund. We proposed to define a ''qualifying private fund'' as ''any private fund that is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C 80a–8) and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a–53).'' [659] We are modifying rule 203(m)–1 to also permit an adviser to treat as a ''private fund,'' and thus as a ''qualifying private fund,'' an issuer that qualifies for an exclusion from the definition of ''investment company,'' as defined in section 3 of the Investment Company Act, in addition to those provided by section 3(c)(1) or 3(c)(7) of that Act.[660] Absent this modification, an adviser to a section 3(c)(1) or 3(c)(7) fund would lose the exemption if the fund also qualified for another exclusion.[661] For example, an adviser to a section 3(c)(1) or 3(c)(7) fund would lose the exemption if the fund also qualified for another exclusion, even though the adviser may be unaware of the fund so qualifying and the fund does not purport to rely on the other exclusion.

Expanding the range of potential ''qualifying private funds,'' therefore, should benefit advisers to funds that also qualify for other exclusions by permitting these advisers to rely on the exemption.[662] It also will prevent advisers from violating the Advisers Act's registration requirements solely because their funds qualify for another exclusion. In addition, advisers will not be required to incur the time and expense required to assess whether the funds they advise also qualify for an additional exclusion.

2. Costs

Assets under Management in the United States. As noted above, under rule 203(m)–1, we look to an adviser's principal office and place of business as the location where the adviser directs, controls or has responsibility for the management of private fund assets, and therefore as *the* place where all the adviser's assets are managed.[663] Thus, a U.S. adviser must include all of its private fund assets under management in determining whether it exceeds the $150 million limit under the exemption. We also look to where day-to-day management of private fund assets may occur for purposes of a non-U.S. adviser, whose principal office and place of business is outside of the United States.[664] A non-U.S. adviser therefore would count only the private fund assets it manages at a place of business in the United States in determining the availability of the exemption. This approach is similar to the way we have identified the location of the adviser for regulatory purposes under our current rules,[665] and we believe it is the way in which most advisers would have interpreted the exemption without our rule.[666]

[651] ABA Letter; Debevoise Letter; Dechert Foreign Adviser Letter; Gunderson Dettmer Letter; Katten Foreign Advisers Letter; MAp Airports Letter; Merkl Letter; Wellington Letter.

[652] Wellington Letter.

[653] Debevoise Letter. *See also* ABA Letter (''When, in the private fund context, United States investors invest with a non-United States-based investment manager, they understand they are not being afforded the investor protection safeguards of the United States Investment Advisers Act.''); Avoca Letter (''It is reasonable to assume that U.S. investors who purchase shares of a private fund (as defined in section 202(a)(29)) will not expect an investment adviser that has no United States presence to be registered with the U.S. SEC as an investment adviser.'').

[654] ABA Letter.

[655] Rule 203(m)–1(d)(8) (defining a ''United States person'' as any person that is a ''U.S. person'' as defined in Regulation S, except that any discretionary account or similar account that is held for the benefit of a United States person by a dealer or other professional fiduciary is a United States person if the dealer or professional fiduciary is a related person of the investment adviser relying on rule 203(m)–1 and is not organized, incorporated, or (if an individual) resident in the United States). As discussed above, two commenters that generally supported our incorporation of the definition in Regulation S also urged us to modify our proposed definition in certain respects. *See supra* notes 409–413 and accompanying text. We decline to accept these suggestions for the reasons discussed in Section II.B.4, and we continue to believe that advisers will benefit from the efficiencies created by our general incorporation of the definition of ''U.S. person'' in Regulation S.

[656] AIMA Letter; CompliGlobe Letter; Debevoise Letter; Dechert General Letter; Gunderson Dettmer Letter; Katten Foreign Advisers Letter; O'Melveny Letter.

[657] *See supra* Section II.B.4.

[658] *See* EFAMA Letter (argued that an analogous note in the foreign private adviser exemption, revised consistent with its comments, ''also should apply to the 'private fund adviser exemption' and the 'venture capital fund exemption' ''); IFIC Letter (''We ask for clarification from the SEC as to whether it will apply the [analogous note to the foreign private adviser exemption] in other contexts for purposes of compliance with the U.S. Federal securities laws, including compliance with Rule 12g3–2(b) of the 1934 Act.'').

[659] *See* proposed rule 203(m)–1(e)(5).

[660] Rule 203(m)–1(d)(5). An adviser relying on this provision must treat the fund as a private fund under the Advisers Act and the rules thereunder for all purposes (*e.g.,* reporting on Form ADV). *Id.*

[661] A fund that qualifies for an additional exclusion would not be a private fund, because a ''private fund'' is a fund that would be an investment company as defined in section 3 of the Investment Company Act *but for* section 3(c)(1) or 3(c)(7) of that Act. *See supra* Section II.B.1.

[662] *See, e.g.,* Dechert General Letter (argued that advisers should be permitted to treat as a private fund for purposes of rule 203(m)–1 a fund that qualifies for another exclusion from the definition of ''investment company'' in the Investment Company Act in addition to section 3(c)(1) or 3(c)(7), such as section 3(c)(5)(C), which excludes certain real estate funds).

[663] *See supra* note 385 and accompanying text.

[664] *See supra* note 384 and accompanying text.

[665] *See supra* note 385 and accompanying text.

[666] We do not believe that the statutory text refers to where the assets themselves may be located or traded or the location of the account where the assets are held. In today's market, using the location of assets would raise numerous questions of where a security with no physical existence is ''located.'' Although physical stock certificates were once sent to investors as proof of ownership, stock certificates

Continued

We believe that our approach will promote efficiency because advisers are familiar with it, and we do not anticipate that U.S. advisers to private funds would likely change their business models, the location of their private funds or the location where they manage assets as a result of the rule. As noted in the Proposing Release, we expect that non-U.S. advisers may, however, incur minimal costs to determine whether they have assets under management in the United States. We estimate that these costs would be no greater than $6,730 per adviser to hire U.S. counsel and perform an internal review to assist in this determination, in particular to assess whether a non-U.S. affiliate manages a discretionary account for the benefit of a United States person under the rule.[667]

As noted above, because the rule is designed to encourage the participation of non-U.S. advisers in the U.S. market, we believe that it will have minimal regulatory and operational burdens on non-U.S. advisers and their U.S. clients. Non-U.S. advisers may rely on the rule if they manage U.S. private funds with more than $150 million in assets at a non-U.S. location as long as the private fund assets managed at a U.S. place of business are less than $150 million. This could affect competition with U.S. advisers, which must register when they have $150 million in private fund assets under management regardless of where the assets are managed.

In contrast to the many commenters who supported our approach, one commenter argued that treating U.S. and non-U.S. advisers differently would disadvantage U.S.-based advisers by permitting non-U.S. advisers to accept substantial amounts of money from U.S. investors without having to comply with certain U.S. regulatory requirements, and would cause advisers to move offshore or close U.S. offices to avoid regulation.[668]

As we explained in the Proposing Release, we believe that our interpretation recognizes that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and is in keeping with general principles of international comity.[669] The rule also is designed to encourage the participation of non-U.S. advisers in the U.S. market by applying the U.S. securities laws in a manner that does not impose U.S. regulatory and operational requirements on a non-U.S. adviser's non-U.S. advisory business.[670] Non-U.S. advisers relying on rule 203(m)–1 will remain subject to the Advisers Act's antifraud provisions and will become subject to the requirements applicable to exempt reporting advisers. Moreover, the commenter appears to suggest that an adviser that moves offshore to avoid registering under the Advisers Act would not be subject to any regulation as an investment adviser, but we understand that most non-U.S. advisers to private funds locate in major financial centers in jurisdictions that regulate investment advisers. We therefore believe that any competitive consequences to U.S. advisers will be diminished.[671]

As we acknowledged in the Proposing Release, to avail themselves of rule 203(m)–1, some advisers might choose to move their principal offices and places of business outside of the United States and manage private funds at those locations.[672] This could result in costs to U.S. investors in private funds that are managed by these advisers because they would not have the investor protection and other benefits that result from an adviser's registration under the Advisers Act. We do not expect that many advisers would be likely to relocate for purposes of avoiding registration, however, because, as we explained in the Proposing Release, we understand that the primary reasons for advisers to locate in a particular jurisdiction involve tax and other business considerations.[673]

We also note that if an adviser did relocate, it would incur the costs of regulation under the laws of most of the foreign jurisdictions in which it may be likely to relocate, as well as the costs of complying with the reporting requirements applicable to exempt reporting advisers, unless it also qualified for the foreign private adviser exemption. We do not believe, in any case, that the adviser would relocate if relocation would result in a material decrease in the amount of assets managed because that loss would likely not justify the benefits of avoiding registration, and thus we do not believe our rule is likely to have an adverse effect on capital formation.

One commenter also proposed that we adopt an alternative approach that would look to the source of the assets.[674] Under this alternative approach, a non-U.S. adviser would count the assets of private funds attributable to U.S. investors towards the $150 million threshold, regardless of the location where it manages private funds, and a U.S. adviser would exclude

are now centrally held by securities depositories, which perform electronic ''book-entry'' changes in their records to document ownership of securities. This arrangement reduces transmittal costs and increases efficiencies for securities settlements. *See generally* Bank for International Settlements, The Depository Trust Company: Response to the Disclosure Framework for Securities Settlement Systems (2002), *http://www.bis.org/publ/cpss20r3.pdf.* An account also has no physical location even if the prime broker, custodian or other service that holds assets on behalf of the customer does. Each of these approaches would be confusing and extremely difficult to apply on a consistent basis.

[667] We estimated in the Proposing Release that a non-U.S. adviser would need no more than 10 hours of external legal advice (at $400 per hour) and 10 hours of internal review by a senior compliance officer (at $294 per hour) to evaluate whether the adviser would qualify for the exemption provided by rule 203(m)–1, for a total estimated cost of $6,940. We did not receive any comments on these estimates. We are, however, decreasing this estimate slightly, to $6,730, to account for more recent salary data reflecting a $273 per hour wage for senior compliance officers. *See supra* note 597. One commenter suggested that we presume for non-U.S. advisers, like U.S. advisers, that all of their private fund assets are managed at their principal office and place of business. Katten Foreign Advisers Letter. We decline to adopt this suggestion for the reasons discussed above. *See supra* notes 388–389 and accompanying text. In addition, the commenter did not convince us that the costs we estimate a non-U.S. adviser would incur in determining if it has assets under management in the United States justify foregoing our approach and its attendant benefits. To the extent the commenter suggests that we adopt an alternative interpretation to conserve our resources, we note that any interpretation that requires additional advisers to register will contribute to our workload, and registration provides benefits of its own, as discussed above.

[668] Portfolio Manager Letter. *See also* Tuttle Implementing Release Letter (argued that businesses may move offshore if they become too highly regulated in the United States).

[669] *See supra* note 392 and accompanying text.

[670] *See supra* note 393 and accompanying text.

[671] *See also supra* Section II.B.3. We also decline to accept a separate commenter's suggestion to permit U.S. advisers to exclude assets managed at non-U.S. offices. *See supra* notes 395–396 and accompanying and following text.

[672] *See* Proposing Release, *supra* note 26, discussion at section V.B.2.

[673] We note that the two commenters that suggested U.S. advisers might relocate to rely on the rule provided no data as to the likelihood that this would occur or the number or types of advisers who might relocate, and neither refuted our contention that the primary reasons for advisers to locate in a particular jurisdiction involve tax and other business considerations. *See* Portfolio Manager Letter; Tuttle Implementing Release Letter.

[674] Portfolio Manager Letter (''If you raise significant money here you should be on the same level playing field as the fund managers located here so that we can compete fairly.''). *See also* Merkl Letter (suggested that it ''may be useful'' to look both to assets managed from a U.S. place of business and assets contributed by U.S. private fund investors to address both investor protection and systemic risk concerns). Another commenter suggested that we determine the ''assets under management in the United States'' for U.S. advisers by reference to the amount of assets invested, or ''in play,'' in the United States. Dougherty Letter. We decline to adopt this approach because it would be difficult for advisers to ascertain and monitor which assets are invested in the United States, and this approach thus would be confusing and extremely difficult to apply on a consistent basis. *See supra* note 394 and accompanying and following text.

assets that are not attributable to U.S. investors. As a result, more U.S. advisers might be able to rely on rule 203(m)–1 under this alternative interpretation. To the extent that non-U.S. advisers have U.S. investors in private funds that they manage at a non-U.S. location, fewer non-U.S. advisers would be eligible for the exemption. Thus, this alternative could increase costs for those non-U.S. advisers that would have to register but reduce costs for those U.S. advisers that would not have to register.

This alternative approach also could adversely affect U.S. investors to the extent that it discouraged U.S. advisers from managing U.S. investor assets. A U.S. adviser might avoid managing assets from U.S. investors because, under this alternative interpretation, the assets would be included in determining whether the adviser was eligible to rely on rule 203(m)–1. This could reduce competition for the management of assets from U.S. investors. The likelihood of U.S. advisers seeking to avoid registration in this way might be mitigated, however, to the extent that the loss of managed assets of U.S. investors would exceed the savings from avoiding registration.

Method of Calculating Private Fund Assets. Rule 203(m)–1 incorporates the valuation methodology in the instructions to Form ADV, which requires advisers to use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable, when determining regulatory assets under management and to include in the calculation certain types of assets advisers previously were permitted to exclude. The revised instructions also clarify that this calculation must be done on a gross basis.

We acknowledged in the Proposing Release that some private fund advisers may not use fair value methodologies.[675] As we explained there, the costs incurred by those advisers to use fair valuation methodologies would vary based on factors such as the nature of the asset, the number of positions that do not have a market value, and whether the adviser has the ability to value such assets internally or would rely on a third party for valuation services.[676] Nevertheless, we continue to believe that the requirement to use fair value would not result in significant costs for these advisers, particularly in light of our decision to require annual, rather than quarterly, valuations. We also understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[677]

A number of commenters objected to the requirement to determine private fund assets based on fair value, generally arguing that the requirement would cause those advisers that did not use fair value methods to incur additional costs, especially if the private funds' assets that they manage are illiquid and therefore difficult to fair value.[678] As discussed in Section II.B.2, we are sensitive to the costs this new requirement will impose, and we requested comment in the Proposing Release on our estimates concerning the costs related to fair value. Commission staff estimates that such an adviser would incur $1,320 in internal costs to conform its internal valuations to a fair value standard.[679] In the event a fund does not have an internal capability for valuing specific illiquid assets, we expect that it could obtain pricing or valuation services from an outside administrator or other service provider. Staff estimated that the cost of such a service would range from $1,000 to $120,000 annually, which could be borne by several funds that invest in similar assets or have similar investment strategies.[680] We did not receive any comments on these estimates. These estimates, however, assumed that an adviser would be required to calculate the fair value of its private funds assets quarterly, as required by rule 203(m)–1 as proposed. We are reducing the estimated range to $250 to $75,000 annually to reflect that rule 203(m)–1 requires advisers to calculate their private fund assets annually, rather than quarterly as proposed.[681]

In addition, as discussed above, we have taken several steps to mitigate these costs.[682] While many advisers will calculate fair value in accordance with GAAP or another international accounting standard,[683] other advisers acting consistently and in good faith may utilize another fair valuation standard.[684] While these other standards may not provide the quality of information in financial reporting (for

[675] *See supra* note 634 and accompanying and following text. In addition, we estimate in the Implementing Adopting Release, based on registered advisers' responses to Items 5.D, 7.B, and 9.C of Form ADV, that approximately 3% of registered advisers have at least one private fund client that is not audited, and that these advisers therefore may incur costs to fair value their private fund assets. *See* Implementing Adopting Release, *supra* note 32, at nn.634–641 and accompanying text. We also estimate in that release that each of these registered advisers that potentially would incur costs as a result of the fair value requirement would incur costs of $37,625 on an annual basis. *Id.,* at n.641 and accompanying text. This is the middle of the range of the estimated fair value costs, which range from $250 to $75,000 annually. *Id. See also infra* notes 680–681 and accompanying text.

[676] *See* Proposing Release, *supra* note 26, at n.323 and accompanying text.

[677] For example, a hedge fund adviser may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to private equity funds may obtain valuations of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement applicable to private fund assets.

[678] *See, e.g.,* Gunderson Dettmer Letter; Merkl Letter; O'Melveny Letter; Seward Letter; Wellington Letter.

[679] We estimated in the Proposing Release that such an adviser would incur $1,224 in internal costs to conform its internal valuations to a fair value standard. *See* Proposing Release, *supra* note 26, at n.325. We received no comments on this estimate. We are, however, increasing this estimate slightly, to $1,320, to account for more recent salary data. This revised estimate is based upon the following calculation: 8 hours × $165/hour = $1,320. The hourly wage is based on data for a fund senior accountant from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[680] These estimates are based on conversations with valuation service providers. We understand that the cost of valuation for illiquid fixed income securities generally ranges from $1.00 to $5.00 per security, depending on the difficulty of valuation, and is performed for clients on a weekly or monthly basis. We understand that appraisals of privately placed equity securities may cost from $3,000 to $5,000 with updates to such values at much lower prices. For purposes of this cost benefit analysis, we are estimating the range of costs for (i) a private fund that holds 50 fixed income securities at a cost of $5.00 to price and (ii) a private fund that holds privately placed securities of 15 issuers that each cost $5,000 to value initially and $1,000 thereafter. We believe that costs for funds that hold both fixed-income and privately placed equity securities would fall within the maximum of our estimated range. We note that funds that have significant positions in illiquid securities are likely to have the in-house capacity to value those securities or already subscribe to a third-party service to value them. We note that many private funds are likely to have many fewer fixed income illiquid securities in their portfolios, some or all of which may cost less than $5.00 per security to value. Finally, we note that obtaining valuation services for a small number of fixed income positions on an annual basis may result in a higher cost for each security or require a subscription to the valuation service for those that do not already purchase such services. The staff's estimate is based on the following calculations: (50 × $5.00 × 4 = $1,000); (15 × $5,000) + (15 × $1,000 × 3) = $120,000).

[681] The staff's revised estimate is based on the following calculations: (50 × $5.00 = $250; 15 × $5,000 = $75,000). *See also supra* note 680.

[682] *See supra* notes 363–366 and accompanying text.

[683] *See supra* note 364 and accompanying text.

[684] *See supra* note 365 and accompanying text.

example, of private fund returns), we expect these calculations will provide sufficient consistency for the purposes that regulatory assets under management serve in our rules, including rule 203(m)–1.[685]

Use of the alternative approaches recommended by commenters (*e.g.,* cost basis or any method required by the private fund's governing documents other than fair value) would not meet our objective of having more meaningful and comparable valuation of private fund assets, and could result in a significant understatement of appreciated assets. Moreover, these alternative approaches could permit advisers to circumvent the Advisers Act's registration requirements. Permitting the use of any valuation standard set forth in the governing documents of the private fund other than fair value could effectively yield to the adviser the choice of the most favorable standard for determining its registration obligation as well as the application of other regulatory requirements. For these reasons and those discussed in the Implementing Adopting Release, commenters did not persuade us that the extent of the additional burdens the fair value requirement would impose on some advisers to private funds would be inappropriate in light of the value of a more meaningful and consistent calculation by all advisers to private funds.

We also do not expect that advisers' principals (or other employees) generally will cease to invest alongside the advisers' clients as a result of the inclusion of proprietary assets, as some commenters suggested.[686] If private fund investors value their advisers' co-investments as suggested by these commenters, we expect that the investors will demand them and their advisers will structure their businesses accordingly.[687]

One commenter also argued that including proprietary assets would deter non-U.S. advisers that manage large sums of proprietary assets from establishing U.S. operations and employing U.S. residents.[688] Such an adviser, however, would not be ineligible for the private fund adviser exemption merely because it established U.S. operations. As discussed in Section II.B, a non-U.S. adviser may rely on the private fund adviser exemption while also having one or more U.S. places of business, provided it complies with the exemption's conditions.

Some commenters objected to calculating regulatory assets under management on the basis of gross, rather than net, assets. They argued, among other things, that gross asset measurements would be confusing,[689] complex,[690] and inconsistent with industry practice.[691] However, nothing in the current instructions suggests that liabilities should be deducted from the calculation of an adviser's assets under management. Indeed, since 1997, the instructions have stated that an adviser should not deduct securities purchased on margin when calculating its assets under management.[692] Whether a client has borrowed to purchase a portion of the assets managed does not seem to us a relevant consideration in determining the amount an adviser has to manage, the scope of the adviser's business, or the availability of the exemptions.[693]

Moreover, we are concerned that the use of net assets could permit advisers to highly leveraged funds to avoid registration under the Advisers Act even though the activities of such advisers may be significant and the funds they advise may be appropriate for systemic risk reporting.[694] One commenter argued, in contrast, that it would be ''extremely unlikely that a net asset limit of $150,000,000 in private funds could be leveraged into total investments that would pose any systemic risk.'' [695] But a comprehensive view of systemic risk requires information about certain funds that may not present systemic risk concerns when viewed in isolation, but nonetheless are relevant to an assessment of systemic risk across the economy. Moreover, because private funds are not subject to the leverage restrictions in section 18 of the Investment Company Act, a private fund with less than $150 million in net assets could hold assets far in excess of that amount as a result of its extensive use of leverage. In addition, under a net assets test such a fund would be treated similarly for regulatory purposes as a fundamentally different fund, such as one that did not make extensive use of leverage and had $140 million in net assets.

The use of gross assets also need not cause any investor confusion, as some commenters suggested.[696] Although an adviser will be required to use gross (rather than net) assets for purposes of determining whether it is eligible for the private fund adviser or the foreign private adviser exemptions (among other purposes), we would not preclude an adviser from holding itself out to its clients as managing a net amount of assets as may be its custom.[697]

Definition of a Qualifying Private Fund. As discussed above, we modified the definition of a ''qualifying private fund'' to include an issuer that qualifies for an exclusion from the definition of ''investment company,'' as defined in section 3 of the Investment Company Act, in addition to those provided by section 3(c)(1) or 3(c)(7) of that Act. To the extent advisers are able to rely on the exemption as a result of this modification, investors and the Commission will lose the benefits registration would provide. This modification does, however, benefit advisers, as discussed above, and investors (and the Commission) will still have access to the information these advisers will be required to file as exempt reporting advisers.

Solely Advises Private Funds. Some commenters asserted, in effect, that advisers should be permitted to combine other exemptions with rule 203(m)–1 so that, for example, an adviser could advise venture capital funds with assets under management in excess of $150 million in addition to other, non-venture capital private funds with less than $150 million in assets under management.[698] One commenter argued that, by declining to adopt this view, we are imposing unnecessary burdens, particularly on advisers who advise both small private funds and small business investment companies.[699] But as we discuss in Section II.B.1, the approach the commenter suggests runs contrary to the language of section 203(m), which directs us to provide an exemption ''to any investment adviser of private funds, if each of such investment adviser acts solely as an adviser to private funds and

[685] *See supra* note 366 and accompanying text.

[686] *See, e.g.,* ABA Letter; Katten Foreign Advisers Letter; Seward Letter.

[687] *See supra* note 347 and accompanying text.

[688] Katten Foreign Advisers Letter.

[689] Dechert General Letter. *See also* Implementing Adopting Release, *supra* note 32, at n.80 and accompanying text.

[690] MFA Letter.

[691] *See, e.g.,* Merkl Letter; Shearman Letter. *See also supra* note 351.

[692] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(2), as in effect before it was amended by the Implementing Adopting Release (''Do not deduct securities purchased on margin.''). Instruction 5.b.(2), as amended in the Implementing Adopting Release, provides ''Do not deduct any outstanding indebtedness or other accrued but unpaid liabilities.'' *See* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3.

[693] *See id.*

[694] *See id.,* at n.82 and preceding and accompanying text.

[695] ABA Letter.

[696] *See, e.g.,* Dechert General Letter. *See also* Implementing Adopting Release, *supra* note 32, at n.80 and accompanying text.

[697] *See supra* note 357.

[698] NASBIC/SBIA Letter; Seward Letter.

[699] NASBIC/SBIA Letter.

has assets under management in the United States of less than $150,000,000.'' Thus, we believe that the costs to advisers that may have to register because they do not advise solely private funds with assets under management in the United States of less than $150 million flow directly from the Dodd-Frank Act.

Assessing Whether the Exemption Is Available and Costs of Registration and Compliance. We estimate each adviser may incur between $800 to $4,800 in legal advice to learn whether it may rely on the exemption.[700] We did not receive any comments concerning these estimates. We also estimate that each adviser that registers would incur registration costs, which we estimate would be $15,077,[701] initial compliance costs ranging from $10,000 to $45,000, and ongoing annual compliance costs ranging from $10,000 to $50,000.[702] Some commenters suggested that these estimates are too low, and estimated that they would incur one-time registration and compliance costs ranging from $50,000 to $600,000, followed by ongoing annual compliance costs ranging from $50,000 to $500,000.[703] Although some advisers may incur these costs, we do not believe they are representative, as discussed above.[704] Moreover, as discussed above, commenters identifying themselves as ''middle market private equity fund'' advisers provided the highest estimated costs, but these commenters generally would not qualify for the private fund adviser exemption we are required to provide under section 203(m).[705] We also note that the costs of registration for advisers that do not qualify for the private fund adviser exemption flow from the Dodd-Frank Act, which removed the private adviser exemption on which they currently rely.

C. Foreign Private Adviser Exemption

Section 403 of the Dodd-Frank Act replaces the current private adviser exemption from registration under the Advisers Act with a new exemption for any ''foreign private adviser,'' as defined in new section 202(a)(30) of the Advisers Act.[706] We are adopting, substantially as proposed, new rule 202(a)(30)–1, which defines certain terms in section 202(a)(30) for use by advisers seeking to avail themselves of the foreign private adviser exemption, including: (i) ''Investor;'' (ii) ''in the United States;'' (iii) ''place of business;'' and (iv) ''assets under management.'' [707] We are also including in rule 202(a)(30)–1 the safe harbor and many of the client counting rules that appeared in rule 203(b)(3)–1.[708]

Rule 202(a)(30)–1 clarifies several provisions used in the statutory definition of ''foreign private adviser.'' First, the rule includes a safe harbor for counting clients, which previously appeared in rule 203(b)(3)–1, and which we have modified to account for its use in the foreign private adviser context. Under the safe harbor, an adviser would count certain natural persons as a single client under certain circumstances.[709] Rule 202(a)(30)–1 also includes another provision of rule 203(b)(3)–1 that permits an adviser to treat as a single ''client'' an entity that receives investment advice based on the entity's investment objectives and two or more entities that have identical owners.[710] As proposed, we are omitting the ''special rule'' that allowed advisers not to count as a client any person for whom the adviser provides investment advisory services without compensation.[711] Finally, the rule includes two provisions that clarify that advisers need not double-count private funds and their investors under certain circumstances.[712]

Second, section 202(a)(30) provides that a ''foreign private adviser'' eligible for the new registration exemption cannot have more than 14 clients ''or investors in the United States.'' We are defining ''investor'' in a private fund in rule 202(a)(30)–1 as any person who would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act, or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act.[713] We are also treating as investors beneficial owners of ''short-term paper'' issued by the private fund, who must be qualified purchasers under section 3(c)(7) but are not counted as beneficial owners for purposes of section 3(c)(1).[714]

Third, rule 202(a)(30)–1 defines ''in the United States'' generally by incorporating the definition of a ''U.S. person'' and ''United States'' under Regulation S.[715] In particular, we define ''in the United States'' in rule 202(a)(30)–1 to mean: (i) With respect to any place of business, any such place

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[700] We estimate that a private fund adviser would obtain between 2 and 12 hours of external legal advice (at a cost of $400 per hour) to determine whether it would be eligible for the private fund adviser exemption.

[701] *See supra* note 597 and accompanying text.

[702] *See supra* note 601 and accompanying text.

[703] *See supra* notes 602–603 and accompanying text.

[704] *See supra* Section V.A.2.

[705] We note that the advisers that gave us these estimates for registration costs have assets under management in excess of the $150 million threshold and they are not representative of advisers that would qualify for the private fund adviser exemption. *See supra* notes 602–603 and accompanying text. We also note that approximately 570 smaller advisers currently are registered with us. *See supra* note 613 and accompanying text. These advisers have absorbed the compliance costs associated with registration, notwithstanding the fact that their revenues are likely to be smaller than those of a typical adviser that will be required to register as a result of Congress's repeal of the private adviser exemption (*e.g.,* an adviser to private funds with $150 million or more of assets under management in the United States, or a ''middle market'' private equity adviser). *See, e.g.,* Atlas Letter (middle market private equity adviser with $365 million of assets under management); Cortec Letter (middle market private equity adviser with less than $750 million of assets under management). *See also supra* note 614 and accompanying text.

[706] *See supra* notes 415–418 and accompanying text. The new exemption is codified as amended section 203(b)(3). *See supra* Section II.C.

[707] Rule 202(a)(30)–1(c).

[708] *See supra* Section II.C. Rule 203(b)(3)–1, which we are rescinding with the Implementing Adopting Release, provides a safe harbor for determining who may be deemed a single client for purposes of the private adviser exemption. We are not, however, carrying over rules 203(b)(3)–1(b)(4), (5), or (7). *See supra* notes 316, 420 and 425 and accompanying text.

[709] Rule 202(a)(30)–1(a)(1).

[710] Rule 202(a)(30)–1(a)(2)(i)–(ii). In addition, rule 202(a)(30)–1(b)(1) through (3) contain the following related ''special rules:'' (1) An adviser must count a shareholder, partner, limited partner, member, or beneficiary (each, an ''owner'') of a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization, as a client if the adviser provides investment advisory services to the owner separate and apart from the investment advisory services provided to the legal organization; (2) an adviser is not required to count an owner as a client solely because the adviser, on behalf of the legal organization, offers, promotes, or sells interests in the legal organization to the owner, or reports periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters; and (3) any general partner, managing member or other person acting as an investment adviser to a limited partnership or limited liability company must treat the partnership or limited liability company as a client.

[711] *See* rule 203(b)(3)–1(b)(4); *supra* notes 425–427 and accompanying text.

[712] *See* rule 202(a)(30)–1(b)(4) (an adviser is not required to count a private fund as a client if it counts any investor, as defined in the rule, in that private fund as an investor in the United States in that private fund); rule 202(a)(30)–1(b)(5) (an adviser is not required to count a person as an investor if the adviser counts such person as a client in the United States). *See also supra* note 429.

[713] *See* rule 202(a)(30)–1(c)(2); *supra* Section II.C.2. In order to avoid double-counting, the rule allows an adviser to treat as a single investor any person who is an investor in two or more private funds advised by the adviser. *See* rule 202(a)(30)–1, at note to paragraph (c)(2).

[714] *See* rule 202(a)(30)–1(c)(2)(ii); *supra* notes 453–462 and accompanying text. Consistently with section 3(c)(1) and section (3)(c)(7) of the Investment Company Act, the final rule, unlike the proposed rule, does not treat knowledgeable employees as ''investors.'' *Cf.* proposed rule 202(a)(30)–1(c)(1)(i).

[715] Rule 202(a)(30)–1(c)(3). *See supra* Section II.C.3.

located in the ''United States,'' as defined in Regulation S;[716] (ii) with respect to any client or private fund investor in the United States, any person who is a ''U.S. person'' as defined in Regulation S,[717] except that under the rule, any discretionary account or similar account that is held for the benefit of a person ''in the United States'' by a non-U.S. dealer or other professional fiduciary is a person ''in the United States'' if the dealer or professional fiduciary is a related person of the investment adviser relying on the exemption; and (iii) with respect to the public, in the ''United States,'' as defined in Regulation S.[718]

Fourth, rule 202(a)(30)–1 defines ''place of business'' to have the same meaning as in Advisers Act rule 222–1(a).[719] Finally, for purposes of rule 202(a)(30)–1, we are defining ''assets under management'' by reference to ''regulatory assets under management'' as determined under Item 5 of Form ADV.[720]

1. Benefits

We are defining certain terms included in the statutory definition of ''foreign private adviser'' in order to clarify the meaning of these terms and reduce the potential administrative and regulatory burdens for advisers that seek to rely on the foreign private adviser exemption. As noted above, our rule references definitions set forth in other Commission rules under the Advisers Act, the Investment Company Act and the Securities Act, all of which are likely to be familiar to non-U.S. advisers active in the U.S. capital markets.

As we discussed in the Proposing Release, we anticipate that by defining these terms we will benefit non-U.S. advisers by providing clarity with respect to the terms that advisers would otherwise be required to interpret (and which they would likely interpret with reference to the rules we reference).[721] Our approach provides consistency among these other rules and the new exemption. This should limit non-U.S. advisers' need to undertake additional analysis with respect to these terms for purposes of determining the availability of the foreign private adviser exemption.[722] We believe that the consistency and clarity that results from the rule will promote efficiency for non-U.S. advisers and the Commission. Commenters that expressed support for the proposed definitions confirmed that the references to other rules will allow advisers to apply existing concepts and maintain consistency with current interpretations.[723]

For example, for purposes of determining eligibility for the foreign private adviser exemption, advisers must count clients substantially in the same manner as they counted clients under the private adviser exemption.[724] In identifying ''investors,'' advisers can generally rely on the determination made to assess whether the private fund meets the counting or qualification requirements under section 3(c)(1) or 3(c)(7) of the Investment Company Act.[725] In determining whether a client, an investor, or a place of business is ''in the United States,'' or whether it holds itself out as an investment adviser to the public ''in the United States,'' an adviser generally will apply the same analysis it would otherwise apply under Regulation S.[726] In identifying whether it has a place of business in the United States, an adviser will use the definition of ''place of business'' as defined in Advisers Act rule 222–1, which is used to determine whether a state may assert regulatory jurisdiction over the adviser.[727]

As noted above, the definitions of ''investor'' and ''United States'' under our rule rely on existing definitions, with slight modifications.[728] Our rule also incorporates the safe harbor that appeared in rule 203(b)(3)–1 for counting clients, except that it no longer allows an adviser to disregard clients for whom the adviser provides services without compensation.[729] We are making these modifications (collectively, the ''modifications'') in order to preclude some advisers from excluding certain assets or clients from their calculation so as to avoid registration with the Commission and the regulatory requirements associated with registration.[730] Without a definition of these terms, advisers would likely rely on the same definitions we reference in rule 202(a)(30)–1, but without the modifications. We expect, therefore, that the rule likely will have the practical effect of narrowing the scope of the exemption, and thus likely will result in more advisers registering than if it reflected no modifications from the current rules.

The final rule does not include one of the modifications we proposed. The final rule does not treat knowledgeable employees as investors, consistent with sections 3(c)(1) and 3(c)(7).[731] As some commenters noted, treating knowledgeable employees in the same manner for purposes of the definition of investor and sections 3(c)(1) and 3(c)(7) will simplify advisers' compliance with these regulatory requirements.[732] In addition, as a result of this treatment of knowledgeable employees, more non-U.S. advisers will be able to rely on the exemption.

We believe that any increase in registration as compared to the number of non-U.S. advisers that might have registered if we had not adopted rule 202(a)(30)–1 will benefit investors. Investors whose assets are, directly or indirectly, managed by the non-U.S. advisers that will be required to register will benefit from the increased protection afforded by Federal registration of the adviser and application to the adviser of all of the requirements of the Advisers Act. As

[716] *See* 17 CFR 230.902(l).

[717] *See* 17 CFR 230.902(k). We are allowing foreign advisers to determine whether a client or investor is ''in the United States'' by reference to the time the person became a client or acquires securities issued by the private fund. *See* rule 202(a)(30)–1, at note to paragraph (c)(3)(i).

[718] *See* 17 CFR 230.902(l).

[719] *See* rule 202(a)(30)–1(c)(4); rule 222–1(a) (defining ''place of business'' of an investment adviser as: ''(1) An office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and (2) Any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.''). *See supra* Section II.C.4.

[720] Rule 202(a)(30)–1(c)(1); Form ADV: Instructions to Part 1A, instr. 5.b(4). *See also supra* Section II.C.5.

[721] *See* Proposing Release, *supra* note 26, at n.350 and accompanying text.

[722] This is true for all of the definitions except for ''assets under management.'' An adviser that relies on the foreign private adviser exemption must calculate its assets under management according to the instructions to Item 5 of Form ADV only for purposes of determining the availability of the exemption. As discussed above, rule 202(a)(30)–1 includes a reference to Item 5 of Form ADV in order to provide for consistency in the calculation of assets under management for various purposes under the Advisers Act. *See supra* note 497 and accompanying text.

[723] *See, e.g.,* Dechert General Letter (with respect to the definition of ''investor''); Dechert Foreign Adviser Letter and IFIC Letter (noting that the proposed definition of ''in the United States'' has the benefit of relying on existing guidance that is generally used by investment advisers); O'Melveny Letter (with respect to the definition of ''U.S. person'').

[724] *See supra* Section II.C.1.

[725] *See supra* note 432 and accompanying text.

[726] *See supra* notes 471–472 and accompanying text.

[727] *See supra* Section II.C.4. Under section 222 of the Advisers Act, a state may not require an adviser to register if the adviser does not have a ''place of business'' within, and has fewer than 6 client residents of, the state.

[728] *See supra* Sections II.C.2 and II.C.3.

[729] *See supra* Section II.C.1.

[730] *See supra* notes 453–462 and accompanying and following text and notes 474–477 and accompanying text. *See also infra* notes 744–747 for an estimate of the costs associated with registration.

[731] *See supra* notes 448–452 and accompanying text.

[732] *See* Seward Letter; Shearman Letter.

noted above, registration offers benefits to the investing public, including periodic examination of the adviser and compliance with rules requiring recordkeeping, custody of client funds and compliance programs.[733]

2. Costs

As discussed in the Proposing Release, we do not believe our definitions will result in significant costs for non-U.S. advisers.[734] Non-U.S. advisers that seek to avail themselves of the foreign private adviser exemption will incur costs to determine whether they are eligible for the exemption. We expect that these advisers will consult with outside U.S. counsel and perform an internal review of the extent to which an advisory affiliate manages discretionary accounts owned by a U.S. person that would be counted toward the limitation on clients in the United States and investors in the United States. We estimate these costs will be $6,730 per adviser.[735]

Without the rule, we believe that most advisers would have interpreted the new statutory provision by reference to the same rules that rule 202(a)(30)–1 references. Without our rule, some advisers would have likely incurred additional costs because they would have sought guidance in interpreting the terms used in the statutory exemption. By defining the statutory terms in a rule, we believe that we are providing certainty for non-U.S. advisers and limiting the time, compliance costs and legal expenses non-U.S. advisers would have incurred in seeking an interpretation, all of which could have inhibited capital formation and reduced efficiency. Advisers will also be less likely to seek additional assistance from us because they can rely on relevant guidance that we have previously provided with respect to the definitions that rule 202(a)(30)–1 references. We also believe that non-U.S. advisers' ability to rely on the definitions that the rule references and the guidance provided with respect to the referenced rules will reduce Commission resources that would have otherwise been applied to administering the foreign private adviser exemption, which resources can be allocated to other matters.

Our instruction allowing non-U.S. advisers to determine whether a client or investor is ''in the United States'' by reference to the time the person became a client or an investor acquires securities issued by the private fund should also reduce advisers' costs.[736] Advisers will make the determination only once and will not be required to monitor changes in the status of each client and private fund investor. Moreover, if a client or an investor moved to the United States, the adviser would not have to choose among registering with us, terminating the relationship with the client, or forcing the investor out of the private fund. Some commenters agreed that the instruction will benefit advisers.[737]

Some commenters disagreed with the Proposing Release's explanation of how the exemption's requirement that an adviser look through to private fund investors would apply with respect to certain structures, such as master-feeder funds and total return swaps.[738] In both respects, we note that the obligation to look through certain transactions stems from section 208(d) of the Advisers Act (section 48(a) of the Investment Company Act with respect to sections 3(c)(1) and 3(c)(7)) as it applies to an adviser's obligations to look through to private fund investors for purposes of the foreign private adviser exemption. Thus, any costs associated with the statutory provisions that prohibit any person from doing indirectly or through or by another person anything that would be unlawful to do directly flow from those provisions, rather than any definitions we are adopting.

Some commenters expressed concern that the look-through requirement contained in the statutory definition of a ''foreign private adviser'' could impose significant burdens on advisers to non-U.S. funds, including non-U.S. retail funds publicly offered outside of the United States.[739] Two of these commenters stated, for example, that in their view a non-U.S. fund could be considered a private fund as a result of independent actions of U.S. investors, such as if a non-U.S. shareholder of a non-U.S. fund moves to the United States and purchases additional shares.[740] If these funds were ''private funds,'' their advisers would, if seeking to rely on the foreign private adviser exemption, be required to determine the number of private fund investors in the United States and the assets under management attributable to them.

As we explain above, if an adviser reasonably believes that an investor is not ''in the United States,'' the adviser may treat the investor as not being ''in the United States.'' Moreover, we understand that non-U.S. private funds currently count or qualify their U.S. investors in order to avoid regulation under the Investment Company Act.[741] A non-U.S. adviser would need to count the same U.S. investors (except for holders of short-term paper with respect to a fund relying on section 3(c)(1)) in order to rely on the foreign private adviser exemption. In this respect, therefore, the look-through requirement of the foreign private adviser exemption will generally not impose any new burden on advisers to non-U.S. funds.

As discussed in the Proposing Release, the modifications will result in some costs for non-U.S. advisers who might change their business practices in order to rely on the exemption.[742] Some non-U.S. advisers may have to choose to register under the Advisers Act or to limit the scope of their contacts with the United States in order to rely on the statutory exemption for foreign private advisers (or the private fund adviser exemption).[743] As noted above, we have

[733] *See supra* text accompanying and following note 575.

[734] *See* Proposing Release, *supra* note 26, at section V.C.2.

[735] *See supra* note 667 and accompanying text. As noted above, we are decreasing this estimate to $6,730 to account for more recent salary data. *Id.* We did not receive any comments on the costs we estimated advisers would incur to perform this internal review.

[736] *See* rule 202(a)(30)–1, at note to paragraph (c)(3)(i); *supra* note 476 and accompanying text.

[737] *See* Dechert General Letter (''The note provides helpful relief at a time when advisory clients often move across international borders while keeping an existing relationship with a financial institution.''); IFIC Letter (the proposed approach ''is consistent with the current interpretations on which Canadian advisers have relied for many years, and will ensure continuity and certainty in their business operations.'').

[738] *See* Dechert General Letter; EFAMA Letter. *See also supra* notes 442–444 and accompanying text. As we discussed above, for purposes of the look-through provision, the adviser to a master fund in a master-feeder arrangement must treat as investors the holders of the securities of any feeder fund formed or operated for the purpose of investing in the master fund rather than the feeder funds, which act as conduits. In addition, an adviser must count as an investor any owner of a total return swap on the private fund because that arrangement effectively provides the risks and rewards of investing in the private fund to the swap owner.

[739] *See* AFG letter; Dechert Foreign Adviser Letter; EFAMA Letter; Shearman Letter.

[740] Dechert Foreign Adviser Letter; EFAMA Letter. *See also supra* note 464 and accompanying text.

[741] This practice is consistent with positions our staff has taken in which the staff has stated it would not recommend enforcement action in certain circumstances. *See, e.g.,* Goodwin Procter No-Action Letter, *supra* note 294; Touche Remnant No-Action Letter, *supra* note 294. *See also* sections 7(d), 3(c)(1), and 3(c)(7) of the Investment Company Act. *See also, e.g.,* Canadian Tax-Deferred Retirement Savings Accounts Release, *supra* note 294, at n.23 (''The Commission and its staff have interpreted section 7(d) to generally prohibit a foreign fund from making a U.S. private offering if that offering would cause the securities of the fund to be beneficially owned by more than 100 U.S. residents.'').

[742] *See* Proposing Release, *supra* note 26, at n. 362 and accompanying and following text.

[743] *See, e.g.,* O'Melveny Letter (argued that because the foreign private adviser is subject to a low statutory asset threshold, it is likely ''that the

Continued

estimated the costs of registration to be $15,077.[744] In addition, we estimate that registered advisers would incur initial costs to establish a compliance infrastructure, which we estimate would range from $10,000 to $45,000 and ongoing annual costs of compliance and examination, which we estimate would range from $10,000 to $50,000.[745] Some commenters suggested that these estimates are too low, and estimated that they would incur one-time registration and compliance costs ranging from $50,000 to $600,000, followed by ongoing annual compliance costs ranging from $50,000 to $500,000.[746] Although some advisers may incur these costs, we do not believe they are representative, as discussed above.[747] Moreover, as discussed above, commenters identifying themselves as ''middle market private equity fund'' advisers provided the highest estimated costs, but these commenters generally would not qualify for the foreign private adviser exemption (*e.g.,* because these advisers generally appear to have places of business in the United States).

In any case, non-U.S. advisers will assess the costs of registering with the Commission relative to relying on the foreign private adviser or the private fund adviser exemption. This assessment will take into account many factors, which will vary from one adviser to another, to determine whether registration, relative to other options, is the most cost-effective business option for the adviser to pursue. If a non-U.S. adviser limited its activities within the United States in order to rely on the exemption, the modifications might have the effect of reducing competition in the market for advisory services or decreasing the availability of certain investment opportunities for U.S. investors. If the non-U.S. adviser chose to register, competition among registered advisers would increase. One commenter asserted that treating holders of short-term paper as investors could result in a U.S. commercial lender to a fund being treated as an investor, leading non-U.S. advisers to avoid U.S. lenders.[748] To the extent that the modification included in the definition of ''investor'' causes a non-U.S. adviser seeking to rely on the foreign private adviser exemption to limit U.S. investors in a private fund's short-term notes, the modification could have an adverse effect on capital formation and reduce U.S. lenders as sources of credit for non-U.S. funds. However, unless the extension of credit by a fund's broker-dealer or custodian bank results in the issuance of a security by the fund to its creditor, the creditor would not be considered an investor for purposes of the foreign private adviser exemption.[749]

As a result of the rule's reference to the method of calculating assets under management under Form ADV, non-U.S. advisers will use the valuation method provided in the instructions to Form ADV to verify compliance with the $25 million asset threshold included in the foreign private adviser exemption.[750] Among other things, these instructions require advisers to use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable, when determining regulatory assets under management and to include in the calculation certain types of assets advisers previously were permitted to exclude.[751] Most commenters addressed the components of the new method of calculation in reference to the calculation of ''regulatory assets under management'' under Form ADV, or with respect to the calculation of private fund assets for purposes of the private fund adviser exemption.[752]

As discussed in the Proposing Release, some non-U.S. advisers to private funds may value assets based on their fair value in accordance with GAAP or other international accounting standards that require the use of fair value, while other advisers to private funds currently may not use fair value methodologies.[753] We noted above that the costs associated with fair valuation will vary based on factors such as the nature of the asset, the number of positions that do not have a market value, and whether the adviser has the ability to value such assets internally or relies on a third party for valuation services.[754] Nevertheless, we do not believe that the requirement to use fair value methodologies will result in significant costs for these advisers to these funds.[755] Commission staff estimates that such advisers will each incur $1,320 in internal costs to conform its internal valuations to a fair value standard.[756] In the event a fund does not have an internal capability for valuing illiquid assets, we expect that it will be able to obtain pricing or valuation services from an outside administrator or other service provider. Staff estimated that the annual cost of such a service will range from $1,000 to $120,000 annually, which could be borne by several funds that invest in similar assets or have similar investment strategies.[757] We did not receive any comments on these estimates.

VI. Regulatory Flexibility Certification

The Commission certified in the Proposing Release, pursuant to section 605(b) of the Regulatory Flexibility Act,[758] that proposed rules 203(l)–1 and 203(m)–1 under the Advisers Act would not, if adopted, have a significant economic impact on a substantial number of small entities.[759] As we explained in the Proposing Release, under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small

cost of enhanced regulatory compliance [resulting from advisers registering or filing reports required of advisers relying on rule 203(m)–1] may, as a commercial matter, have to be borne solely by U.S. investors, which would affect their net returns''; the commenter also stated that, alternatively, ''many non-U.S. advisers with less significant amounts of U.S. assets invested in their funds may choose to restrict the participation by U.S. investors rather than attempt to comply with the Proposed Rules and, thereby, decrease the availability of potentially attractive investment opportunities to U.S. investors''). We note, however, that the benefits and costs associated with the elimination of the private adviser exemption are attributable to the Dodd-Frank Act, including the costs of registration incurred by advisers that previously relied on that exemption but that will have to register because they do not qualify for another exemption. In addition, the benefits and costs associated with the reporting requirements applicable to advisers relying on the private fund adviser exemption are associated with the separate rules that impose those requirements. *See* Implementing Adopting Release, *supra* note 32, at section II.B.

[744] *See supra* note 597 and accompanying text.

[745] *See supra* note 601 and accompanying text.

[746] *See supra* notes 602–603 and accompanying text.

[747] *See supra* Section V.A.2.

[748] *See* Shearman Letter.

[749] *See Reves* v. *Ernst & Young,* 494 U.S. 56 (1990). *See also supra* note 458 and accompanying text.

[750] *See supra* Section II.C.5.

[751] *See supra* Section II.B.2.a.

[752] *See* Implementing Adopting Release, *supra* note 32, discussion at section II.A.3; *supra* Section II.B.2.a. Among those commenters who addressed the components specifically with respect to the foreign private adviser exemption, one noted that because of the requirement to include proprietary assets in the calculation, ''managers, in order to qualify for the [exemption], will have an incentive to reduce their personal commitments to the private funds, and manage their own assets individually.'' *See* ABA Letter. This result, argues the commenter, will not be in the best interest of investors, who benefit from managers having ''skin the game.'' As discussed in Section II.B.2, if private fund investors value their advisers' co-investments as suggested by the commenter, we expect that the investors will demand them and their advisers will structure their businesses accordingly.

[753] *See* Proposing Release, *supra* note 26, at n.365 and accompanying text.

[754] *See supra* note 676 and accompanying text.

[755] *See supra* text following note 676.

[756] *See supra* note 679.

[757] *See supra* note 680.

[758] 5 U.S.C. 605(b).

[759] *See* Proposing Release, *supra* note 26, at section VI.

entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year (''small adviser'').[760]

Investment advisers solely to venture capital funds and advisers solely to private funds in each case with assets under management of less than $25 million would remain generally ineligible for registration with the Commission under section 203A of the Advisers Act.[761] We expect that any small adviser solely to existing venture capital funds that would not be ineligible to register with the Commission would be able to avail itself of the exemption from registration under the grandfathering provision. If an adviser solely to a new venture capital fund could not avail itself of the exemption because, for example, the fund it advises did not meet the definition of ''venture capital fund,'' we anticipate that the adviser could avail itself of the exemption in section 203(m) of the Advisers Act as implemented by rule 203(m)–1. Similarly, we expect that any small adviser solely to private funds would be able to rely on the exemption in section 203(m) of the Advisers Act as implemented by rule 203(m)–1.

Thus, we believe that small advisers solely to venture capital funds and small advisers to other private funds will generally be ineligible to register with the Commission. Those small advisers that may not be ineligible to register with the Commission, we believe, would be able to rely on the venture capital fund adviser exemption under section 203(l) of the Advisers Act or the private fund adviser exemption under section 203(m) of that Act as implemented by our rules. For these reasons, we certified in the Proposing Release that rules 203(l)–1 and 203(m)–1 under the Advisers Act would not, if adopted, have a significant economic impact on a substantial number of small entities. Although we requested written comments regarding this certification, no commenters responded to this request.

[760] Rule 0–7(a) (17 CFR 275.0–7(a)).

[761] Section 203A of the Advisers Act (prohibiting an investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business from registering with the Commission unless the adviser has $25 million or more in assets under management or is an adviser to a registered investment company).

VII. Statutory Authority

The Commission is adopting rule 202(a)(30)–1 under the authority set forth in sections 403 and 406 of the Dodd-Frank Act, to be codified at sections 203(b) and 211(a) of the Advisers Act, respectively (15 U.S.C. 80b–3(b), 80b–11(a)). The Commission is adopting rule 203(l)–1 under the authority set forth in sections 406 and 407 of the Dodd-Frank Act, to be codified at sections 211(a) and 203(l) of the Advisers Act, respectively (15 U.S.C. 80b–11(a), 80b–3(l)). The Commission is adopting rule 203(m)–1 under the authority set forth in sections 406 and 408 of the Dodd-Frank Act, to be codified at sections 211(a) and 203(m) of the Advisers Act, respectively (15 U.S.C. 80b–11(a), 80b–3(m)).

List of Subjects in 17 CFR Part 275

Reporting and recordkeeping requirements; Securities.

Text of Rules

For reasons set out in the preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The general authority citation for Part 275 is revised to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6(a), and 80b–11, unless otherwise noted.

* * * * *

■ 2. Section 275.202(a)(30)–1 is added to read as follows:

§ 275.202(a)(30)–1 Foreign private advisers.

(a) *Client.* You may deem the following to be a single client for purposes of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)):

(1) A natural person, and:

(i) Any minor child of the natural person;

(ii) Any relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent of the natural person who has the same principal residence;

(iii) All accounts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and

(iv) All trusts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries;

(2)(i) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(1)(iv) of this section), or other legal organization (any of which are referred to hereinafter as a ''legal organization'') to which you provide investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an ''owner''); and

(ii) Two or more legal organizations referred to in paragraph (a)(2)(i) of this section that have identical owners.

(b) *Special rules regarding clients.* For purposes of this section:

(1) You must count an owner as a client if you provide investment advisory services to the owner separate and apart from the investment advisory services you provide to the legal organization, provided, however, that the determination that an owner is a client will not affect the applicability of this section with regard to any other owner;

(2) You are not required to count an owner as a client solely because you, on behalf of the legal organization, offer, promote, or sell interests in the legal organization to the owner, or report periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters;

(3) A limited partnership or limited liability company is a client of any general partner, managing member or other person acting as investment adviser to the partnership or limited liability company;

(4) You are not required to count a private fund as a client if you count any investor, as that term is defined in paragraph (c)(2) of this section, in that private fund as an investor in the United States in that private fund; and

(5) You are not required to count a person as an investor, as that term is defined in paragraph (c)(2) of this section, in a private fund you advise if you count such person as a client in the United States.

Note to paragraphs (a) and (b): These paragraphs are a safe harbor and are not intended to specify the exclusive method for determining who may be deemed a single client for purposes of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)).

(c) *Definitions.* For purposes of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)):

(1) *Assets under management* means the regulatory assets under management

as determined under Item 5.F of Form ADV (§ 279.1 of this chapter).

(2) *Investor* means:

(i) Any person who would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)(1)), or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(7)); and

(ii) Any beneficial owner of any outstanding short-term paper, as defined in section 2(a)(38) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(38)), issued by the private fund.

Note to paragraph (c)(2): You may treat as a single investor any person who is an investor in two or more private funds you advise.

(3) *In the United States* means with respect to:

(i) Any client or investor, any person who is a U.S. person as defined in § 230.902(k) of this chapter, except that any discretionary account or similar account that is held for the benefit of a person in the United States by a dealer or other professional fiduciary is in the United States if the dealer or professional fiduciary is a related person, as defined in § 275.206(4)–2(d)(7), of the investment adviser relying on this section and is not organized, incorporated, or (if an individual) resident in the United States.

Note to paragraph (c)(3)(i): A person who is in the United States may be treated as not being in the United States if such person was not in the United States at the time of becoming a client or, in the case of an investor in a private fund, each time the investor acquires securities issued by the fund.

(ii) Any place of business, *in the United States,* as that term is defined in § 230.902(l) of this chapter; and

(iii) The public, *in the United States,* as that term is defined in § 230.902(l) of this chapter.

(4) *Place of business* has the same meaning as in § 275.222–1(a).

(5) *Spousal equivalent* has the same meaning as in § 275.202(a)(11)(G)–1(d)(9).

(d) *Holding out.* If you are relying on this section, you shall not be deemed to be holding yourself out generally to the public in the United States as an investment adviser, within the meaning of section 202(a)(30) of the Act (15 U.S.C. 80b–2(a)(30)), solely because you participate in a non-public offering in the United States of securities issued by a private fund under the Securities Act of 1933 (15 U.S.C. 77a).

■ 3. Section 275.203(l)–1 is added to read as follows:

§ 275.203(l)–1 Venture capital fund defined.

(a) *Venture capital fund defined.* For purposes of section 203(l) of the Act (15 U.S.C. 80b–3(l)), a venture capital fund is any private fund that:

(1) Represents to investors and potential investors that it pursues a venture capital strategy;

(2) Immediately after the acquisition of any asset, other than qualifying investments or short-term holdings, holds no more than 20 percent of the amount of the fund's aggregate capital contributions and uncalled committed capital in assets (other than short-term holdings) that are not qualifying investments, valued at cost or fair value, consistently applied by the fund;

(3) Does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of the private fund's aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days, except that any guarantee by the private fund of a qualifying portfolio company's obligations up to the amount of the value of the private fund's investment in the qualifying portfolio company is not subject to the 120 calendar day limit;

(4) Only issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and

(5) Is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a–53).

(b) *Certain pre-existing venture capital funds.* For purposes of section 203(l) of the Act (15 U.S.C. 80b–3(l)) and in addition to any venture capital fund as set forth in paragraph (a) of this section, a venture capital fund also includes any private fund that:

(1) Has represented to investors and potential investors at the time of the offering of the private fund's securities that it pursues a venture capital strategy;

(2) Prior to December 31, 2010, has sold securities to one or more investors that are not related persons, as defined in § 275.206(4)–2(d)(7), of any investment adviser of the private fund; and

(3) Does not sell any securities to (including accepting any committed capital from) any person after July 21, 2011.

(c) *Definitions.* For purposes of this section:

(1) *Committed capital* means any commitment pursuant to which a person is obligated to:

(i) Acquire an interest in the private fund; or

(ii) Make capital contributions to the private fund.

(2) *Equity security* has the same meaning as in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(11)) and § 240.3a11–1 of this chapter.

(3) *Qualifying investment* means:

(i) An equity security issued by a qualifying portfolio company that has been acquired directly by the private fund from the qualifying portfolio company;

(ii) Any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company described in paragraph (c)(3)(i) of this section; or

(iii) Any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, as defined in section 2(a)(24) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(24)), or a predecessor, and is acquired by the private fund in exchange for an *equity security* described in paragraph (c)(3)(i) or (c)(3)(ii) of this section.

(4) *Qualifying portfolio company* means any company that:

(i) At the time of any investment by the private fund, is not reporting or foreign traded and does not control, is not controlled by or under common control with another company, directly or indirectly, that is reporting or foreign traded;

(ii) Does not borrow or issue debt obligations in connection with the private fund's investment in such company and distribute to the private fund the proceeds of such borrowing or issuance in exchange for the private fund's investment; and

(iii) Is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by § 270.3a–7 of this chapter, or a commodity pool.

(5) *Reporting or foreign traded* means, with respect to a company, being subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), or having a security listed or

traded on any exchange or organized market operating in a foreign jurisdiction.

(6) *Short-term holdings* means cash and cash equivalents, as defined in § 270.2a51–1(b)(7)(i) of this chapter, U.S. Treasuries with a remaining maturity of 60 days or less, and shares of an open-end management investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8) that is regulated as a money market fund under § 270.2a–7 of this chapter.

Note: For purposes of this section, an investment adviser may treat as a private fund any issuer formed under the laws of a jurisdiction other than the United States that has not offered or sold its securities in the United States or to U.S. persons in a manner inconsistent with being a private fund, provided that the adviser treats the issuer as a private fund under the Act (15 U.S.C. 80b) and the rules thereunder for all purposes.

■ 4. Section 275.203(m)–1 is added to read as follows:

§ 275.203(m)–1 Private fund adviser exemption.

(a) *United States investment advisers.* For purposes of section 203(m) of the Act (15 U.S.C. 80b–3(m)), an investment adviser with its principal office and place of business in the United States is exempt from the requirement to register under section 203 of the Act if the investment adviser:

(1) Acts solely as an investment adviser to one or more qualifying private funds; and

(2) Manages private fund assets of less than $150 million.

(b) *Non-United States investment advisers.* For purposes of section 203(m) of the Act (15 U.S.C. 80b–3(m)), an investment adviser with its principal office and place of business outside of the United States is exempt from the requirement to register under section 203 of the Act if:

(1) The investment adviser has no client that is a United States person except for one or more qualifying private funds; and

(2) All assets managed by the investment adviser at a place of business in the United States are solely attributable to private fund assets, the total value of which is less than $150 million.

(c) *Frequency of Calculations.* For purposes of this section, calculate private fund assets annually, in accordance with General Instruction 15 to Form ADV (§ 279.1 of this chapter).

(d) *Definitions.* For purposes of this section:

(1) *Assets under management* means the regulatory assets under management as determined under Item 5.F of Form ADV (§ 279.1 of this chapter).

(2) *Place of business* has the same meaning as in § 275.222–1(a).

(3) *Principal office and place of business* of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

(4) *Private fund assets* means the investment adviser's assets under management attributable to a qualifying private fund.

(5) *Qualifying private fund* means any private fund that is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8) and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a–53). For purposes of this section, an investment adviser may treat as a private fund an issuer that qualifies for an exclusion from the definition of an ''investment company,'' as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), in addition to those provided by section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or 15 U.S.C. 80a–3(c)(7)), provided that the investment adviser treats the issuer as a private fund under the Act (15 U.S.C. 80b) and the rules thereunder for all purposes.

(6) *Related person* has the same meaning as in § 275.206(4)–2(d)(7).

(7) *United States* has the same meaning as in § 230.902(l) of this chapter.

(8) *United States person* means any person that is a U.S. person as defined in § 230.902(k) of this chapter, except that any discretionary account or similar account that is held for the benefit of a United States person by a dealer or other professional fiduciary is a United States person if the dealer or professional fiduciary is a related person of the investment adviser relying on this section and is not organized, incorporated, or (if an individual) resident in the United States.

Note to paragraph (d)(8): A client will not be considered a United States person if the client was not a United States person at the time of becoming a client.

Dated: June 22, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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Part V

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 100217096–1312–01]

RIN 0648–AY63

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from BP Exploration (Alaska) Inc. (BP) for authorization for the take of marine mammals incidental to operation of offshore oil and gas facilities in the U.S. Beaufort Sea, Alaska, for the period 2011–2016. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing to issue regulations to govern that take and requesting information, suggestions, and comments on these proposed regulations. These regulations, if issued, would include required mitigation measures to ensure the least practicable adverse impact on the affected marine mammal species and stocks.

DATES: Comments and information must be received no later than August 5, 2011.

ADDRESSES: You may submit comments, identified by 0648–AY63, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

Comments regarding any aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via one of the means stated here and to the Office of Information and Regulatory Affairs, NEOB–10202, Office of Management and Budget (OMB), Attn: Desk Office, Washington, DC 20503, *OIRA@omb.eop.gov.*

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

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

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, ext. 156, or Brad Smith, Alaska Region, NMFS, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Availability

A copy of BP's application may be obtained by writing to the address specified above (see **ADDRESSES**), calling the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* To help NMFS process and review comments more efficiently, please use only one method to submit comments.

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On November 6, 2009, NMFS received an application from BP requesting authorization for the take of six marine mammal species incidental to operation of the Northstar development in the Beaufort Sea, Alaska, over the course of 5 years, which would necessitate the promulgation of new five-year regulations. Construction of Northstar was completed in 2001. The proposed activities for 2011–2016 include a continuation of drilling, production, and emergency training operations but no construction or activities of similar intensity to those conducted between 1999 and 2001. The likely or possible impacts of the planned continuing operations at Northstar on marine mammals involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of personnel, structures and equipment, construction or maintenance activities, and the occurrence of oil spills. Petroleum development and associated activities in marine waters introduce sound into the environment, produced by island construction, maintenance, and drilling, as well as vehicles operating on the ice, vessels, aircraft, generators, production machinery, gas flaring, and camp operations. BP requests authorization to take individuals of three cetacean and three pinniped species by Level B Harassment. They are: Bowhead, gray, and beluga whales and ringed, bearded, and spotted seals. Further, BP requests authorization to take five individual ringed seals by injury or mortality annually over the course of the 5-year rule.

Description of the Specified Activity

Background on the Northstar Development Facility

BP is currently producing oil from an offshore development in the Northstar Unit (see Figure 1 in BP's application). This development is the first in the Beaufort Sea that makes use of a subsea pipeline to transport oil to shore and

then into the Trans-Alaska Pipeline System. The Northstar facility was built in State of Alaska waters on the remnants of Seal Island approximately 6 mi (9.5 km) offshore from Point Storkersen, northwest of the Prudhoe Bay industrial complex, and 3 mi (5 km) seaward of the closest barrier island. It is located approximately 54 mi (87 km) northeast of Nuiqsut, an Inupiat community.

The main facilities associated with Northstar include a gravel island work surface for drilling and oil production facilities and two pipelines connecting the island to the existing infrastructure at Prudhoe Bay. One pipeline transports crude oil to shore, and the second imports gas from Prudhoe Bay for gas injection at Northstar. Permanent living quarters and supporting oil production facilities are also located on the island.

The construction of Northstar began in early 2000 and continued through 2001. BP states that activities with similar intensity to those that occurred during the construction phase between 2000 and 2001 are not planned or expected for any date within the 5-year period that would be governed by the proposed regulations (*i.e.,* 2011–2016). Well drilling began on December 14, 2000, and oil production commenced on October 31, 2001. Construction and maintenance activities occurred annually on the protection barrier around Northstar due to ice and storm impacts. In August 2003, two barges made a total of 52 round-trips to haul 30,000 cubic yards of gravel from West Dock for berm construction. Depending on the actual damage, repair and maintenance in the following years consisted of activities such as creating a moat for diver access, removing concrete blocks in areas that had sustained erosion and/or block damage, and installing a new layer of filter fabric. In 2008, BP installed large boulders at the NE corner of the barrier instead of replacing the lower concrete blocks that were removed during a storm.

The planned well-drilling program for Northstar was completed in May 2004. Drilling activities to drill new wells, conduct well maintenance, and drill well side-tracks continued in 2006 (six wells), 2007 (two wells), and 2008 (two wells). The drill rig was demobilized and removed from the island by barge during the 2010 open water period. Although future drilling is not specifically planned, drilling of additional wells or well work-over may be required at some time in the future. A more detailed description of past construction, drilling, and production activities at Northstar can be found in BP's application (see **ADDRESSES**).

Expected Activities in 2011–2016

During the 5-year period from 2011–2016, BP intends to continue production and emergency training operations. As mentioned previously, drilling is not specifically planned for the 2011–2016 time period but may be required at some point in the future. The activities described next could occur at any time during the 5-year period. Table 2 in BP's application (see **ADDRESSES**) summarizes the vehicles and machinery used during BP's Northstar activities since the development of Northstar Island. Although all these activities are not planned to take place during the 2011–2016 operational phase, some of the equipment may be required to repair or replace existing structures or infrastructure on Northstar in the future.

(1) Transportation of Personnel, Equipment, and Supplies

Transportation needs for the Northstar project include the ability to safely transport personnel, supplies, and equipment to and from the site during repairs or maintenance, drilling, and operations in an offshore environment. During proposed island renewal construction that may take place during the requested time period, quantities of pipes, vertical support members (*i.e.,* posts that hold up terrestrial pipelines), gravel, and a heavy module will be transported to the site. Drilling operations require movement of pipe materials, chemicals, and other supplies to the island. During ongoing field operations, equipment and supplies will need to be transported to the site. All phases of construction, drilling, and operation require movement of personnel to and from the Northstar area.

During the operations phase from 2002–2009, fewer ice roads were required compared to the construction phase (2000–2001). The future scope of ice road construction activities during ongoing production is expected to be similar to the post-construction period of 2002–2009. The locations, dimensions, and construction techniques of these ice roads are described in the multi-year final comprehensive report (Richardson [ed.], 2008). The presence of ice roads allows the use of standard vehicles such as pick-ups, SUVs, buses and trucks for transport of personnel and equipment to and from Northstar during the ice-covered period. Ice roads are planned to be constructed and used as a means of winter transportation for the duration of Northstar operations. The orientation of future ice roads is undetermined, but will not exceed the number of ice roads created during the winter of 2000/2001.

Barges and Alaska Clean Seas (ACS) vessels are used to transport personnel and equipment from the Prudhoe Bay area to Northstar during the open-water season, which extends from approximately mid- to late-July through early to mid-October. Seagoing barges are used to transport large modules and other supplies and equipment during the construction period.

Helicopter access to Northstar Island continues to be an important transportation option during break-up and freeze-up of the sea ice when wind, ice conditions, or other operational considerations prevent or limit hovercraft travel. Helicopters will be used for movement of personnel and supplies in the fall after freeze-up begins and vessel traffic is not possible but before ice roads have been constructed. Helicopters will also be used in the spring after ice roads are no longer safe for all-terrain vehicles (ATVs) but before enough open water is available for vessel traffic. Helicopters are also available for use at other times of year in emergency situations. Helicopters fly at an altitude of at least 1,000 ft (305 m), except for take-off, landing, and as dictated for safe aircraft operations. Designated flight paths are assigned to minimize potential disturbance to wildlife and subsistence users.

The hovercraft is used to transport personnel and supplies during break-up and freeze-up periods to reduce helicopter use. BP intends to continue the use of the hovercraft in future years. Specifications of the hovercraft and sound characteristics are described in Richardson ([ed.] 2008) and Blackwell and Greene (2005).

(2) Production Operations

The process facilities for the Northstar project are primarily prefabricated sealift modules that were shipped to the island and installed in 2001. The operational aspects of the Northstar production facility include the following: Two diesel generators (designated emergency generators); three turbine generators for the power plant, operating at 50 percent duty cycle (*i.e.,* only two will be operating at any one time); two high pressure turbine compressors; one low pressure flare; and one high pressure flare. Both flares are located on the 215 ft (66 m) flare tower. Modules for the facility include permanent living quarters (*i.e.,* housing, kitchen/dining, lavatories, medical, recreation, office, and laundry space), utility module (*i.e.,* desalinization plant,

emergency power, and wastewater treatment plant), warehouse/shop module, communications module, diesel and potable water storage, and chemical storage. Operations have been continuing since oil production began on October 31, 2001 and are expected to continue beyond 2016.

(3) Drilling Operations

The drilling rig and associated equipment was moved by barge to Northstar Island from Prudhoe Bay during the open-water season in 2000. Drilling began in December 2000 using power supplied by the installed gas line. The first well drilled was the Underground Injection Control well, which was commissioned for disposal of permitted muds and cuttings on January 26, 2001. After Northstar facilities were commissioned, drilling above reservoir depth resumed, while drilling below that depth is allowed only during the ice covered period. Although future drilling is not specifically planned during the requested time period for this proposed rule, drilling of additional wells or well work-over may be required at some time during 2011–2016.

(4) Pipeline Design, Inspection, and Maintenance

The Northstar pipelines have been designed, installed, and monitored to assure safety and leak prevention. Pipeline monitoring and surveillance activities have been conducted since oil production began, and BP will conduct long-term monitoring of the pipeline system to assure design integrity and to detect any potential problems through the life of the Northstar development. The program will include visual inspections/aerial surveillance and pig (a gauging/cleaning device) inspections.

The Northstar pipelines include the following measures to assure safety and leak prevention:

- Under the pipeline design specifications, the tops of the pipes are 6–8 ft (1.8–2.4 m) below the original seabed (this is 2 times the deepest measured ice gouge);
- The oil pipeline uses higher yield steel than required by design codes as applied to internal pressure (by a factor of over 2.5 times). This adds weight and makes the pipe stronger. The 10-in (25.4-cm) diameter Northstar oil pipeline has thicker walls than the 48-in (122-cm) diameter Trans-Alaska Pipeline;
- The pipelines are designed to bend without leaking in the event of ice keel impingement or the maximum predicted subsidence from permafrost thaw;
- The pipelines are coated on the outside and protected with anodes to prevent corrosion; and
- The shore transition is buried to protect against storms, ice pile-up, and coastal erosion. The shore transition valve pad is elevated and set back from the shoreline.

A best-available-technology leak detection system is being used during operations to monitor for any potential leaks. The Northstar pipeline incorporates two independent, computational leak detection systems: (1) The Pressure Point Analysis (PPA) system, which detects a sudden loss of pressure in the pipeline; and (2) the mass balance leak detection system, which supplements the PPA. Furthermore, an independent hydrocarbon sensor, the LEOS leak detection system, located between the two pipelines, can detect hydrocarbon vapors and further supplements the other systems.

- Intelligent inspection pigs are used during operations to monitor pipe conditions and measure any changes.
- The line is constructed with no flanges, valves, or fittings in the subsea section to reduce the likelihood of equipment failure.

During operations, BP conducts aerial forward looking infrared (FLIR) surveillance of the offshore and onshore pipeline corridors at least once per week (when conditions allow), to detect pipeline leaks. Pipeline isolation valves are inspected on a regular basis. In addition to FLIR observations/inspections, BP conducts a regular oil pipeline pig inspection program to assess continuing pipeline integrity. The LEOS Leak Detection System is used continuously to detect under-ice releases during the ice covered period.

The pipelines are also monitored annually to determine any potential sources of damage along the pipeline route. The monitoring work has been conducted in two phases: (1) A helicopter-based reconnaissance of strudel drainage features in early June; and (2) a vessel-based survey program in late July and early August. During the vessel-based surveys, multi-beam, single-beam, and side scan sonar are used. These determine the locations and characteristics of ice gouges and strudel scour depressions in the sea bottom along the pipeline route and at additional selected sites where strudel drainage features have been observed. If strudel scour depressions are identified, additional gravel fill is placed in the open water season to maintain the sea bottom to original pipeline construction depth.

(5) Routine Repair and Maintenance

Various routine repair and maintenance activities have occurred since the construction of Northstar. Examples of some of these activities include completion and repair of the island slope protection berm and well cellar retrofit repairs. Activities associated with these repairs or modifications are reported in the 1999–2004 final comprehensive report (Rodrigues and Williams, 2006) and since 2005 in the various Annual Reports (Rodrigues *et al.,* 2006; Rodrigues and Richardson, 2007; Aerts and Rodrigues, 2008; Aerts, 2009). Some of these activities, such as repair of the island slope protection berm, were major repairs that involved the use of barges and heavy equipment, while others were smaller-scale repairs involving small pieces of equipment and hand operated tools. The berm surrounding the island is designed to break waves and ice movement before they contact the island work surface and is subjected to regular eroding action from these forces. The berm and sheet pile walls will require regular surveying and maintenance in the future. Potential repair and maintenance activities that are expected to occur at Northstar during the period 2011–2016 include pile driving, traffic, gravel transport, dock construction and maintenance, diving and other activities similar to those that have occurred in the past.

(6) Emergency and Oil Spill Response Training

Emergency and oil spill response training activities are conducted at various times throughout the year at Northstar. Oil spill drill exercises are conducted by ACS during both the ice-covered and open-water periods. During the ice-covered periods, exercises are conducted for containment of oil in water and for detection of oil under ice. These spill drills have been conducted on mostly bottom-fast ice in an area 200 ft × 200 ft (61 m × 61 m) located just west of the island, using snow machines and ATVs. The spill drill includes the use of various types of equipment to cut ice slots or drill holes through the floating sea ice. Typically, the snow is cleared from the ice surface with a Bobcat loader and snow blower to allow access to the ice. Two portable generators are used to power light plants at the drill site. The locations and frequency of future spill drills or exercises will vary depending on the condition of the sea ice and training needs.

ACS conducts spill response training activities during the open-water season

during late July through early October. Vessels used as part of the training typically include Zodiacs, Kiwi Noreens, and Bay-class boats that range in length from 12–45 ft (3.7–13.7 m). Future exercises could include other vessels and equipment.

ARKTOS amphibious emergency escape vehicles are stationed on Northstar Island. Each ARKTOS is capable of carrying 52 people. Training exercises with the ARKTOS are conducted monthly during the ice-covered period. ARKTOS training exercises are not conducted during the summer. Equipment and techniques used during oil spill response exercises are continually updated, and some variations relative to the activities described here are to be expected.

(7) Northstar Abandonment

Detailed plans for the decommissioning of Northstar will be prepared near the end of field life, which will not occur during the period requested for these proposed regulations. For additional information on abandonment and decommissioning of the Northstar facility, refer to BP's application (see **ADDRESSES**).

Northstar Sound Characteristics

During continuing production activities at Northstar, sounds and non-acoustic stimuli will be generated by vehicle traffic, vessel operations, helicopter operations, drilling, and general operations of oil and gas facilities (*e.g.,* generator sounds and gas flaring). The sounds generated from transportation activities will be detectable underwater and/or in air some distance away from the area of activity. The distance will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor. Take of marine mammals by Level B harassment incidental to the activities mentioned in this document could occur for the duration of these proposed regulations. The type and significance of the harassment is likely to depend on the species and activity of the animal at the time of reception of the stimulus, as well as the distance from the sound source and the level of the sound relative to ambient conditions.

(1) Construction Sounds

Sounds associated with construction of Seal Island in 1982 were studied and described by Greene (1983a) and summarized in the previous petition for regulations submitted by BP (BPXA, 1999). Underwater and in-air sounds and iceborne vibrations of various activities associated with the final construction phases of Northstar were recorded in the winter of 2000–2002 (Greene *et al.,* 2008). The main purpose of these measurements was to characterize the properties of island construction sounds and to use this information in assessing their possible impacts on wildlife. Activities recorded included ice augering, pumping sea water to flood the ice and build an ice road, a bulldozer plowing snow, a Ditchwitch cutting ice, trucks hauling gravel over an ice road to the island site, a backhoe trenching the sea bottom for a pipeline, and both vibratory and impact sheet pile driving (Greene *et al.,* 2008). Table 5 in BP's application presents a summary of the levels of construction sounds and vibrations measured around the Northstar prospect.

Ice road construction is difficult to separate into its individual components, as one or more bulldozers and several rolligons normally work concurrently. Of the construction activities reported, those related to ice road construction (bulldozers, augering and pumping) produced the least amount of sound, in all three media. The distance to median background for the strongest one-third octave bands for bulldozers, augering, and pumping was less than 1.24 mi (2 km) for underwater sounds, less than 0.62 mi (1 km) for in-air sounds, and less than 2.5 mi (4 km) for iceborne vibrations (see Table 5 in BP's application). Vibratory sheet pile driving produced the strongest sounds, with broadband underwater levels of 143 dB re 1 µPa at 328 ft (100 m). Most of the sound energy was in a tone close to 25 Hz. Distances to background levels of underwater sounds (approximately 1.86 mi [3 km]) were somewhat smaller than expected. Shepard *et al.* (2001) recorded sound near Northstar in April 2001 during construction and reported that the noisiest conditions occurred during sheet pile installation with a vibrating hammer. BP's estimates were 8–10 dB higher at 492 ft (150 m) and 5–8 dB lower at 1.24 mi (2 km) than the measurements by Shepard *et al.* (2001). Greene *et al.* (2008) describes sound levels during impact sheet pile driving. However, satisfactory recordings for this activity were only obtained at one station 2,395 ft (730 m) from the sheet pile driven into the island. The maximum peak pressure recorded on the hydrophone was 136.1 dB re 1 µPa and 141.1 dB re 1 µPa on the geophone (Greene *et al.,* 2008).

(2) Operational Sounds

Drilling operations started in December 2000 and were the first sound-producing activities associated with the operational phase at Northstar. The four principal operations that occur during drilling are drilling itself, tripping (extracting and lowering the drillstring), cleaning, and well-logging (lowering instruments on a cable down the hole). Drilling activities can be categorized as non-continuous sounds, *i.e.,* they contribute to Northstar sounds intermittently. Other non-continuous sounds are those from heavy equipment operation for snow removal, berm maintenance, and island surface maintenance. Sounds from occasional movements of a ''pig'' through the pipeline may also propagate into the marine or nearshore environment.

Sounds from generators, process operations (*e.g.,* flaring, seawater treatment, oil processing, gas injection), and island lighting are more continuous and contribute to the operational sounds from Northstar. Drilling and operational sounds underwater, in air, and of iceborne vibrations were obtained at Northstar Island and are summarized here and in a bit more detail in BP's application (Blackwell *et al.,* 2004b; Blackwell and Greene, 2006).

Drilling—During the ice covered seasons from 1999 to 2002, drilling sounds were measured and readily identifiable underwater, with a marked increase in received levels at 60–250 Hz and 700–1400 Hz relative to no-drilling times. The higher-frequency peak, which was distinct enough to be used as a drilling ''signature'', was clearly detectible 3.1 mi (5 km) from the drill rig, but had fallen to background values by 5.8 mi (9.4 km). Distances at which background levels were reached were defined as the distance beyond which broadband levels remained constant with increasing distance from the source. Sound pressure levels of island production with and without drilling activities measured at approximately 1,640 ft (500 m) from Northstar are similar, with most of the sound energy below 100 Hz. The broadband (10–10,000 Hz) level was approximately 2 dB higher during drilling than without, but relatively low in both cases (99 vs. 97 dB re 1 µPa; Blackwell and Greene, 2006).

In air, drilling sounds were not distinguishable from overall island sounds based on spectral characteristics or on broadband levels (Blackwell *et al.,* 2004b). A similar result was found for recordings from geophones: broadband levels of iceborne vibrations with or without drilling were indistinguishable (Blackwell *et al.,* 2004b). Thus, airborne sounds and iceborne vibrations were not strong enough during drilling to have much influence on overall Northstar sound, in contrast to underwater

sounds, which were higher during drilling (Blackwell and Greene, 2006).

Richardson *et al.* (1995b) summarized then-available data by stating that sounds associated with drilling activities vary considerably, depending on the nature of the ongoing operations and the type of drilling platform (island, ship, etc.). Underwater sound associated with drilling from natural barrier islands or an artificial island built mainly of gravel is generally weak and is inaudible at ranges beyond several kilometers. The results from the Northstar monitoring work in more recent years are generally consistent with the earlier evidence.

Other Operational Sounds: Ice-covered Season—Both with and without drilling, underwater broadband levels recorded north of the island during the ice-covered season were similar with and without production (Blackwell *et al.,* 2004b). Although the broadband underwater levels did not seem to be affected appreciably by production activities, a peak at 125–160 Hz could be related to production. This peak was no longer detectable 3.1 mi (5 km) from the island, either with or without simultaneous drilling (Blackwell *et al.,* 2004b).

Other Operational Sounds: Open-water Season—Underwater and in-air production sounds from Northstar Island were recorded and characterized during nine open-water seasons from 2000 to 2008 (Blackwell and Greene, 2006; Blackwell *et al.,* 2009). Island activity sounds recorded during 2000–2003 included construction of the island, installation of facilities, a large sealift transported by several barges and associated Ocean, River, and Point Class tugs, conversion of power generation from diesel-powered generators to Solar gas turbines, drilling, production, and reconstruction of an underwater berm for protection against ice. From 2003–2008 island activities mainly consisted of production related sounds and maintenance activities of the protection barrier. During the open water season, vessels were the main contributors to the underwater sound field at Northstar (Blackwell and Greene, 2006). Vessel noise is discussed in the next subsection.

During both the construction phase in 2000 and the drilling and production phase, island sounds underwater reached background values at distances of 1.2–2.5 mi (2–4 km; Blackwell and Greene, 2006). For each year, percentile levels of broadband sound (maximum, 95th, 50th, and 5th percentile, and minimum) were computed over the entire field season. The range of broadband levels recorded over 2001–2008 for all percentiles is 80.8–141 dB re 1 μPa. The maximum levels are mainly determined by the presence of vessels and can be governed by one specific event. The 95th percentile represents the sound level generated at Northstar during 95% of the time. From 2004 to 2008 these levels ranged from 110 to 119.5 dB re 1 μPa at approximately 0.3 mi (450 m) from Northstar. Much of the variation in received levels was dependent on sea state, which is correlated with wind speed. The lowest sound levels in the time series are indicative of the quietest times in the water near the island and generally correspond to times with low wind speeds. Conversely, times of high wind speed usually correspond to increased broadband levels in the directional seafloor acoustic recorder (DASAR) record (Blackwell *et al.,* 2009). The short-term variability in broadband sound levels in 2008 was higher than in previous years. This was attributed to the presence of a new type of impulsive sound on the records of the near-island DASARs, referred to as ''pops''. Bearings pointed to the northeastern part of Northstar Island, but to date the source is not known. Pops were broadband in nature, of short duration (approximately 0.05 s), and with received sound pressure levels at the near-island DASAR ranging from 107 to 144 dB re 1 μPa. This sound was also present on the 2009 records, but the source remains unknown.

Airborne sounds were recorded concurrently with the boat-based recordings in 2000–2003 (Blackwell and Greene, 2006). The strongest broadband airborne sounds were recorded approximately 985 ft (300 m) from Northstar Island in the presence of vessels, and reached 61–62 dBA re 20 μPa. These values are expressed as A-weighted levels on the scale normally used for in-air sounds. In-air sounds generally reached a minimum 0.6–2.5 mi (1–4 km) from the island, with or without the presence of boats.

(3) Transportation Sounds

Sounds related to winter construction activities of Seal Island in 1982 were reported by Greene (1983a) and information on this topic can be found in BP's 1999 application (BPXA, 1999). During the construction and operation of Northstar Island from 2000 to 2002, underwater sound from vehicles constructing and traveling along the ice road diminished to background levels at distances ranging from 2.9 to 5.9 mi (4.6 to 9.5 km). In-air sound levels of these activities reached background levels at distances ranging from 328–1,969 ft (100–600 m; see Table 5 in BP's application).

Sounds and vibrations from vehicles traveling along an ice road constructed across the grounded sea ice and along Flaxman Island (a barrier Island east of Prudhoe Bay) were recorded in air and within artificially constructed polar bear dens in March 2002 (MacGillivray *et al.,* 2003). Underwater recordings were not made. Sounds from vehicles traveling along the ice road were attenuated strongly by the snow cover of the artificial dens; broadband vehicle traffic noise was reduced by 30–42 dB. Sound also diminished with increasing distance from the station. Most vehicle noise was indistinguishable from background (ambient) noise at 1,640 ft (500 m), although some vehicles were detectable to more than 1.2 mi (2,000 m). Ground vibrations (measured as velocity) were undetectable for most vehicles at a distance of 328 ft (100 m) but were detectable to 656 ft (200 m) for a Hägglunds tracked vehicle (MacGillivray *et al.,* 2003).

Helicopters were used for personnel and equipment transport to and from Northstar during the unstable ice periods in spring and fall. Helicopters flying to and from Northstar generally maintain straight-line routes at altitudes of 1,000 ft (300 m) ASL, thereby limiting the received levels at and below the surface. Helicopter sounds contain numerous prominent tones at frequencies up to about 350 Hz, with the strongest measured tone at 20–22 Hz. Received peak sound levels of a Bell 212 passing over a hydrophone at an altitude of approximately 1,000 ft (300 m), which is the minimum allowed altitude for the Northstar helicopter under normal operating conditions, varied between 106 and 111 dB re 1 μPa at 30 and 59 ft (9 and 18 m) water depth (Greene, 1982, 1985). Harmonics of the main rotor and tail rotor usually dominate the sound from helicopters; however, many additional tones associated with the engines and other rotating parts are sometimes present (Patenaude *et al.,* 2002).

Under calm conditions, rotor and engine sounds are coupled into the water within a 26° cone beneath the aircraft. Some of the sound transmits beyond the immediate area, and some sound enters the water outside the 26° cone when the sea surface is rough. However, scattering and absorption limit lateral propagation in shallow water. For these reasons, helicopter and fixed-wing aircraft flyovers are not heard underwater for very long, especially when compared to how long they are heard in air as the aircraft approaches, passes and moves away

from an observer. Tones from helicopter traffic were detected underwater at a horizontal distance approximately 1,476 ft (450 m) from Northstar, but only during helicopter departures from Northstar (Blackwell *et al.,* 2009). The duration of the detectable tones, when present, was short (20–50 s), and the received sound levels were weak, sometimes barely detectable. The lack of detectable tones during 65% of the investigated helicopter departures and arrivals supports the importance of the aircraft's path in determining whether tones will be detectable underwater. Helicopter tones were not detectable underwater at the most southern DASAR location approximately 4 mi (6.5 km) north of Northstar.

Principally the crew boat, tugs, and self-propelled barges were the main contributors to the underwater sound field at Northstar during the construction and production periods (Blackwell and Greene, 2006). Vessel sounds are a concern due to the potential disturbance to marine mammals (Richardson *et al.,* 1995b). Characteristics of underwater sounds from boats and vessels have been reported extensively, including specific measurements near Northstar (Greene and Moore, 1995; Blackwell and Greene, 2006). Broadband source levels for most small ships (lengths about 180–279 ft [55–85 m]) are approximately 160–180 dB re 1 μPa. Both the crew boat and the tugs produced substantial broadband sound in the 50–2,000 Hz range, which could at least in part be accounted for by propeller cavitation (Ross, 1976). Several tones were also apparent in the vessel sounds, including one at 17.5 Hz, corresponding to the propeller blade rate of Ocean Class tugs. Two tones were identified for the crew boat: one at 52–55 Hz, which corresponds to the blade rate, and one at 22–26 Hz, which corresponds to a harmonic of the shaft rate.

The presence of boats considerably expanded the distances to which Northstar-related sound was detectable. On days with average levels of background sounds, sounds from tug boats were detectable on offshore DASAR recordings to at least 13.4 mi (21.5 km) from Northstar (Blackwell *et al.,* 2009). On other occasions, vessel sounds from crew boat, tugs, and self-propelled barges were often detectable underwater as much as approximately 18.6 mi (30 km) offshore (Blackwell and Greene, 2006). BP therefore looked into options to reduce vessel use. During the summer of 2003, a small, diesel-powered hovercraft (Griffon 2000TD) was tested to transport crew and supplies between the mainland and Northstar Island. Acoustic measurements showed that the hovercraft was considerably quieter underwater than similar-sized conventional vessels (Blackwell and Greene, 2005). Received underwater broadband sound levels at 21.3 ft (6.5 m) from the hovercraft reached 133 and 131 dB re 1 μPa for hydrophone depths 3 ft and 23 ft (1 m and 7 m), respectively. In-air unweighted and A-weighted broadband (10–10,000 Hz) levels reached 104 and 97 dB re 20 μPa, respectively. Use of the hovercraft for Northstar transport resulted in a decreased number of periods of elevated vessel noise in the acoustic records of the near-island DASARs (Blackwell *et al.,* 2009).

Description of Marine Mammals in the Area of the Specified Activity

The Beaufort Sea supports a diverse assemblage of marine mammals, including: Bowhead, gray, beluga, killer, minke, and humpback whales; harbor porpoises; ringed, ribbon, spotted, and bearded seals; narwhals; polar bears; and walruses. The bowhead and humpback whales and polar bear are listed as ''endangered'' under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. On December 10, 2010, NMFS published a notice of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notice of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. Neither of these two ice seal species is considered depleted under the MMPA. Additionally, the ribbon seal is considered a ''species of concern'' under the ESA. Both the walrus and the polar bear are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this proposed rulemaking.

Of the species mentioned here, the ones that are most likely to occur near the Northstar facility include: bowhead, gray, and beluga whales and ringed, bearded, and spotted seals. Ringed seals are year-round residents in the Beaufort Sea and are anticipated to be the most frequently encountered species in the proposed project area. Bowhead whales are anticipated to be the most frequently encountered cetacean species in the proposed project area; however, their occurrence is not anticipated to be year-round. The most common time for bowheads to occur near Northstar is during the fall migration westward through the Beaufort Sea, which typically occurs from late August through October each year.

Other marine mammal species that have been observed in the Beaufort Sea but are uncommon or rarely identified in the project area include harbor porpoise, narwhal, killer, minke, and humpback whales, and ribbon seals. These species could occur in the project area, but each of these species is uncommon or rare in the area and relatively few encounters with these species are expected during BP's activities. The narwhal occurs in Canadian waters and occasionally in the Beaufort Sea, but it is rare there and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.,* 2002). Point Barrow, Alaska, is the approximate northeastern extent of the harbor porpoise's regular range (Suydam and George, 1992), though there are extralimital records east to the mouth of the Mackenzie River in the Northwest Territories, Canada, and recent sightings in the Beaufort Sea in the vicinity of Prudhoe Bay during surveys in 2007 and 2008 (Christie *et al.,* 2009). Monnett and Treacy (2005) did not report any harbor porpoise sightings during aerial surveys in the Beaufort Sea from 2002 through 2004. Humpback and minke whales have recently been sighted in the Chukchi Sea but very rarely in the Beaufort Sea. Greene *et al.* (2007) reported and photographed a humpback whale cow/calf pair east of Barrow near Smith Bay in 2007, which is the first known occurrence of humpbacks in the Beaufort Sea. Savarese *et al.* (2009) reported one minke whale sighting in the Beaufort Sea in 2007 and 2008. Ribbon seals do not normally occur in the Beaufort Sea; however, two ribbon seal sightings were reported during vessel-based activities near Prudhoe Bay in 2008 (Savarese *et al.,* 2009). Due to the rarity of these species in the proposed project area and the remote chance they would be affected by BP's proposed activities at Northstar, these species are not discussed further in these proposed regulations.

BP's application contains information on the status, distribution, seasonal distribution, and abundance of each of the six species under NMFS jurisdiction likely to be impacted by the proposed activities. When reviewing the application, NMFS determined that the species descriptions provided by BP correctly characterized the status,

distribution, seasonal distribution, and abundance of each species. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The 2010 Alaska Marine Mammal SAR is available on the Internet at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2010.pdf.*

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by Au *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz;
- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz; and
- Pinnipeds in Air: functional hearing is estimated to occur between approximately 75 Hz and 30 kHz.

As mentioned previously in this document, six marine mammal species (three cetacean and three pinniped species) are likely to occur in the Northstar facility area. Of the three cetacean species likely to occur in BP's project area, two are classified as low frequency cetaceans (*i.e.,* bowhead and gray whales) and one is classified as a mid-frequency cetacean (*i.e.,* beluga whales) (Southall *et al.,* 2007).

Underwater audiograms have been obtained using behavioral methods for four species of phocinid seals: the ringed, harbor, harp, and northern elephant seals (reviewed in Richardson *et al.,* 1995b; Kastak and Schusterman, 1998). Below 30–50 kHz, the hearing threshold of phocinids is essentially flat down to at least 1 kHz and ranges between 60 and 85 dB re 1 µPa. There are few published data on in-water hearing sensitivity of phocid seals below 1 kHz. However, measurements for one harbor seal indicated that, below 1 kHz, its thresholds deteriorated gradually to 96 dB re 1 µPa at 100 Hz from 80 dB re 1 µPa at 800 Hz and from 67 dB re 1 µPa at 1,600 Hz (Kastak and Schusterman, 1998). More recent data suggest that harbor seal hearing at low frequencies may be more sensitive than that and that earlier data were confounded by excessive background noise (Kastelein *et al.,* 2009a,b). If so, harbor seals have considerably better underwater hearing sensitivity at low frequencies than do small odontocetes like belugas (for which the threshold at 100 Hz is about 125 dB). In air, the upper frequency limit of phocid seals is lower (about 20 kHz).

Pinniped call characteristics are relevant when assessing potential masking effects of man-made sounds. In addition, for those species whose hearing has not been tested, call characteristics are useful in assessing the frequency range within which hearing is likely to be most sensitive. The three species of seals present in the study area, all of which are in the phocid seal group, are all most vocal during the spring mating season and much less so during late summer. In each species, the calls are at frequencies from several hundred to several thousand hertz—above the frequency range of the dominant noise components from most of the proposed oil production and operational activities.

Cetacean hearing has been studied in relatively few species and individuals. The auditory sensitivity of bowhead, gray, and other baleen whales has not been measured, but relevant anatomical and behavioral evidence is available. These whales appear to be specialized for low frequency hearing, with some directional hearing ability (reviewed in Richardson *et al.,* 1995b; Ketten, 2000). Their optimum hearing overlaps broadly with the low frequency range where BP's production activities and associated vessel traffic emit most of their energy.

The beluga whale is one of the better-studied species in terms of its hearing ability. As mentioned earlier, the auditory bandwidth in mid-frequency odontocetes is believed to range from 150 Hz to 160 kHz (Southall *et al.,* 2007); however, belugas are most sensitive above 10 kHz. They have relatively poor sensitivity at the low frequencies (reviewed in Richardson *et al.,* 1995b) that dominate the sound from industrial activities and associated vessels. Nonetheless, the noise from strong low frequency sources is detectable by belugas many kilometers away (Richardson and Wursig, 1997). Also, beluga hearing at low frequencies in open-water conditions is apparently somewhat better than in the captive situations where most hearing studies were conducted (Ridgway and Carder, 1995; Au, 1997). If so, low frequency sounds emanating from production activities may be detectable somewhat farther away than previously estimated.

Call characteristics of cetaceans provide some limited information on their hearing abilities, although the auditory range often extends beyond the range of frequencies contained in the calls. Also, understanding the frequencies at which different marine mammal species communicate is relevant for the assessment of potential impacts from manmade sounds. A summary of the call characteristics for bowhead, gray, and beluga whales is provided next. More information is available in BP's application (see **ADDRESSES**).

Most bowhead calls are tonal, frequency-modulated sounds at frequencies of 50–400 Hz. These calls overlap broadly in frequency with the underwater sounds emitted by many construction and operational activities (Richardson *et al.,* 1995b). Source levels are quite variable, with the stronger calls having source levels up to about 180 dB re 1 µPa at 1 m. Gray whales make a wide variety of calls at frequencies from < 100–2,000 Hz (Moore and Ljungblad, 1984; Dalheim, 1987).

Beluga calls include trills, whistles, clicks, bangs, chirps and other sounds (Schevill and Lawrence, 1949; Ouellet, 1979; Sjare and Smith, 1986a). Beluga whistles have dominant frequencies in the 2–6 kHz range (Sjare and Smith, 1986a). This is above the frequency range of most of the sound energy produced by the planned Northstar production activities and associated vessels. Other beluga call types reported by Sjare and Smith (1986a,b) included

sounds at mean frequencies ranging upward from 1 kHz.

The beluga also has a very well developed high frequency echolocation system, as reviewed by Au (1993). Echolocation signals have peak frequencies from 40–120 kHz and broadband source levels of up to 219 dB re 1 µPa-m (zero-peak). Echolocation calls are far above the frequency range of the sounds from the planned Northstar activities. Therefore, those industrial sounds are not expected to interfere with echolocation.

Potential Effects of the Specified Activity on Marine Mammals

The likely or possible impacts of the planned offshore oil developments at Northstar on marine mammals involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of personnel, structures and equipment, construction or maintenance activities, and the occurrence of oil spills. In winter, during ice road construction, and in spring, flooding on the sea ice may displace some ringed seals along the ice road corridor. There is a small chance that a seal pup might be injured or killed by on-ice construction or transportation activities. A major oil spill is unlikely and, if it occurred, its effects are difficult to predict. Potential impacts from an oil spill are discussed in more detail later in this section.

Petroleum development and associated activities in marine waters introduce sound into the environment, produced by island construction, maintenance, and drilling, as well as vehicles operating on the ice, vessels, aircraft, generators, production machinery, gas flaring, and camp operations. The potential effects of sound from the proposed activities might include one or more of the following: masking of natural sounds; behavioral disturbance and associated habituation effects; and, at least in theory, temporary or permanent hearing impairment. As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.,* 1995b):

(1) The noise may be too weak to be heard at the location of the animal (*i.e.,* lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

The characteristics of the various sound sources at Northstar were summarized earlier in this document (see the ''Description of the Specified Activity'' section). Additionally, BP's application contains more details on the Northstar sound characteristics, underwater and in-air sound propagation in and around Northstar, and ambient noise levels in the waters near Prudhoe Bay, Alaska. Please refer to that document for more information (see **ADDRESSES**).

Potential Effects of Sound on Cetaceans

(1) Masking

Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.,* 1995b). Background noise also can include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked.

Although some degree of masking is inevitable when high levels of manmade broadband sounds are introduced into the sea, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). The components of background noise that are similar in frequency to the sound signal in question primarily determine the degree of masking of that signal.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.,* 1995b). The dominant background noise

may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.,* 1986; Dubrovskiy, 1990; Bain *et al.,* 1993; Bain and Dahlheim, 1994). Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.,* 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.,* 1999). A few marine mammal species are known to increase the source levels or alter the frequency of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.,* 1993, 1999; Terhune, 1999; Foote *et al.,* 2004; Parks *et al.,* 2007, 2009; Di Iorio and Clark, 2009; Holt *et al.,* 2009).

These data demonstrating adaptations for reduced masking pertain mainly to the very high frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.,* 1995b). This ability may be useful in reducing masking at these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies. For higher frequencies, such as that used in echolocation by toothed whales, several mechanisms are available that may allow them to reduce the effects of such masking.

There would be no masking effects on cetaceans from BP's proposed activities during the ice-covered season because cetaceans will not occur near Northstar at that time. The sounds from oil production and any drilling activities are not expected to be detectable beyond several kilometers from the source (Greene, 1983; Blackwell *et al.,* 2004b; Blackwell and Greene, 2005, 2006). Sounds from vessel activity, however, were detectable to distances as far as approximately 18.6 mi (30 km) from Northstar (Blackwell and Greene, 2006). Vessels under power to maintain position can be a source of continuous noise in the marine environment (Blackwell *et al.,* 2004b; Blackwell and Greene, 2006) and therefore have the potential to cause some degree of masking.

Small numbers of bowheads, belugas and (rarely) gray whales could be present near Northstar during the open-water season. Almost all energy in the sounds emitted by drilling and other operational activities is at low frequencies, predominantly below 250 Hz with another peak centered around 1,000 Hz. Most energy in the sounds from the vessels and aircraft to be used during this project is below 1 kHz (Moore *et al.,* 1984; Greene and Moore, 1995; Blackwell *et al.,* 2004b; Blackwell and Greene, 2006). These frequencies are mainly used by mysticetes but not by odontocetes. Therefore, masking effects would potentially be more pronounced in the bowhead and gray whales that might occur in the proposed project area.

Because of the relatively low effective source levels and rapid attenuation of drilling and production sounds from artificial islands in shallow water, masking effects are unlikely even for mysticetes that are within several kilometers of Northstar Island. Vessels that are docking or under power to maintain position could cause some degree of masking. However, the adaptation of some cetaceans to alter the source level or frequency of their calls, along with directional hearing, pre-adaptation to tolerate some masking by natural sounds, and the brief periods when most individual whales occur near Northstar, would all reduce the potential impacts of masking from BP's proposed activities. Therefore, impacts from masking on cetaceans are anticipated to be minor.

(2) Behavioral Disturbance

Disturbance can induce a variety of effects, such as subtle changes in behavior, more conspicuous dramatic changes in activities, and displacement. A main concern about the impacts of manmade noise on marine mammals is the potential for disturbance. Behavioral reactions of marine mammals to sound are difficult to predict because they are dependent on numerous factors, including species, state of maturity, experience, current activity, reproductive state, time of day, and weather.

When the received level of noise exceeds some behavioral reaction threshold, it is possible that some cetaceans could exhibit disturbance reactions. The levels, frequencies and types of noise that elicit a response vary among and within species, individuals, locations, and seasons. Behavioral changes may be subtle alterations in surface-respiration-dive cycles, changes in activity or aerial displays, movement away from the sound source, or complete avoidance of the area. The reaction threshold and degree of response are related to the activity of the animal at the time of the disturbance. Whales engaged in active behaviors such as feeding, socializing, or mating are less likely than resting animals to show overt behavioral reactions. However, they may do so if the received noise level is high or the source of disturbance is directly threatening.

Some researchers have noted that behavioral reactions do not occur throughout the entire zone ensonified by industrial activity. In most cases that have been studied, including work on bowhead, gray, and beluga whales, the actual radius of effect is smaller than the radius of detectability (reviewed in Richardson and Malme, 1993; Richardson *et al.,* 1995b; Nowacek *et al.,* 2007; Southall *et al.,* 2007).

Effects of Construction, Drilling, and Production Activity—Spring migration of bowheads and belugas through the western and central Beaufort Sea occurs from April to June. Their spring migration corridors are far north of the barrier islands and of the Northstar project area. Whales, including bowhead, beluga, and gray, will not be within the Northstar project area during winter or spring. In addition, industrial sounds from Northstar are unlikely to be detectable far enough offshore to be heard by spring-migrating whales. In rare cases where these sounds might be audible to cetaceans in spring, the received levels would be weak and unlikely to elicit behavioral reactions. Consequently, noise from construction and operational activities at Northstar during the ice-covered season would have minimal, if any, effect on whales.

During the open-water season, sound propagation from sources on the island

is reduced because of poor coupling of sound through the gravel island into the shallow waters. In the absence of boats, underwater sounds from Northstar Island during construction, drilling, and production reached background values 1.2–2.5 mi (2–4 km) away in quiet conditions (Blackwell and Greene, 2006). However, when Northstar-related vessels were present, levels were higher and faint vessel sound was often still evident 12.4–18.6 mi (20–30 km) away.

Information about the reactions of cetaceans to construction or heavy equipment activity on artificial (or natural) islands is limited (Richardson *et al.,* 1995b). During the construction of artificial islands and other oil-industry facilities in the Canadian Beaufort Sea during late summers of 1980–1984, bowheads were at times observed as close as 0.5 mi (0.8 km) from the construction sites (Richardson *et al.,* 1985, 1990). Richardson *et al.* (1990) showed that, at least in summer, bowheads generally tolerated playbacks of low-frequency construction and dredging noise at received broadband levels up to about 115 dB re 1 μPa. At received levels higher than about 115 dB, some avoidance reactions were observed. Bowheads apparently reacted in only a limited and localized way (if at all) to construction of Seal Island, the precursor of Northstar (Hickie and Davis, 1983).

There are no specific data on reactions of bowhead or gray whales to noise from drilling on an artificial island. However, playback studies have shown that both species begin to display overt behavioral responses to various low-frequency industrial sounds when received levels exceed 110–120 dB re 1 μPa (Malme *et al.,* 1984; Richardson *et al.,* 1990, 1995a, 1995b). The overall received level of drilling sound from Northstar Island generally diminished to 115 dB within 0.62 mi (1 km; Blackwell *et al.,* 2004b). Therefore, any reactions by bowhead or gray whales to drilling at Northstar were expected to be highly localized, involving few whales.

Prior to construction of Northstar, it was expected (based on early data mentioned earlier) that some bowheads would avoid areas where noise levels exceeded 115 dB re 1 μPa (Richardson *et al.,* 1990). On their summer range in the Beaufort Sea, bowhead whales were observed reacting to drillship noises within 2.5–5 mi (4–8 km) of the drillship at received levels 20 dB above ambient (Richardson *et al.,* 1990). It was expected that, during most autumn migration seasons, few bowheads would come close enough to shore to receive sound levels that high from Northstar. Thus disturbance effects from continuous construction and operational noise were expected to be limited to the closest whales and the times with highest sound emissions.

In 2000–2004, bowhead whales were monitored acoustically to determine the number of whales that might have been exposed to Northstar-related sounds. Data from 2001–2004 were useable for this purpose. The results showed that, during late summer and early autumn of 2001, a small number of bowhead whales in the southern part of the migration corridor (closest to Northstar) were apparently affected by vessel or Northstar operations. At these times, most ''Northstar sound'' was from maneuvering vessels, not the island itself. The distribution of calling whales was analyzed, and the results indicated that the apparent southern (proximal) edge of the call distribution was significantly associated with the level of industrial sound output each year, with the southern edge of the call distribution varying by 0.47 mi to 1.46 mi (0.76 km to 2.35 km; depending on year) farther offshore when underwater sound levels from Northstar and associated vessels were above average (Richardson *et al.,* 2008a). It is possible that the apparent deflection effect was, at least in part, attributable to a change in calling behavior rather than actual deflection. In either case, there was a change in the behavior of some bowhead whales.

Nowacek *et al.* (2004) used controlled exposures to demonstrate behavioral reactions of North Atlantic right whales (a species closely related to the bowhead whale) to various non-pulse sounds. Playback stimuli included ship noise, social sounds of conspecifics, and a complex, 18-min ''alert'' sound consisting of repetitions of three different artificial signals. Ten whales were tagged with calibrated instruments that measured received sound characteristics and concurrent animal movements in three dimensions. Five out of six exposed whales reacted strongly to alert signals at measured received levels between 130 and 150 dB (*i.e.,* ceased foraging and swam rapidly to the surface). Two of these individuals were not exposed to ship noise, and the other four were exposed to both stimuli. These whales reacted mildly to conspecific signals. Seven whales, including the four exposed to the alert stimulus, had no measurable response to either ship sounds or actual vessel noise.

There are no data on the reactions of gray whales to production activities similar to those in operation at Northstar. Oil production platforms of a very different type have been in place off California for many years. Gray whales regularly migrate through that area (Brownell, 1971), but no detailed data on distances of closest approach or possible noise disturbance have been published. Oil industry personnel have reported seeing whales near platforms, and that the animals approach more closely during low-noise periods (Gales, 1982; McCarty, 1982). Playbacks of recorded production platform noise indicate that gray whales react if received levels exceed approximately 123 dB re 1 μPa—similar to the levels of drilling noise that elicit avoidance (Malme *et al.,* 1984).

A typical migrating gray whale tolerates steady, low-frequency industrial sounds at received levels up to about 120 dB re 1 μPa (Malme *et al.,* 1984). Gray whales may tolerate higher-level sounds if the sound source is offset to the side of the migration path (Tyack and Clark, 1998). Also, gray whales generally tolerate repeated low-frequency seismic pulses at received levels up to about 163–170 dB re 1 μPa measured on an (approximate) rms basis. Above those levels, avoidance is common. Because the reaction thresholds to both steady and pulsed sounds are slightly higher than corresponding values for bowheads, reaction distances for gray whales would be slightly less than those for bowheads.

In the Canadian Beaufort Sea, beluga whales were seen within several feet of an artificial island. During the island's construction, belugas were displaced from the immediate vicinity of the island but not from the general area (Fraker, 1977a). Belugas in the Mackenzie River estuary showed less response to a stationary dredge than to moving tug/barge traffic. They approached as close as 1,312 ft (400 m) from stationary dredges. Underwater sounds from Northstar Island are weaker than those from the dredge. In addition, belugas occur only infrequently in nearshore waters in the Prudhoe Bay region. They also have relatively poor hearing sensitivity at the low frequencies of most construction noises. Therefore, effects of construction and related sounds on belugas would be expected to be minimal.

Responses of beluga whales to drilling operations are described in Richardson *et al.* (1995a) and summarized here. In the Mackenzie Estuary during summer, belugas have been seen regularly within 328 to 492 ft (100 to 150 m) of artificial islands (Fraker 1977a,b; Fraker and Fraker, 1979). However, in the Northstar area, belugas are present only during late summer and autumn, and almost all of them are migrating through offshore

waters far seaward of Northstar. Only a very small proportion of the population enters nearshore waters. In spring, migrating belugas showed no overt reactions to recorded drilling noise (<350 Hz) until within 656 to 1,312 ft (200 to 400 m) of the source, even though the sounds were measurable up to 3.1 mi away (5 km; Richardson *et al.,* 1991). During another drilling noise playback study, overt reactions by belugas within 164 to 984 ft (50 to 300 m) involved increased swimming speed or reversal of direction of travel (Stewart *et al.,* 1983). The short reaction distances are probably partly a consequence of the poor hearing sensitivity of belugas at low frequencies (Richardson *et al.,* 1995b). In general, very few belugas are expected to approach Northstar Island, and any such occurrences would be restricted to the late summer/autumn period.

There are no specific data on the reactions of beluga whales to production operations similar to those at Northstar. Personnel from production platforms in Cook Inlet, Alaska, report that belugas are seen within 30 ft (9 m) of some rigs, and that steady noise is non-disturbing to belugas (Gales, 1982; McCarty, 1982). Beluga whales are regularly observed near the Port of Anchorage and the extensive dredging/maintenance activities that operate there (NMFS, 2003). Pilot whales, killer whales, and unidentified dolphins were also reported near Cook Inlet platforms. In that area, flare booms might attract belugas, possibly because the flares attract salmon in that area. Attraction of belugas to prey concentrations is not likely to occur at Northstar because belugas are predominantly migrating rather than feeding when in that area and because only a very small proportion of the beluga population occurs in nearshore waters. Overall, effects of routine production activities on belugas are expected to be minimal.

Effects of Aircraft Activity—Helicopters are the only aircraft associated with Northstar drilling and oil production operations for crew transfer and supply and support. Helicopter traffic occurs during late spring/summer and fall/early winter when travel by ice roads, hovercraft, or vessels is not possible. Twin Otters are used for routine pipeline inspections.

Potential effects to cetaceans from aircraft activity could involve both acoustic and non-acoustic effects. It is uncertain if the animals react to the sound of the aircraft or to its physical presence flying overhead. Low passes by aircraft over a cetacean, including a bowhead, gray, or beluga whale, can result in short-term responses or no discernible reaction. Responses can include sudden dives, breaching, churning the water with the flippers and/or flukes, or rapidly swimming away from the aircraft track (reviewed in Richardson *et al.,* 1995b; updated review in Luksenburg and Parsons, 2009). These studies have found that various factors affect cetacean responses to aircraft noise. Some of these factors include species, behavioral state at the time of the exposure, and altitude and lateral distance of the aircraft to the animal. For example, Wursig *et al.* (1998) found that resting individuals appeared to be more sensitive to the disturbance.

Patenaude *et al.* (2002) recorded reactions of bowhead and beluga whales to a Bell 212 helicopter and Twin Otter fixed-wing aircraft during four spring seasons (1989–1991 and 1994) in the western Beaufort Sea. Responses were more common to the helicopter than to the fixed-wing aircraft. The authors noted responses by 38% of belugas (n = 40) and 14% of bowheads (n = 63) to the helicopter, whereas only 3.2% of belugas (n = 760) and 2.2% of bowheads (n = 507) reacted to the Twin Otter. Common responses to the helicopter included immediate dives, changes in heading, changes in behavioral state, and apparent displacement for belugas and abrupt dives and breaching for bowheads (Patenaude *et al.,* 2002). Similar reactions were observed by the authors from the fixed-wing aircraft: Immediate dives with a tail thrash, turns or changes in heading, and twists to look upwards for belugas and unusually short surfacing for bowheads. For both species, the authors noted that responses were seen more often when the helicopter was below 492 ft (150 m) altitude and at a lateral distance of less than 820 ft (250 m) and when the Twin Otter was below 597 ft (182 m) altitude and at a lateral distance of less than 820 ft (250 m).

During their study, Patenaude *et al.* (2002) observed one bowhead whale cow-calf pair during four passes totaling 2.8 hours of the helicopter and two pairs during Twin Otter overflights. All of the helicopter passes were at altitudes of 49–98 ft (15–30 m). The mother dove both times she was at the surface, and the calf dove once out of the four times it was at the surface. For the cow-calf pair sightings during Twin Otter overflights, the authors did not note any behaviors specific to those pairs. Rather, the reactions of the cow-calf pairs were lumped with the reactions of other groups that did not consist of calves.

Richardson *et al.* (1995b) and Moore and Clarke (2002) reviewed a few studies that observed responses of gray whales to aircraft. Cow-calf pairs were quite sensitive to a turboprop survey flown at 1,000 ft (305 m) altitude on the Alaskan summering grounds. In that survey, adults were seen swimming over the calf, or the calf swam under the adult (Ljungblad *et al.,* 1983, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002). However, when the same aircraft circled for more than 10 minutes at 1,050 ft (320 m) altitude over a group of mating gray whales, no reactions were observed (Ljungblad *et al.,* 1987, cited in Moore and Clarke, 2002). Malme *et al.* (1984, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002) conducted playback experiments on migrating gray whales. They exposed the animals to underwater noise recorded from a Bell 212 helicopter (estimated altitude = 328 ft [100 m]), at an average of three simulated passes per minute. The authors observed that whales changed their swimming course and sometimes slowed down in response to the playback sound but proceeded to migrate past the transducer. Migrating gray whales did not react overtly to a Bell 212 helicopter at greater than 1,394 ft (425 m) altitude, occasionally reacted when the helicopter was at 1,000–1,198 ft (305–365 m), and usually reacted when it was below 825 ft (250 m; Southwest Research Associates, 1988, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002). Reactions noted in that study included abrupt turns or dives or both. Green *et al.* (1992, cited in Richardson *et al.,* 1995b) observed that migrating gray whales rarely exhibited noticeable reactions to a straight-line overflight by a Twin Otter at 197 ft (60 m) altitude.

There is little likelihood of project-related helicopter and aircraft traffic over bowheads during their westward fall migration through the Beaufort Sea. Helicopter and aircraft traffic is between the shore and Northstar Island. Most bowhead whales migrate west in waters farther north than the island. Helicopters maintain an altitude of 1,000 ft (305 m) above sea level while traveling over water to and from Northstar whenever weather conditions allow. It is unlikely that there will be any need for helicopters or aircraft to circle or hover over the open water other than when landing or taking off. Gray whales are uncommon in the area, and there is little likelihood that any will be overflown by a helicopter or aircraft. The planned flight altitude will minimize any disturbance that might occur if a gray whale is encountered. Likewise, there is little likelihood of helicopter disturbance to belugas.

Because of the predominantly offshore migration route of belugas, very few (if any) will be overflown during flights over nearshore waters. Any overflights are most likely to be at an altitude of 1,000 ft (305 m) or more, weather permitting. This is greater than the altitude at which belugas and bowheads typically react to aircraft (Patenaude *et al.,* 2002). Therefore, few belugas or bowheads are expected to react to aircraft overflights near the Northstar facility. Additionally, reactions are expected to be brief.

Effects of Vessel Activity—Reactions of cetaceans to vessels often include changes in general activity (*e.g.,* from resting or feeding to active avoidance), changes in surfacing-respiration-dive cycles, and changes in speed and direction of movement. As with aircraft, responses to vessel approaches tend to be reduced if the animals are actively involved in a specific activity such as feeding or socializing (reviewed in Richardson *et al.,* 1995b). Past experiences of the animals with vessels are important in determining the degree and type of response elicited from a whale-vessel encounter.

Whales react most noticeably to erratically moving vessels with varying engine speeds and gear changes and to vessels in active pursuit. Avoidance reactions by bowheads sometimes begin as subtle alterations in whale activity, speed and heading as far as 2.5 mi (4 km) from the vessel. Consequently, the closest point of approach is farther from the vessel than if the cetacean had not altered course. Bowheads sometimes begin to swim actively away from approaching vessels when they come within 1.2–2.5 mi (2–4 km). If the vessel approaches to within several hundred meters, the response becomes more noticeable, and whales sometimes change direction to swim perpendicularly away from the vessel path (Richardson *et al.,* 1985, 1995b; Richardson and Malme, 1993).

North Atlantic right whales (a species closely related to the bowhead whale) also display variable responses to boats. There may be an initial orientation away from a boat, followed by a lack of observable reaction (Atkins and Swartz, 1989). A slowly moving boat can approach a right whale, but an abrupt change in course or engine speed usually elicits a reaction (Goodyear, 1989; Mayo and Marx, 1990; Gaskin, 1991). When approached by a boat, right whale mothers will interpose themselves between the vessel and calf and will maintain a low profile (Richardson *et al.,* 1995b). In a long-term study of baleen whale reactions to boats, while other baleen whale species appeared to habituate to boat presence over the 25-year period, right whales continued to show either uninterested or negative reactions to boats with no change over time (Watkins, 1986).

Beluga whales are generally quite responsive to vessels. Belugas in Lancaster Sound in the Canadian Arctic showed dramatic reactions in response to icebreaking ships, with received levels of sound ranging from 101 dB to 136 dB re 1 µPa in the 20 to 1,000-Hz band at a depth of 66 ft (20 m; Finley *et al.,* 1990). Responses included emitting distinctive pulsive calls that were suggestive of excitement or alarm and rapid movement in what seemed to be a flight response. Reactions occurred out to 50 mi (80 km) from the ship. Another study found belugas use higher-frequency calls, a greater redundancy in their calls (more calls emitted in a series), and a lower calling rate in the presence of vessels (Lesage *et al.,* 1999). The level of response of belugas to vessels is thought to be partly a function of habituation.

During the drilling and oil production phase of the Northstar development, most vessel traffic involves slow-moving tugs and barges and smaller faster-moving vessels providing local transport of equipment, supplies, and personnel. Much of this traffic will occur during August and early September before many whales are in the area. Some vessel traffic during the broken ice periods in the spring and fall may also occur. Alternatively, small hovercraft may be used during the spring and fall when the ice is too thin to allow safe passage by large vehicles over the ice road.

Whale reactions to slow-moving vessels are less dramatic than their reactions to faster and/or erratic vessel movements. Bowhead, gray, and beluga whales often tolerate the approach of slow-moving vessels within several hundred meters. This is especially so when the vessel is not directed toward the whale and when there are no sudden changes in direction or engine speed (Wartzok *et al.,* 1989; Richardson *et al.,* 1995b; Heide-Jorgensen *et al.,* 2003).

Most vessel traffic associated with Northstar will be inshore of the bowhead and beluga migration corridor and/or prior to the migration season of bowhead and beluga whales. Underwater sounds from hovercraft are generally lower than for standard vessels since the sound is generated in air, rather than underwater. If vessels or hovercraft do approach whales, a small number of individuals may show short-term avoidance reactions.

The highest levels of underwater sound produced by routine Northstar operations are generally associated with Northstar-related vessel operations. These vessel operations around Northstar sometimes result in sound levels high enough that a small number of the bowheads in the southern part of the migration corridor appear to be deflected slightly offshore. To the extent that offshore deflection occurs as a result of Northstar, it is mainly attributable to Northstar-related vessel operations. As previously described, this deflection is expected to involve few whales and generally small deflections.

(3) Hearing Impairment and Other Physiological Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some marine mammal species (*i.e.,* beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong sounds, particularly at higher frequencies. There are no beaked whale species found in the proposed project area. Cetaceans are not anticipated to experience non-auditory physiological effects as a result of operation of the Northstar facility, as none of the activities associated with the facility will generate sounds loud enough to cause such effects.

Temporary Threshold Shift (TTS)—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same sound exposure

level [SEL]) producing equal amounts of hearing impairment regardless of how the sound energy is distributed in time (NIOSH, 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.,* 2007). Three newer studies, two by Mooney *et al.* (2009a, b) on a single bottlenose dolphin either exposed to playbacks of U.S. Navy mid-frequency active sonar or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2007) on a single California sea lion exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations, the equal energy relationship may not be the best indicator to predict TTS onset levels. Generally, with sound exposures of equal energy, those that were quieter (lower sound pressure level [SPL]) with longer duration were found to induce TTS onset more than those of louder (higher SPL) and shorter duration. Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 µPa · 2. s (*i.e.,* 186 dB SEL) in order to produce brief, mild TTS. NMFS considers TTS to be a form of Level B harassment, which temporarily causes a shift in an animal's hearing, and the animal is able to recover. Data on TTS from continuous sound (such as that produced by many of BP's Northstar activities) are limited, so available data from seismic activities are used as a proxy. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. Given that the SPL is approximately 10–15 dB higher than the SEL value for the same pulse, an odontocete would need to be exposed to a sound level of 190 dB re 1 µPa (rms) in order to incur TTS.

TTS was measured in a single, captive bottlenose dolphin after exposure to a continuous tone with maximum SPLs at frequencies ranging from 4 to 11 kHz that were gradually increased in intensity to 179 dB re 1 µPa and in duration to 55 minutes (Nachtigall *et al.,* 2003). No threshold shifts were measured at SPLs of 165 or 171 dB re 1 µPa. However, at 179 dB re 1 µPa, TTSs greater than 10 dB were measured during different trials with exposures ranging from 47 to 54 minutes. Hearing sensitivity apparently recovered within 45 minutes after noise exposure.

Schlundt *et al.* (2000) measure masked TTS (*i.e.,* band-limited white noise, masking noise, was introduced into the testing environment to keep thresholds consistent despite variations in ambient noise levels) in five bottlenose dolphins and two beluga whales during eight experiments conducted over 2.3 years. The test subjects were exposed to 1-s pure tones at frequencies of 0.4, 3, 10, 20, and 75 kHz. Over the course of the eight experiments, Schlundt *et al.* (2000) conducted a total of 195 masked TTS sessions, and 11 of those sessions produced masked TTSs. The authors found that the levels needed to induce a 6 dB or larger masked TTS were generally between 192 and 201 dB re 1 µPa. No subjects exhibited shifts at levels up to 193 dB re 1 µPa for tones played at 0.4 kHz (Schlundt *et al.,* 2000). The authors found that at the conclusion of each experiment, all thresholds were within 3 dB of baseline values. Additionally, they did not note any permanent shifts in hearing thresholds (Schlundt *et al.,* 2000).

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. Marine mammals can hear sounds at varying frequency levels. However, sounds that are produced in the frequency range at which an animal hears the best do not need to be as loud as sounds in less functional frequencies to be detected by the animal. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). Therefore, for a sound to be audible, baleen whales require sounds to be louder (*i.e.,* higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. Based on this information, it is suspected that received levels causing TTS onset may also be higher in baleen whales. Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, NMFS' onset of TTS threshold is likely conservative for mysticetes.

NMFS (1995, 2000) concluded that cetaceans should not be exposed to pulsed underwater noise at received levels exceeding 180 dB re 1 µPa (rms). The established 180-dB re 1 µPa (rms) criterion is not considered to be the level above which TTS might occur in cetaceans. Rather, it is the received level above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to cetaceans. Levels of underwater sound from production and drilling activities that occur continuously over extended periods at Northstar are not very high (Blackwell and Greene, 2006). For example, received levels of prolonged drilling sounds are expected to diminish below 140 dB re 1 µPa at a distance of about 131 ft (40 m) from the center of activity. Sound levels during production activities other than drilling usually would diminish below 140 dB re 1 µPa at a closer distance. The 140 dB re 1 µPa radius for drilling noise is within the island and drilling sounds are attenuated to levels below 140 dB re 1 µPa in the water near Northstar. Additionally, cetaceans are not commonly found in the area during the ice-covered season. Based on this information and the available data, TTS of cetaceans is not expected from the operations at Northstar.

Permanent Threshold Shift (PTS)—When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no specific evidence that exposure to underwater industrial sounds can cause PTS in any marine mammal (see Southall *et al.,* 2007). However, given the possibility that marine mammals might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to industrial activities might incur PTS. Richardson *et al.* (1995b) hypothesized that PTS caused by prolonged exposure to continuous anthropogenic sound is unlikely to occur in marine mammals, at least for sounds with source levels up to approximately 200 dB re 1 µPa at 1 m (rms). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS.

It is highly unlikely that cetaceans could receive sounds strong enough (and over a sufficient duration) to cause PTS (or even TTS) during the proposed operation of the Northstar facility. Source levels for much of the equipment

used at Northstar do not reach the threshold of 180 dB (rms) currently used for cetaceans. Based on this conclusion, it is highly unlikely that any type of hearing impairment, temporary or permanent, would occur as a result of BP's proposed activities. Additionally, Southall *et al.* (2007) proposed that the thresholds for injury of marine mammals exposed to ''discrete'' noise events (either single or multiple exposures over a 24-hr period) are higher than the 180-dB re 1 μPa (rms) in-water threshold currently used by NMFS. Table 1 in this document summarizes the SPL and SEL levels thought to cause auditory injury to cetaceans. For more information, please refer to Southall *et al.* (2007).

TABLE 1—PROPOSED INJURY CRITERIA FOR LOW- AND MID-FREQUENCY CETACEANS EXPOSED TO ''DISCRETE'' NOISE EVENTS (EITHER SINGLE PULSES, MULTIPLE PULSES, OR NON-PULSES WITHIN A 24-HR PERIOD; SOUTHALL ET AL., 2007)

	Single pulses	Multiple pulses	Non pulses
Low-frequency cetaceans			
Sound pressure level	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)
Sound exposure level	198 dB re 1 μPa^2-s (M_{lf})	198 dB re 1 μPa^2-s (M_{lf})	215 dB re 1 μPa^2-s (M_{lf})
Mid-frequency cetaceans			
Sound pressure level	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)
Sound exposure level	198 dB re 1 μPa^2-s (M_{lf})	198 dB re 1 μPa^2-s (M_{lf})	215 dB re 1 μPa^2-s (M_{lf})

Potential Effects of Sound on Pinnipeds

(1) Masking

As stated previously in this document, masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. There are fewer data available regarding the potential impacts of masking on pinnipeds than on cetaceans. Cummings *et al.* (1984) subjected breeding ringed seals to recordings of industrial sounds. The authors did not document any impacts to ringed seal vocalizations as a result of exposure to the recordings.

During the ice-covered season, only ringed seals and small numbers of bearded seals are found near Northstar. Therefore, there would be no masking effects on spotted seals, as they do not occur in the area during that time. All three pinniped species can be found in and around Northstar during the summer open-water season. As stated previously in this document, sounds from oil production and any drilling activities are not expected to be detectable beyond several kilometers from the source; however, sounds from vessels were detectable to distances as far as approximately 18.6 mi (30 km) from Northstar. There is the potential for vessels to cause some degree of masking.

It is expected that masking of calls or other natural sounds would not extend beyond the maximum distance where the construction or operational sounds are detectable, and, at that distance, only the weakest sounds would be masked. The maximum distances for masking will vary greatly depending on ambient noise and sound propagation conditions but will typically be about 1.2–3.1 mi (2–5 km) in air and 1.9–6.2 mi (3–10 km) underwater. Also, some types of Northstar sounds (especially the stronger ones) vary over time, and, at quieter times, masking would be absent or limited to closer distances. While some masking is possible, it is usually more prominent for lower frequencies. Although the functional hearing range for pinnipeds is estimated to occur between approximately 75 Hz and 75 kHz, the range with the greatest sensitivity is estimated to occur between approximately 700 Hz and 20 kHz. Therefore, BP's proposed activities are expected to have minor masking effects on pinnipeds.

(2) Behavioral Disturbance

As stated earlier in this document, disturbance can induce a variety of effects, such as subtle changes in behavior, more conspicuous dramatic changes in activities, and displacement. When the received level of noise exceeds some behavioral reaction threshold, it is possible that some pinnipeds could exhibit disturbance reactions. The levels, frequencies and types of noise that elicit a response vary among and within species, individuals, locations, and seasons. Behavioral changes may be an upright posture for hauled out seals, movement away from the sound source, or complete avoidance of the area. The reaction threshold and degree of response are related to the activity of the animal at the time of the disturbance. Some researchers have noted that behavioral reactions do not occur throughout the entire zone ensonified by industrial activity. In most cases that have been studied, including recent work on ringed seals, the actual radius of effect is smaller than the radius of detectability (reviewed in Richardson *et al.,* 1995b; Moulton *et al.,* 2003a, 2005; Blackwell *et al.,* 2004a).

Effects of Construction, Drilling, and Production Activity—Systematic aerial surveys to assess ringed seal responses to the construction of Seal Island were done both for Shell Oil (Green and Johnson, 1983) and for the Minerals Management Service, now the Bureau of Ocean Energy Management, Regulation and Enforcement (Frost and Burns, 1989; Kelly *et al.,* 1988). Green and Johnson (1983) found that some seals within several kilometers of Seal Island were apparently displaced by construction of the island during the winter of 1981–82. Similarly, Frost and Lowry (1988) found lower densities of seals within 2.3 mi (3.7 km) of artificial islands than in a zone 2.3–4.6 mi (3.7–7.4 km) away when exploration activity was high. During years with construction or drilling activities, there was a 38–40% reduction in seal densities near the islands (Frost and Lowry, 1988). However, these early analyses did not account for non-industrial factors known to influence basking activity of seals (Moulton *et al.,* 2002, 2005). Also, the numbers of sightings were small relative to the variation in the data.

Kelly *et al.* (1988) used trained dogs to study the use by seals of breathing holes and lairs in relation to exposure to industrial activities. They reported that the proportion of structures abandoned within 5 mi (8 km) of Seal Island was similar to that within 492 ft (150 m) of on-ice seismic lines. There were no differences in abandonment rate within or beyond 492 ft (150 m) from Seal Island. Kelly *et al.* (1988) indicated that the data were not adequate to evaluate at what distances

from the island abandonment of structures began to decrease. In a final analysis of those data, Frost and Burns (1989) reported that the proportion of abandoned structures was significantly higher within 1.2 mi (2 km) of Seal Island than 1.2–6.2 mi (2–10 km) away. Complicating the interpretation is that dog-based searches were conducted where structures were expected to be found, rather than over the entire study area, and multiple searches over a given area were not conducted. Hammill and Smith (1990) found that dogs missed as many as 73% of the structures during the first search of an area. Frost and Burns (1989) also noted that the analyses of disturbance and abandonment as a result of Seal Island construction were complicated by other noise sources that were active at the same time. These included on-ice seismic exploration, excavation of structures by their investigations, and snow machine traffic. Frost and Burns (1989) suspected that, overall, there was no area-wide increase in abandonment of structures. Finally, it is unknown whether there are differences in detection rates by dogs for open versus abandoned structures or for areas of different structure density. This detection bias potentially confounds interpretation of the data.

Utilizing radio telemetry to examine the short-term behavioral responses of ringed seals to human activities, Kelly *et al.* (1988) found that some ringed seals temporarily departed from lairs when various sources of noise were within 97–3,000 m (0.06–1.9 mi) of an occupied structure. Radio-tagged ringed seals did return to re-occupy those lairs. However, the authors did not note the amount of time it took the ringed seals to re-occupy the lairs. The durations of haul-out bouts during periods with and without disturbance were not significantly different. Also, the time ringed seals spent in the water after disturbance did not differ significantly from that during periods of no disturbance (Kelly *et al.,* 1988). Kelly *et al.* (1988) observed that rates of ringed seal abandonment of lairs were three times higher in areas with noise disturbance than in areas without noise disturbance. However, the abandonment rates in areas with noise disturbance were similar to rates of disturbance in areas of frequent predator activity (*e.g.,* polar bears trying to break into lairs).

Moulton *et al.* (2003a, 2005) conducted intensive and replicated aerial surveys during the springs of 1997–1999 (prior to the construction of Northstar) and 2000–2002 (with Northstar activities) to study the distribution and abundance of ringed seals within an approximately 1,598 mi^2 (4,140 km^2) area around the Northstar Development. The main objective was to determine whether, and to what extent, oil development affected the local distribution and abundance of ringed seals. The 1997–1999 surveys were conducted coincidentally with aerial surveys over a larger area of the central Beaufort Sea (Frost *et al.,* 2004). Moulton *et al.* (2003a, 2005) determined that the raw density of ringed seals over their study area ranged from 0.39 to 0.83 seals/km^2, while Frost *et al.* (2004) obtained raw densities of 0.64 to 0.87 seals/km^2 in a similar area at about the same times. There was no evidence that construction, drilling, and production activities at Northstar in 2000–2002 significantly affected local ringed seal distribution and abundance relative to the baseline years (1997–1999). Additionally, after natural variables that affect haul-out behavior were considered (Moulton *et al.,* 2003a, 2005), there was no significant evidence of reduced seal densities close to Northstar as compared with farther away during the springs of 2000, 2001, and 2002. The survey methods and associated analyses were shown to have high statistical power to detect such changes if they occurred. Environmental factors such as date, water depth, degree of ice deformation, presence of meltwater, and percent cloud cover had more conspicuous and statistically-significant effects on seal sighting rates than did any human-related factors (Moulton *et al.,* 2003a, 2005).

To complement the aerial survey program on a finer scale, specially-trained dogs were used to find seal structures and to monitor the fate of structures in relation to distance from industrial activities (Williams *et al.,* 2006c). In late 2000, surveys began before construction of ice roads but concurrent with drilling and other island activities. In the winter of 2000–2001, a total of 181 structures were located, of which 118 (65%) were actively used by late May 2001. However, there was no relationship between structure survival or the proportion of structures abandoned and distance to Northstar-related activities. The most important factors predicting structure survival were time of year when found and ice deformation. The covariate distance to the ice road improved the fit of the model, but the relationship indicated that structure survival was lower farther away from the ice road, contrary to expectation. However, new structures found after the ice road was constructed were, on average, farther from the ice road than were structures found before construction (though this was marginally statistically significant). This may have been related to the active flooding of the ice road, which effectively removed some of the ice as potential ringed seal habitat.

Blackwell *et al.* (2004a) investigated the effects of noise from pipe-driving and other construction activities on Northstar to ringed seals in June and July 2000, during and just after break-up of the landfast ice. None of the ringed seals seen during monitoring showed any strong reactions to the pipe-driving or other construction activities on Northstar. Eleven of the seals (48%) appeared either indifferent or curious when exposed to construction or pipe-driving sounds. One seal approached within 9.8 ft (3 m) of the island's edge during pipe-driving and others swam in the 9.8–49.2 ft (3–15 m) moat around the island. Seals in the moat may have been exposed to sound levels up to 153–160 dB re 1 μPa (rms) when they dove close to the bottom.

Consistent with Blackwell *et al.* (2004a), seals are often very tolerant of exposure to other types of pulsed sounds. For example, seals tolerate high received levels of sounds from airgun arrays (Arnold, 1996; Harris *et al.,* 2001; Moulton and Lawson, 2002). Monitoring work in the Alaskan Beaufort Sea during 1996–2001 provided considerable information regarding the behavior of seals exposed to seismic pulses (Harris *et al.,* 2001; Moulton and Lawson, 2002). These seismic projects usually involved arrays of 6 to 16 airguns with total volumes of 560 to 1,500 in^3 (0.01 to 0.03 m^3). The combined results suggest that some seals avoid the immediate area around seismic vessels. In most survey years, ringed seal sightings tended to be farther away from the seismic vessel when the airguns were operating than when they were not (Moulton and Lawson, 2002). However, these avoidance movements were relatively small, on the order of 328 ft (100 m) to a few hundreds of meters, and many seals remained within 328–656 ft (100–200 m) of the trackline as the operating airgun array passed by. Seal sighting rates at the water surface were lower during airgun array operations than during no-airgun periods in each survey year except 1997. Similarly, seals are often very tolerant of pulsed sounds from seal-scaring devices (Mate and Harvey, 1987; Jefferson and Curry, 1994; Richardson *et al.,* 1995b). Therefore, the short distance for avoidance reactions to impulsive pile driving sounds from the pile driving operations on Northstar is consistent with these other data.

Effects of Aircraft Activity—Helicopters are the only aircraft associated with Northstar oil production activities. Helicopter traffic occurs primarily during late spring and autumn when travel by ice road, hovercraft, or vessel is not possible.

Potential effects to pinnipeds from aircraft activity could involve both acoustic and non-acoustic effects. It is uncertain if the seals react to the sound of the helicopter or to its physical presence flying overhead. Typical reactions of hauled out pinnipeds to aircraft that have been observed include looking up at the aircraft, moving on the ice or land, entering a breathing hole or crack in the ice, or entering the water. Ice seals hauled out on the ice have been observed diving into the water when approached by a low-flying aircraft or helicopter (Burns and Harbo, 1972, cited in Richardson *et al.,* 1995b; Burns and Frost, 1979, cited in Richardson *et al.,* 1995b). Richardson *et al.* (1995b) note that responses can vary based on differences in aircraft type, altitude, and flight pattern. Additionally, a study conducted by Born *et al.* (1999) found that wind chill was also a factor in level of response of ringed seals hauled out on ice, as well as time of day and relative wind direction.

Blackwell *et al.* (2004a) observed 12 ringed seals during low-altitude overflights of a Bell 212 helicopter at Northstar in June and July 2000 (9 observations took place concurrent with pipe-driving activities). One seal showed no reaction to the aircraft while the remaining 11 (92%) reacted, either by looking at the helicopter (n=10) or by departing from their basking site (n=1). Blackwell *et al.* (2004a) concluded that none of the reactions to helicopters were strong or long lasting, and that seals near Northstar in June and July 2000 probably had habituated to industrial sounds and visible activities that had occurred often during the preceding winter and spring. There have been few systematic studies of pinniped reactions to aircraft overflights, and most of the available data concern pinnipeds hauled out on land or ice rather than pinnipeds in the water (Richardson *et al.,* 1995b; Born *et al.,* 1999).

Born *et al.* (1999) determined that 49% of ringed seals escaped (*i.e.,* left the ice) as a response to a helicopter flying at 492 ft (150 m) altitude. Seals entered the water when the helicopter was 4,101 ft (1,250 m) away if the seal was in front of the helicopter and at 1,640 ft (500 m) away if the seal was to the side of the helicopter. The authors noted that more seals reacted to helicopters than to fixed-wing aircraft. The study concluded that the risk of scaring ringed seals by small-type helicopters could be substantially reduced if they do not approach closer than 4,921 ft (1,500 m).

Spotted seals hauled out on land in summer are unusually sensitive to aircraft overflights compared to other species. They often rush into the water when an aircraft flies by at altitudes up to 984–2,461 ft (300–750 m). They occasionally react to aircraft flying as high as 4,495 ft (1,370 m) and at lateral distances as far as 1.2 mi (2 km) or more (Frost and Lowry, 1990; Rugh *et al.,* 1997). However, no spotted seal haul-outs are located near Northstar.

Effects of Vessel Activity—Few authors have specifically described the responses of pinnipeds to boats, and most of the available information on reactions to boats concerns pinnipeds hauled out on land or ice. Ringed seals hauled out on ice pans often showed short-term escape reactions when a ship approached the animal within 0.16 to 0.31 mi (0.25 to 0.5 km; Brueggeman *et al.,* 1992). Jansen *et al.* (2006) reported that harbor seals approached by vessels within 328 ft (100 m) were 25 times more likely to enter the water than were seals approached at 1,640 ft (500 m). However, during the open water season in the Beaufort Sea, ringed and bearded seals are commonly observed close to vessels (Harris *et al.,* 2001; Moulton and Lawson, 2002).

In places where boat traffic is heavy, there have been cases where seals have habituated to vessel disturbance. In England, harbor and gray seals at specific haul-outs appear to have habituated to close approaches by tour boats (Bonner, 1982). Jansen *et al.* (2006) found that harbor seals in Disenchantment Bay, Alaska, increased in abundance during the summer as ship traffic also increased. In Maine, Lelli and Harris (2001) found that boat traffic was the best predictor of variability in harbor seal haulout behavior, followed by wave height and percent sunshine, utilizing multiple regressions. Lelli and Harris (2001) reported that increasing boat traffic reduced the number of seals counted on the haul-out. Suryan and Harvey (1999) reported that Pacific harbor seals commonly left the shore when powerboat operators approached to observe the seals. Those seals detected a powerboat at a mean distance of 866 ft (264 m), and seals left the haul-out site when boats approached to within 472 ft (144 m). Southall *et al.* (2007) report that pinnipeds exposed to sounds at approximately 110 to 120 dB re 20 µPa in-air tended to respond by leaving their haul-outs and seeking refuge in the water, while animals exposed to in-air sounds of approximately 60 to 70 dB re 20 µPa often did not respond at all.

(3) Hearing Impairment and Other Physiological Effects

Pinnipeds are able to hear both in-water and in-air sounds. However, they have significantly different hearing capabilities in the two media. Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. Pinnipeds are not anticipated to experience non-auditory physiological effects as a result of operation of the Northstar facility, as none of the activities associated with the facility will generate sounds loud enough to cause such effects.

TTS—As stated earlier in this document, TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). For additional background about TTS, please refer to the discussion on impacts to cetaceans from sound found earlier in this section of the document.

As stated earlier in this document, the functional hearing range for pinnipeds in-air is 75 Hz to 30 kHz (Southall *et al.,* 2007). Richardson *et al.* (1995b) note that dominant tones in noise spectra from both helicopters and fixed-wing aircraft are generally below 500 Hz. Kastak and Schustermann (1995) state that the in-air hearing sensitivity is less than the in-water hearing sensitivity for pinnipeds. In-air hearing sensitivity deteriorates as frequency decreases below 2 kHz, and generally pinnipeds appear to be considerably less sensitive to airborne sounds below 10 kHz than humans. There is a dearth of information on the acoustic effects of helicopter overflights on pinniped hearing and communication (Richardson *et al.,* 1995b), and, to NMFS' knowledge, there has been no specific documentation of TTS in free-ranging pinnipeds exposed to helicopter operations during realistic field conditions.

In free-ranging pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. However, systematic TTS studies on captive pinnipeds have been conducted (Bowles *et al.,* 1999; Kastak

et al., 1999, 2005, 2007; Schusterman *et al.,* 2000; Finneran *et al.,* 2003; Southall *et al.,* 2007). Kastak *et al.* (1999) reported TTS of approximately 4–5 dB in three species of pinnipeds (harbor seal, California sea lion, and northern elephant seal) after underwater exposure for approximately 20 minutes to noise with frequencies ranging from 100–2,000 Hz at received levels 60–75 dB above hearing threshold. This approach allowed similar effective exposure conditions to each of the subjects, but resulted in variable absolute exposure values depending on subject and test frequency. Recovery to near baseline levels was reported within 24 hours of noise exposure (Kastak *et al.,* 1999). Kastak *et al.* (2005) followed up on their previous work using higher sensitivity levels and longer exposure times (up to 50 min) and corroborated their previous findings. The sound exposures necessary to cause slight threshold shifts were also determined for two California sea lions and a juvenile elephant seal exposed to underwater sound for a similar duration. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.,* 2000; Kastak *et al.,* 2005, 2007). For very short exposures (*e.g.,* to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.,* 2003). For pinnipeds exposed to in-air sounds, auditory fatigue has been measured in response to single pulses and to non-pulse noise (Southall *et al.,* 2007), although high exposure levels were required to induce TTS-onset (SEL: 129 dB re: 20 μPa^2·s; Bowles *et al.,* unpub. data).

NMFS (1995, 2000) concluded that pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding 190 dB re 1 μPa (rms). The established 190-dB re 1 μPa (rms) criterion is not considered to be the level above which TTS might occur in pinnipeds. Rather, it is the received level above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to pinnipeds. Levels of underwater sound from production and drilling activities that occur continuously over extended periods at Northstar are not very high (Blackwell and Greene, 2006). For example, received levels of prolonged drilling sounds are expected to diminish below 140 dB re 1 μPa at a distance of about 131 ft (40 m) from the center of activity. Sound levels during other production activities aside from drilling usually would diminish below 140 dB re 1 μPa at a closer distance. The 140 dB re 1 μPa radius for drilling noise is within the island and drilling sounds are attenuated to levels below 140 dB re 1 μPa in the water near Northstar. Therefore, TTS is not expected from the operations at Northstar.

PTS—As stated earlier in this document, when PTS occurs, there is physical damage to the sound receptors in the ear. For additional background about PTS, please refer to the discussion with respect to impacts from sound on cetaceans found earlier in this section of the document.

It is highly unlikely that pinnipeds could receive sounds strong enough (and over a sufficient duration) to cause PTS (or even TTS) during the proposed operation of the Northstar facility. Source levels for much of the equipment used at Northstar do not reach the threshold of 190 dB currently used for pinnipeds. Based on this conclusion, it is highly unlikely that any type of hearing impairment, temporary or permanent, would occur as a result of BP's proposed activities. Additionally, Southall *et al.* (2007) proposed that the thresholds for injury of marine mammals exposed to ''discrete'' noise events (either single or multiple exposures over a 24-hr period) are higher than the 190-dB re 1 μPa (rms) in-water threshold currently used by NMFS. Table 2 in this document summarizes the SPL and SEL levels thought to cause auditory injury to pinnipeds both in-water and in-air. For more information, please refer to Southall *et al.* (2007).

TABLE 2—PROPOSED INJURY CRITERIA FOR PINNIPEDS EXPOSED TO ''DISCRETE'' NOISE EVENTS (EITHER SINGLE PULSES, MULTIPLE PULSES, OR NON-PULSES WITHIN A 24-HR PERIOD; SOUTHALL ET AL., 2007)

	Single pulses	Multiple pulses	Non pulses
Pinnipeds (in water)			
Sound pressure level	218 dB re 1 μPa (peak) (flat)	218 dB re 1 μPa (peak) (flat)	218 dB re 1 μPa (peak) (flat)
Sound exposure level	186 dB re 1 μPa^2-s (M_{pw})	186 dB re 1 μPa^2-s (M_{pw})	203 dB re 1 μPa^2-s (M_{pw})
Pinnipeds (in air)			
Sound pressure level	149 dB re 20 μPa (peak) (flat)	149 dB re 20 μPa (peak) (flat)	149 dB re 20 μPa (peak) (flat)
Sound exposure level	144 dB re (20 μPa)^2-s (M_{pa})	144 dB re (20 μPa)^2-s (M_{pa})	144.5 dB re (20 μPa)^2-s (M_{pa})

Potential Effects of Oil on Cetaceans

The specific effects an oil spill would have on bowhead, gray, or beluga whales are not well known. While direct mortality is unlikely, exposure to spilled oil could lead to skin irritation, baleen fouling (which might reduce feeding efficiency), respiratory distress from inhalation of hydrocarbon vapors, consumption of some contaminated prey items, and temporary displacement from contaminated feeding areas. Geraci and St. Aubin (1990) summarize effects of oil on marine mammals, and Bratton *et al.* (1993) provides a synthesis of knowledge of oil effects on bowhead whales. The number of whales that might be contacted by a spill would depend on the size, timing, and duration of the spill. Whales may not avoid oil spills, and some have been observed feeding within oil slicks (Goodale *et al.,* 1981). These topics are discussed in more detail next.

In the case of an oil spill occurring during migration periods, disturbance of the migrating cetaceans from cleanup activities may have more of an impact than the oil itself. Human activity associated with cleanup efforts could deflect whales away from the path of the oil. However, noise created from cleanup activities likely will be short term and localized. In fact, whale avoidance of clean-up activities may benefit whales by displacing them from the oil spill area.

There is no concrete evidence that oil spills, including the much studied Santa Barbara Channel and Exxon Valdez spills, have caused any deaths of cetaceans (Geraci, 1990; Brownell, 1971;

Harvey and Dahlheim, 1994). It is suspected that some individually identified killer whales that disappeared from Prince William Sound during the time of the Exxon Valdez spill were casualties of that spill. However, no clear cause and effect relationship between the spill and the disappearance could be established (Dahlheim and Matkin, 1994). The AT–1 pod of transient killer whales that sometimes inhabits Prince William Sound has continued to decline after the Exxon Valdez oil spill (EVOS). Matkin *et al.* (2008) tracked the AB resident pod and the AT–1 transient group of killer whales from 1984 to 2005. The results of their photographic surveillance indicate a much higher than usual mortality rate for both populations the year following the spill (33% for AB Pod and 41% for AT–1 Group) and lower than average rates of increase in the 16 years after the spill (annual increase of about 1.6% for AB Pod compared to an annual increase of about 3.2% for other Alaska killer whale pods). In killer whale pods, mortality rates are usually higher for non-reproductive animals and very low for reproductive animals and adolescents (Olesiuk *et al.,* 1990, 2005; Matkin *et al.,* 2005). No effects on humpback whales in Prince William Sound were evident after the Exxon Valdez spill (von Ziegesar *et al.,* 1994). There was some temporary displacement of humpback whales out of Prince William Sound, but this could have been caused by oil contamination, boat and aircraft disturbance, displacement of food sources, or other causes.

Migrating gray whales were apparently not greatly affected by the Santa Barbara spill of 1969. There appeared to be no relationship between the spill and mortality of marine mammals. The higher than usual counts of dead marine mammals recorded after the spill represented increased survey effort and therefore cannot be conclusively linked to the spill itself (Brownell, 1971; Geraci, 1990). The conclusion was that whales were either able to detect the oil and avoid it or were unaffected by it (Geraci, 1990).

(1) Oiling of External Surfaces

Whales rely on a layer of blubber for insulation, so oil would have little if any effect on thermoregulation by whales. Effects of oiling on cetacean skin appear to be minor and of little significance to the animal's health (Geraci, 1990). Histological data and ultrastructural studies by Geraci and St. Aubin (1990) showed that exposures of skin to crude oil for up to 45 minutes in four species of toothed whales had no effect. They switched to gasoline and applied the sponge up to 75 minutes. This produced transient damage to epidermal cells in whales. Subtle changes were evident only at the cell level. In each case, the skin damage healed within a week. They concluded that a cetacean's skin is an effective barrier to the noxious substances in petroleum. These substances normally damage skin by getting between cells and dissolving protective lipids. In cetacean skin, however, tight intercellular bridges, vital surface cells, and the extraordinary thickness of the epidermis impeded the damage. The authors could not detect a change in lipid concentration between and within cells after exposing skin from a white-sided dolphin to gasoline for 16 hours in vitro.

Bratton *et al.* (1993) synthesized studies on the potential effects of contaminants on bowhead whales. They concluded that no published data proved oil fouling of the skin of any free-living whales, and conclude that bowhead whales contacting fresh or weathered petroleum are unlikely to suffer harm. Although oil is unlikely to adhere to smooth skin, it may stick to rough areas on the surface (Henk and Mullan, 1997). Haldiman *et al.* (1985) found the epidermal layer to be as much as seven to eight times thicker than that found on most whales. They also found that little or no crude oil adhered to preserved bowhead skin that was dipped into oil up to three times, as long as a water film stayed on the skin's surface. Oil adhered in small patches to the surface and vibrissae (stiff, hairlike structures), once it made enough contact with the skin. The amount of oil sticking to the surrounding skin and epidermal depression appeared to be in proportion to the number of exposures and the roughness of the skin's surface. It can be assumed that if oil contacted the eyes, effects would be similar to those observed in ringed seals; continued exposure of the eyes to oil could cause permanent damage (St. Aubin, 1990).

(2) Ingestion

Whales could ingest oil if their food is contaminated, or oil could also be absorbed through the respiratory tract. Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Geraci, 1990). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982). Oil ingestion can decrease food assimilation of prey eaten (St. Aubin, 1988). Cetaceans may swallow some oil-contaminated prey, but it likely would be only a small part of their food. It is not known if whales would leave a feeding area where prey was abundant following a spill. Some zooplankton eaten by bowheads and gray whales consume oil particles and bioaccumulation can result. Tissue studies by Geraci and St. Aubin (1990) revealed low levels of naphthalene in the livers and blubber of baleen whales. This result suggests that prey have low concentrations in their tissues, or that baleen whales may be able to metabolize and excrete certain petroleum hydrocarbons. Whales exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982) and this kind of damage has not been reported (Geraci, 1990).

(3) Fouling of Baleen

Baleen itself is not damaged by exposure to oil and is resistant to effects of oil (St. Aubin *et al.,* 1984). Crude oil could coat the baleen and reduce filtration efficiency; however, effects may be temporary (Braithwaite, 1983; St. Aubin *et al.,* 1984). If baleen is coated in oil for long periods, it could cause the animal to be unable to feed, which could lead to malnutrition or even death. Most of the oil that would coat the baleen is removed after 30 min, and less than 5% would remain after 24 h (Bratton *et al.,* 1993). Effects of oiling of the baleen on feeding efficiency appear to be minor (Geraci, 1990). However, a study conducted by Lambertsen *et al.* (2005) concluded that their results highlight the uncertainty about how rapidly oil would depurate at the near zero temperatures in arctic waters and whether baleen function would be restored after oiling.

(4) Avoidance

Some cetaceans can detect oil and sometimes avoid it, but others enter and swim through slicks without apparent effects (Geraci, 1990; Harvey and Dahlheim, 1994). Bottlenose dolphins apparently could detect and avoid slicks and mousse but did not avoid light sheens on the surface (Smultea and Wursig, 1995). After the Regal Sword spill in 1979, various species of baleen and toothed whales were observed swimming and feeding in areas containing spilled oil southeast of Cape Cod, MA (Goodale *et al.,* 1981). For months following EVOS, there were numerous observations of gray whales, harbor porpoises, Dall's porpoises, and killer whales swimming through light-to-heavy crude-oil sheens (Harvey and Dalheim, 1994, cited in Matkin *et al.,* 2008). However, if some of the animals avoid the area because of the oil, then

the effects of the oiling would be less severe on those individuals.

(5) Factors Affecting the Severity of Effects

Effects of oil on whales in open water are likely to be minimal, but there could be effects on whales where both the oil and the whales are at least partly confined in leads or at ice edges (Geraci, 1990). In spring, bowhead and beluga whales migrate through leads in the ice. At this time, the migration can be concentrated in narrow corridors defined by the leads, thereby creating a greater risk to animals caught in the spring lead system should oil enter the leads. However, given the probable alongshore trajectory of oil spilled from Northstar in relation to the whale migration route through offshore waters, interactions between oil slicks and whales are unlikely in spring, as any spilled oil would likely remain closer to shore.

In fall, the migration route of bowheads can be close to shore (Blackwell *et al.,* 2009). If fall migrants were moving through leads in the pack ice or were concentrated in nearshore waters, some bowhead whales might not be able to avoid oil slicks and could be subject to prolonged contamination. However, the autumn migration past the Northstar area extends over several weeks, and many of the whales travel along routes well north of Northstar. Thus, only a small portion of the whales are likely to approach patches of spilled oil. Additionally, vessel activity associated with spill cleanup efforts may deflect the small number of whales traveling nearshore farther offshore, thereby reducing the likelihood of contact with spilled oil. Also, during years when movements of oil and whales might be partially confined by ice, the bowhead migration corridor tends to be farther offshore (Treacy, 1997; LGL and Greeneridge, 1996a; Moore, 2000).

Bowhead and beluga whales overwinter in the Bering Sea (mainly from November to March). In the summer, the majority of the bowhead whales are found in the Canadian Beaufort Sea, although some have recently been observed in the U.S. Beaufort and Chukchi Seas during the summer months (June to August). Data from the Barrow-based boat surveys in 2009 (George and Sheffield, 2009) showed that bowheads were observed almost continuously in the waters near Barrow, including feeding groups in the Chukchi Sea at the beginning of July. The majority of belugas in the Beaufort stock migrate into the Beaufort Sea in April or May, although some whales may pass Point Barrow as early as late March and as late as July (Braham *et al.,* 1984; Ljungblad *et al.,* 1984; Richardson *et al.,* 1995b). Therefore, a spill in winter or summer would not be expected to have major impacts on these species. Additionally, while gray whales have commonly been sighted near Point Barrow, they are much less frequently found in the Prudhoe Bay area. Therefore, an oil spill is not expected to have major impacts to gray whales.

(6) Effects of Oil-Spill Cleanup Activities

Oil spill cleanup activities could increase disturbance effects on either whales or seals, causing temporary disruption and possible displacement (MMS, 1996). The Northstar Oil Discharge Prevention and Contingency Plan (ODPCP; BPXA, 1998a, b) includes a scenario of a production well blowout to the open-water in August. In this scenario, approximately 177,900 barrels of North Slope crude oil will reach the open-water. It is estimated that response activities would require 186 staff (93 per shift) using 33 vessels (see Table 1.6.1–3 in BPXA, 1998b) for about 15 days to recover oil in open-water. Shoreline cleanup would occur for approximately 45 days employing low pressure, cold water deluge on the soiled shorelines. In a similar scenario during solid ice conditions, it is estimated that 97 pieces of equipment along with 246 staff (123 per shift) would be required for response activities (BPXA, 1998a).

The potential effects on cetaceans are expected to be less than those on seals (described later in this section of the document). Cetaceans tend to occur well offshore where cleanup activities (in the open-water season) are unlikely to be as concentrated. Also, cetaceans are transient and, during the majority of the year, absent from the area. However, if intensive cleanup activities were necessary during the autumn whale hunt, this could affect subsistence hunting. Impacts to subsistence uses of marine mammals are discussed later in this document (see the ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

Potential Effects of Oil on Pinnipeds

Ringed, bearded, and spotted seals are present in open-water areas during summer and early autumn, and ringed seals remain in the area through the ice-covered season. During the spring periods in 1997–2002, the observed densities of ringed seals on the fast-ice in areas greater than 9.8 ft (3 m) deep ranged from 0.35 to 0.72 seals/km^2. After allowance for seals not seen by aerial surveyors, actual densities may have been about 2.84 times higher (Moulton *et al.,* 2003a). Therefore, an oil spill from the Northstar development or its pipeline could affect seals. Any oil spilled under the ice also has the potential to directly contact seals.

Externally oiled phocid seals often survive and become clean, but heavily oiled seal pups and adults may die, depending on the extent of oiling and characteristics of the oil. Prolonged exposure could occur if fuel or crude oil was spilled in or reached nearshore waters, was spilled in a lead used by seals, or was spilled under the ice when seals have limited mobility (NMFS, 2000). Adult seals may suffer some temporary adverse effects, such as eye and skin irritation, with possible infection (MMS, 1996). Such effects may increase stress, which could contribute to the death of some individuals. Ringed seals may ingest oil-contaminated foods, but there is little evidence that oiled seals will ingest enough oil to cause lethal internal effects. There is a likelihood that newborn seal pups, if contacted by oil, would die from oiling through loss of insulation and resulting hypothermia. These potential effects are addressed in more detail in subsequent paragraphs.

Reports of the effects of oil spills have shown that some mortality of seals may have occurred as a result of oil fouling; however, large scale mortality had not been observed prior to the EVOS (St. Aubin, 1990). Effects of oil on marine mammals were not well studied at most spills because of lack of baseline data and/or the brevity of the post-spill surveys. The largest documented impact of a spill, prior to EVOS, was on young seals in January in the Gulf of St. Lawrence (St. Aubin, 1990). Brownell and Le Boeuf (1971) found no marked effects of oil from the Santa Barbara oil spill on California sea lions or on the mortality rates of newborn pups.

Intensive and long-term studies were conducted after the EVOS in Alaska. There may have been a long-term decline of 36% in numbers of molting harbor seals at oiled haul-out sites in Prince William Sound following EVOS (Frost *et al.,* 1994a). However, in a reanalysis of those data and additional years of surveys, along with an examination of assumptions and biases associated with the original data, Hoover-Miller *et al.* (2001) concluded that the EVOS effect had been overestimated. The decline in attendance at some oiled sites was more likely a continuation of the general decline in harbor seal abundance in Prince William Sound documented since 1984 (Frost *et al.,* 1999) than a

result of EVOS. The results from Hoover-Miller *et al.* (2001) indicate that the effects of EVOS were largely indistinguishable from natural decline by 1992. However, while Frost *et al.* (2004) concluded that there was no evidence that seals were displaced from oiled sites, they did find that aerial counts indicated 26% less pups were produced at oiled locations in 1989 than would have been expected without the oil spill. Harbor seal pup mortality at oiled beaches was 23% to 26%, which may have been higher than natural mortality, although no baseline data for pup mortality existed prior to EVOS (Frost *et al.,* 1994a). There was no conclusive evidence of spill effects on Steller sea lions (Calkins *et al.,* 1994). Oil did not persist on sea lions themselves (as it did on harbor seals), nor did it persist on sea lion haul-out sites and rookeries (Calkins *et al.,* 1994). Sea lion rookeries and haul out sites, unlike those used by harbor seals, have steep sides and are subject to high wave energy (Calkins *et al.,* 1994).

(1) Oiling of External Surfaces

Adult seals rely on a layer of blubber for insulation, and oiling of the external surface does not appear to have adverse thermoregulatory effects (Kooyman *et al.,* 1976, 1977; St. Aubin, 1990). Contact with oil on the external surfaces can potentially cause increased stress and irritation of the eyes of ringed seals (Geraci and Smith, 1976; St. Aubin, 1990). These effects seemed to be temporary and reversible, but continued exposure of eyes to oil could cause permanent damage (St. Aubin, 1990). Corneal ulcers and abrasions, conjunctivitis, and swollen nictitating membranes were observed in captive ringed seals placed in crude oil-covered water (Geraci and Smith, 1976), and in seals in the Antarctic after an oil spill (Lillie, 1954).

Newborn seal pups rely on their fur for insulation. Newborn ringed seal pups in lairs on the ice could be contaminated through contact with oiled mothers. There is the potential that newborn ringed seal pups that were contaminated with oil could die from hypothermia.

(2) Ingestion

Marine mammals can ingest oil if their food is contaminated. Oil can also be absorbed through the respiratory tract (Geraci and Smith, 1976; Engelhardt *et al.,* 1977). Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Engelhardt, 1981). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982, 1985). In addition, seals exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982).

(3) Avoidance and Behavioral Effects

Although seals may have the capability to detect and avoid oil, they apparently do so only to a limited extent (St. Aubin, 1990). Seals may abandon the area of an oil spill because of human disturbance associated with cleanup efforts, but they are most likely to remain in the area of the spill. One notable behavioral reaction to oiling is that oiled seals are reluctant to enter the water, even when intense cleanup activities are conducted nearby (St. Aubin, 1990; Frost *et al.,* 1994b, 2004).

(4) Factors Affecting the Severity of Effects

Seals that are under natural stress, such as lack of food or a heavy infestation by parasites, could potentially die because of the additional stress of oiling (Geraci and Smith, 1976; St. Aubin, 1990; Spraker *et al.,* 1994). Female seals that are nursing young would be under natural stress, as would molting seals. In both cases, the seals would have reduced food stores and may be less resistant to effects of oil than seals that are not under some type of natural stress. Seals that are not under natural stress (*e.g.,* fasting, molting) would be more likely to survive oiling. In general, seals do not exhibit large behavioral or physiological reactions to limited surface oiling or incidental exposure to contaminated food or vapors (St. Aubin, 1990; Williams *et al.,* 1994). Effects could be severe if seals surface in heavy oil slicks in leads or if oil accumulates near haul-out sites (St. Aubin, 1990). An oil spill in open-water is less likely to impact seals.

Seals exposed to heavy doses of oil for prolonged periods could die. This type of prolonged exposure could occur if fuel or crude oil was spilled in or reached nearshore waters, was spilled in a lead used by seals, or was spilled under the ice in winter when seals have limited mobility. Seals residing in these habitats may not be able to avoid prolonged contamination and some could die. Impacts on regional populations of seals would be expected to be minor.

Since ringed seals are found year-round in the U.S. Beaufort Sea and more specifically in the project area, an oil spill at any time of year could potentially have effects on ringed seals. However, they are more widely dispersed during the open-water season. Spotted seals are unlikely to be found in the project area during late winter and spring. Therefore, they are more likely to be affected by a spill in the summer or fall seasons. Bearded seals typically overwinter south of the Beaufort Sea. However, some have been reported around Northstar during early spring (Moulton *et al.,* 2003b). Oil spills during the open-water period and fall are the most likely to impact bearded seals.

(5) Effects of Oil-Spill Cleanup Activities

Oil spill cleanup activities could increase disturbance effects on either whales or seals, causing temporary disruption and possible displacement (MMS, 1996). General issues related to oil spill cleanup activities are discussed earlier in this section for cetaceans. In the event of a large spill contacting and extensively oiling coastal habitats, the presence of response staff, equipment, and the many aircraft involved in the cleanup could (depending on the time of the spill and the cleanup) potentially displace seals. If extensive cleanup operations occur in the spring, they could cause increased stress and reduced pup survival of ringed seals. Oil spill cleanup activity could exacerbate and increase disturbance effects on subsistence species, cause localized displacement of subsistence species, and alter or reduce access to those species by hunters. On the other hand, the displacement of marine mammals away from oil-contaminated areas by cleanup activities would reduce the likelihood of direct contact with oil. Impacts to subsistence uses of marine mammals are discussed later in this document (see the ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

Summary of Potential Effects on Marine Mammals

The likely or possible impacts of the planned offshore oil developments at Northstar on marine mammals involve both non-acoustic and acoustic effects. Potential non-acoustic effects are most likely to impact pinnipeds in the area through temporary displacement from haul-out areas near the Northstar facility. There is a small chance that a seal pup might be injured or killed by on-ice construction or transportation activities. A major oil spill is unlikely and, if it occurred, its effects are difficult to predict. A major oil spill might cause serious injury or mortality to small numbers of marine mammals by impacting the animals' ability to eat or find uncontaminated prey or by causing respiratory distress from

inhalation of hydrocarbon vapors. Oiled newborn seal pups could also die from hypothermia. However, BP has an oil spill contingency and prevention plan (discussed later in this document) in place that will help avoid the occurrence of a spill and the impacts to the environment (including marine mammals) should one occur.

BP's activities at Northstar will also introduce sound into the environment. The potential effects of sound from the proposed activities might include one or more of the following: Masking of natural sounds; behavioral disturbance and associated habituation effects; and, at least in theory, temporary or permanent hearing impairment. Because of the low source levels for the majority of equipment used at Northstar, no hearing impairment is expected in any pinnipeds or cetaceans. Other types of effects are expected to be less for cetaceans, as the higher sound levels are found close to shore, usually further inshore than the migration paths of cetaceans. Additionally, cetaceans are not found in the Northstar area during the ice-covered season; therefore, they would only be potentially impacted during certain times of the year. As discussed earlier in the document, cetaceans often avoid sound sources, which would further reduce impacts from sound. Pinnipeds may exhibit some behavioral disturbance reactions, but they are anticipated to be minor. In summary, impacts to marine mammals that may occur in the Northstar area are expected to be minor, as source levels are low and many of the species are found farther out to sea.

Moreover, the potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections).

Anticipated Effects on Habitat

Potential impacts to marine mammals and their habitat as a result of operation of the Northstar facility are mainly associated with elevated sound levels. However, potential impacts are also possible from ice road construction and an oil spill (should one occur).

Common Marine Mammal Prey in the Project Area

All six of the marine mammal species that may occur in the proposed project area prey on either marine fish or invertebrates. The ringed seal feeds on fish and a variety of benthic species, including crabs and shrimp. Bearded seals feed mainly on benthic organisms, primarily crabs, shrimp, and clams. Spotted seals feed on pelagic and demersal fish, as well as shrimp and cephalopods. They are known to feed on a variety of fish including herring, capelin, sand lance, Arctic cod, saffron cod, and sculpins.

Bowhead whales feed in the eastern Beaufort Sea during summer and early autumn, but continue feeding to varying degrees while on their migration through the central and western Beaufort Sea in the late summer and fall (Richardson and Thomson [eds.], 2002). Aerial surveys in recent years have sighted bowhead whales feeding in Camden Bay on their westward migration through the Beaufort Sea. [Camden Bay is more than 62 mi (100 km) east of Northstar.] When feeding in relatively shallow areas, bowheads feed throughout the water column. However, feeding is concentrated at depths where zooplankton is concentrated (Wursig *et al.,* 1984, 1989; Richardson [ed.], 1987; Griffiths *et al.,* 2002). Lowry and Sheffield (2002) found that copepods and euphausiids were the most common prey found in stomach samples from bowhead whales harvested in the Kaktovik area from 1979 to 2000. Areas to the east of Barter Island (which is approximately 110 mi [177 km] east of Northstar) appear to be used regularly for feeding as bowhead whales migrate slowly westward across the Beaufort Sea (Thomson and Richardson, 1987; Richardson and Thomson [eds.], 2002). However, in some years, sizable groups of bowhead whales have been seen feeding as far west as the waters just east of Point Barrow (which is more than 155 mi [250 km] west of Northstar) near the Plover Islands (Braham *et al.,* 1984; Ljungblad *et al.,* 1985; Landino *et al.,* 1994). The situation in September–October 1997 was unusual in that bowheads fed widely across the Alaskan Beaufort Sea, including higher numbers in the area east of Barrow than reported in any previous year (S. Treacy and D. Hansen, MMS, pers. comm.).

Beluga whales feed on a variety of fish, shrimp, squid and octopus (Burns and Seaman, 1985). Very few beluga whales occur near Northstar; their main migration route is much further offshore.

Gray whales are primarily bottom feeders, and benthic amphipods and isopods form the majority of their summer diet, at least in the main summering areas west of Alaska (Oliver *et al.,* 1983; Oliver and Slattery, 1985). Farther south, gray whales have also been observed feeding around kelp beds, presumably on mysid crustaceans, and on pelagic prey such as small schooling fish and crab larvae (Hatler and Darling, 1974).

Two kinds of fish inhabit marine waters in the study area: (1) True marine fish that spend all of their lives in salt water, and (2) anadromous species that reproduce in fresh water and spend parts of their life cycles in salt water.

Most arctic marine fish species are small, benthic forms that do not feed high in the water column. The majority of these species are circumpolar and are found in habitats ranging from deep offshore water to water as shallow as 16.4–33 ft (5–10 m; Fechhelm *et al.,* 1995). The most important pelagic species, and the only abundant pelagic species, is the Arctic cod. The Arctic cod is a major vector for the transfer of energy from lower to higher trophic levels (Bradstreet *et al.,* 1986). In summer, Arctic cod can form very large schools in both nearshore and offshore waters (Craig *et al.,* 1982; Bradstreet *et al.,* 1986). Locations and areas frequented by large schools of Arctic cod cannot be predicted, but can be almost anywhere. The Arctic cod is a major food source for beluga whales, ringed seals, and numerous species of seabirds (Frost and Lowry, 1984; Bradstreet *et al.,* 1986).

Anadromous Dolly Varden char and some species of whitefish winter in rivers and lakes, migrate to the sea in spring and summer, and return to fresh water in autumn. Anadromous fish form the basis of subsistence, commercial, and small regional sport fisheries. Dolly Varden char migrate to the sea from May through mid-June (Johnson, 1980) and spend about 1.5 to 2.5 months there (Craig, 1989). They return to rivers beginning in late July or early August with the peak return migration occurring between mid-August and early September (Johnson, 1980). At sea, most anadromous corregonids (whitefish) remain in nearshore waters within several kilometers of shore (Craig, 1984, 1989). They are often termed ''amphidromous'' fish in that they make repeated annual migrations into marine waters to feed, returning each fall to overwinter in fresh water.

Benthic organisms are defined as bottom dwelling creatures. Infaunal organisms are benthic organisms that live within the substrate and are often sedentary or sessile (bivalves, polychaetes). Epibenthic organisms live on or near the bottom surface sediments and are mobile (amphipods, isopods, mysids, and some polychaetes). Epifauna, which live attached to hard substrates, are rare in the Beaufort Sea because hard substrates are scarce there. A small community of epifauna, the

Boulder Patch, occurs in Stefansson Sound.

The benthic environment near Northstar appears similar to that reported in various other parts of the Arctic (Ellis, 1960, 1962, 1966; Dunbar, 1968; Wacasey, 1975). Many of the nearshore benthic marine invertebrates of the Arctic are circumpolar and are found over a wide range of water depths (Carey *et al.,* 1975). Species identified include polychaetes (*Spio filicornis, Chaetozone setosa, Eteone longa*), bivalves (*Cryrtodaria kurriana, Nucula tenuis, Liocyma fluctuosa*), an isopod (*Saduria entomon*), and amphipods (*Pontoporeia femorata, P. affinis*).

Nearshore benthic fauna have been studied in lagoons west of Northstar and near the mouth of the Colville River (Kinney *et al.,* 1971, 1972; Crane and Cooney, 1975). The waters of Simpson Lagoon, Harrison Bay, and the nearshore region support a number of infaunal species including crustaceans, mollusks, and polychaetes. In areas influenced by river discharge, seasonal changes in salinity can greatly influence the distribution and abundance of benthic organisms. Large fluctuations in salinity and temperature that occur over a very short time period, or on a seasonal basis, allow only very adaptable, opportunistic species to survive (Alexander *et al.,* 1974). Since shorefast ice is present for many months, the distribution and abundance of most species depends on annual (or more frequent) recolonization from deeper offshore waters (Woodward Clyde Consultants, 1995). Due to ice scouring, particularly in water depths of less than 8 ft (2.4 m), infaunal communities tend to be patchily distributed. Diversity increases with water depth until the shear zone is reached at 49–82 ft (15–25 m; Carey, 1978). Biodiversity then declines due to ice gouging between the landfast ice and the polar pack ice (Woodward Clyde Consultants, 1995).

Potential Impacts From Sound Generation

Fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.,* 1981) and possibly avoid predators (Wilson and Dill, 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

Fishes produce sounds that are associated with behaviors that include territoriality, mate search, courtship, and aggression. It has also been speculated that sound production may provide the means for long distance communication and communication under poor underwater visibility conditions (Zelick *et al.,* 1999), although the fact that fish communicate at low-frequency sound levels where the masking effects of ambient noise are naturally highest suggests that very long distance communication would rarely be possible. Fishes have evolved a diversity of sound generating organs and acoustic signals of various temporal and spectral contents. Fish sounds vary in structure, depending on the mechanism used to produce them (Hawkins, 1993). Generally, fish sounds are predominantly composed of low frequencies (less than 3 kHz).

Since objects in the water scatter sound, fish are able to detect these objects through monitoring the ambient noise. Therefore, fish are probably able to detect prey, predators, conspecifics, and physical features by listening to environmental sounds (Hawkins, 1981). There are two sensory systems that enable fish to monitor the vibration-based information of their surroundings. The two sensory systems, the inner ear and the lateral line, constitute the acoustico-lateralis system.

Although the hearing sensitivities of very few fish species have been studied to date, it is becoming obvious that the intra- and inter-specific variability is considerable (Coombs, 1981). Nedwell *et al.* (2004) compiled and published available fish audiogram information. A noninvasive electrophysiological recording method known as auditory brainstem response is now commonly used in the production of fish audiograms (Yan, 2004). Generally, most fish have their best hearing in the low-frequency range (*i.e.,* less than 1 kHz). Even though some fish are able to detect sounds in the ultrasonic frequency range, the thresholds at these higher frequencies tend to be considerably higher than those at the lower end of the auditory frequency range.

Literature relating to the impacts of sound on marine fish species can be divided into the following categories: (1) Pathological effects; (2) physiological effects; and (3) behavioral effects. Pathological effects include lethal and sub-lethal physical damage to fish; physiological effects include primary and secondary stress responses; and behavioral effects include changes in exhibited behaviors of fish. Behavioral changes might be a direct reaction to a detected sound or a result of the anthropogenic sound masking natural sounds that the fish normally detect and to which they respond. The three types of effects are often interrelated in complex ways. For example, some physiological and behavioral effects could potentially lead to the ultimate pathological effect of mortality. Hastings and Popper (2005) reviewed what is known about the effects of sound on fishes and identified studies needed to address areas of uncertainty relative to measurement of sound and the responses of fishes. Popper *et al.* (2003/2004) also published a paper that reviews the effects of anthropogenic sound on the behavior and physiology of fishes.

The following discussions of the three primary types of potential effects on fish from exposure to sound mostly consider continuous sound sources since the majority of sounds that will be generated by the proposed activities associated with Northstar are of a continuous nature; however, most research reported in the literature focuses on the effects of airguns, which produce pulsed sounds.

Potential effects of exposure to continuous sound on marine fish include TTS, physical damage to the ear region, physiological stress responses, and behavioral responses such as startle response, alarm response, avoidance, and perhaps lack of response due to masking of acoustic cues. Most of these effects appear to be either temporary or intermittent and therefore probably do not significantly impact the fish at a population level. The studies that resulted in physical damage to the fish ears used noise exposure levels and durations that were far more extreme than would be encountered under conditions similar to those expected at Northstar.

The situation for disturbance responses is less clear. Fish do react to underwater noise from vessels and move out of the way, move to deeper depths, or change their schooling behavior. The received levels at which fish react are not known and in fact are somewhat variable depending upon circumstances and species. In order to assess the possible effects of underwater project noise, it is best to examine project noise in relation to continuous noises routinely produced by other projects and activities such as shipping, fishing, *etc.*

Construction activities at Northstar produced both impulsive sounds (*e.g.,* pile driving) and longer-duration sounds. Short, sharp sounds can cause overt or subtle changes in fish behavior. Chapman and Hawkins (1969) tested the reactions of whiting (hake) in the field to an airgun. When the airgun was fired, the fish dove from 82 to 180 ft (25 to 55 m) depth and formed a compact layer.

The whiting dove when received sound levels were higher than 178 dB re 1 µPa (Pearson *et al.,* 1992).

Pearson *et al.* (1992) conducted a controlled experiment to determine effects of strong noise pulses on several species of rockfish off the California coast. They used an airgun with a source level of 223 dB re 1 µPa. They noted:

- Startle responses at received levels of 200–205 dB re 1 µPa and above for two sensitive species, but not for two other species exposed to levels up to 207 dB;
- Alarm responses at 177–180 dB for the two sensitive species, and at 186 to 199 dB for other species;
- An overall threshold for the above behavioral response at about 180 dB;
- An extrapolated threshold of about 161 dB for subtle changes in the behavior of rockfish; and
- A return to pre-exposure behaviors within the 20–60 minute exposure period.

In summary, fish often react to sounds, especially strong and/or intermittent sounds of low frequency. Sound pulses at received levels of 160 dB re 1 µPa may cause subtle changes in behavior. Pulses at levels of 180 dB may cause noticeable changes in behavior (Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Skalski *et al.,* 1992). It also appears that fish often habituate to repeated strong sounds rather rapidly, on time scales of minutes to an hour. However, the habituation does not endure, and resumption of the strong sound source may again elicit disturbance responses from the same fish. Underwater sound levels from Northstar, even during construction, were lower than the response threshold reported by Pearson *et al.* (1992), and are not likely to result in major effects to fish near Northstar.

The reactions of fish to research vessel sounds have been measured in the field with forward-looking echosounders. Sound produced by a ship varies with aspect and is lowest directly ahead of the ship and highest within butterfly-shaped lobes to the side of the ship (Misund *et al.,* 1996). Because of this directivity, fish that react to ship sounds by swimming in the same direction as the ship may be guided ahead of it (Misund, 1997). Fish in front of a ship that show avoidance reactions may do so at ranges of 164 to 1,148 ft (50 to 350 m; Misund, 1997), though reactions probably will depend on the species of fish. In some instances, fish will likely avoid the ship by swimming away from the path and become relatively concentrated to the side of the ship (Misund, 1997). Most schools of fish are likely to show avoidance if they are not in the path of the vessel. When the vessel passes over fish, some species, in some cases, show sudden escape responses that include lateral avoidance and/or downward compression of the school (Misund, 1997). Some fish show no reaction. Avoidance reactions are quite variable and depend on species, life history stage, behavior, time of day, whether the fish have fed, and sound propagation characteristics of the water (Misund, 1997).

Some of the fish species found in the Arctic are prey sources for odontocetes and pinnipeds. A reaction by fish to sounds produced by the operations at Northstar would only be relevant to marine mammals if it caused concentrations of fish to vacate the area. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the majority of equipment at Northstar. Impacts on fish behavior are predicted to be inconsequential. Thus, feeding odontocetes and pinnipeds would not be adversely affected by this minimal loss or scattering, if any, of reduced prey abundance.

Reactions of zooplankton to sound are, for the most part, not known. Their ability to move significant distances is limited or nil, depending on the type of zooplankton. Behavior of zooplankters is not expected to be affected by drilling and production operations at Northstar. These animals have exoskeletons and no air bladders. Many crustaceans can make sounds, and some crustacea and other invertebrates have some type of sound receptor. Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Some feeding bowhead whales may occur in the Alaskan Beaufort Sea in July and August, and others feed intermittently during their westward migration in September and October (Richardson and Thomson [eds.], 2002; Lowry *et al.,* 2004). A reaction by zooplankton to sounds produced by the operations at Northstar would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the majority of equipment at Northstar. Impacts on zooplankton behavior are predicted to be inconsequential. Thus, feeding mysticetes would not be adversely affected by this minimal loss or scattering, if any, of reduced zooplankton abundance.

Potential Impacts From Ice Road Construction

Ringed seals dig lairs in the sea ice near and around Northstar during the pupping season. There is the potential for ice road construction to impact areas of the ice used by ringed seals to create these lairs and breathing holes. Ice habitat for ringed seal breathing holes and lairs (especially for mothers and pups) is normally associated with pressure ridges or cracks (Smith and Stirling, 1975). The amount of habitat altered by Northstar ice road construction is minimal compared to the overall habitat available in the region. Densities of ringed seals on the ice near Northstar during late spring are similar to densities seen elsewhere in the region (Miller *et al.,* 1998b; Link *et al.,* 1999; Moulton *et al.,* 2002, 2005). Ringed seals use multiple breathing holes (Smith and Stirling, 1975; Kelly and Quakenbush, 1990) and are not expected to be adversely affected by the loss of one to two breathing holes within the thickened ice road. Ringed seals near Northstar appear to have the ability to open new holes and create new structures throughout the winter, and ringed seal use of landfast ice near Northstar did not appear to be much different than that of ice 1.2–2.2 mi away (2–3.5 km; Williams *et al.,* 2002). Active seal structures were found within tens of meters of thickened ice (Williams *et al.,* 2006b,c). A few ringed seals occur within areas of artificially thickened ice if cracks that can be exploited by seals form in that thickened ice. Therefore, ice road construction activities are not anticipated to have a major impact on the availability of ice for lairs and breathing holes for ringed seals in the vicinity of Northstar.

Potential Impacts From an Oil Spill

Oil spill probabilities for the Northstar project have been calculated based on historic oil spill data. Probabilities vary depending on assumptions and method of calculation. A reanalysis of worldwide oil spill data indicates the probability of a large oil spill (≤1,000 barrels) during the lifetime of Northstar is low (S.L. Ross Environmental Research Ltd., 1998). That report uses standardized units such as well-years and pipeline mile-years to develop oil spill probabilities for the Northstar project. Well-years represent the summed number of years that the various wells will be producing, and mile-years represent the length of pipeline times the amount of time the

pipeline is in service. The calculated probability of a large oil spill takes into account the state-of-the-art engineering and procedures used at Northstar. That probability is far lower than previously-estimated probabilities (23–26%), which were based on Minerals Management Service (MMS, now the Bureau of Ocean Energy Management [BOEM]), studies of offshore oil field experience in the Gulf of Mexico and California (USACE, 1998a).

Based on the MMS exposure variable and an estimated production of 158 million barrels of oil, the probability of one or more well blowouts or tank spills >1,000 barrels on Seal Island is 7% throughout the life of the project (approximately 15–20 years; USACE, 1998a). The chance of the maximum estimated well blowout volume (225,000 barrels) being released is very low. Tank spills would likely be contained to the island itself. Based on the MMS exposure variable, there is an estimated 19% probability of one or more offshore pipeline ruptures or leaks releasing 1,000 barrels or more. However, of the 12 pipeline spills in OCS areas of >1,000 barrels from 1964–1992, anchor damage to the pipeline caused 7 spills, hurricane damage caused 2, trawl damage caused 2, and pipeline corrosion caused 1. The Northstar pipeline is buried, and there is minimal boat traffic in the area, therefore eliminating damage from anchors or trawls. With these two events eliminated, the risk of an offshore pipeline spill is reduced to 5%. A second exposure variable, based on the CONCAWE exposure variable (which is a European organization that maintains a database relevant to environment, health, and safety activities associated with the oil industry), indicates there is a 1.6 to 2.4% probability for one or more offshore pipeline ruptures or leaks releasing >1,000 barrels (USACE, 1998a). It should also be noted that production at BP's Northstar facility has declined significantly since it originally began operating nearly 10 years ago. The oil spill assessment conducted in the late 1990s was based on original peak production levels (which was approximately 80,000 barrels/day), not current production levels (which is approximately 18,000 barrels/day; B. Streever, BP Senior Environmental Studies Advisor, 2011, pers. comm.).

In the unlikely event of an oil spill from the Northstar pipeline, flow through the line can be stopped. There are automated isolation valves at each terminus of pipeline and at the mainland landfall, including along the sales line at Northstar Island, where the pipeline comes onshore, and at Pump Station 1. These would allow isolation of the marine portion of the line at the island and at the shore landing south of the island.

The Northstar pipe wall thickness is approximately 2.8 × greater than that required to contain the maximum operating gas pressure. Therefore, the probability of a gas pipeline leak is considered to be low. Also, a gas pipeline leak is not considered to be a potential source of an oil spill.

(1) Oil Effects on Seal and Whale Prey

Arctic cod and other fishes are a principal food item for beluga whales and seals in the Beaufort Sea. Anadromous fish are more sensitive to oil when in the marine environment than when in the fresh water environment (Moles *et al.,* 1979). Generally, arctic fish are more sensitive to oil than are temperate species (Rice *et al.,* 1983). However, fish in the open sea are unlikely to be affected by an oil spill. Fish in shallow nearshore waters could sustain heavy mortality if an oil slick were to remain in the area for several days or longer. Fish concentrations in shallow nearshore areas that are used as feeding habitat for seals and whales could be unavailable as prey. Because the animals are mobile, effects would be minor during the ice-free period when whales and seals could go to unaffected areas to feed.

Effects of oil on zooplankton as food for bowhead whales were discussed by Richardson ([ed.] 1987). Zooplankton populations in the open sea are unlikely to be depleted by the effects of an oil spill. Oil concentrations in water under a slick are low and unlikely to have anything but very minor effects on zooplankton. Zooplankton populations in near surface waters could be depleted; however, concentrations of zooplankton in near-surface waters generally are low compared to those in deeper water (Bradstreet *et al.,* 1987; Griffiths *et al.,* 2002).

Some bowheads feed in shallow nearshore waters (Bradstreet *et al.,* 1987; Richardson and Thomson [eds.], 2002). Wave action in nearshore waters could cause high concentrations of oil to be found throughout the water column. Oil slicks in nearshore feeding areas could contaminate food and render the site unusable as a feeding area. However, bowhead feeding is uncommon along the coast near the Northstar Development area, and contamination of certain areas would have only a minor impact on bowhead feeding. In the Beaufort Sea, Camden Bay and Point Barrow are more common feeding grounds for bowhead whales. Additionally, gray whales do not commonly feed in the Beaufort Sea and are rarely seen near the Northstar Development area.

Effects of oil spills on zooplankton as food for seals would be similar to those described above for bowhead whales. Effects would be restricted to nearshore waters. During the ice-free period, effects on seal feeding would be minor.

Bearded seals consume benthic animals. Wave action in nearshore waters could cause oil to reach the bottom through adherence to suspended sediments (Sanders *et al.,* 1990). There could be mortality of benthic animals and elimination of some benthic feeding habitat. During the ice-free period, effects on seal feeding would be minor.

Effects on availability of feeding habitat would be restricted to shallow nearshore waters. During the ice-free period, seals and whales could find alternate feeding habitats.

The ringed seal is the only marine mammal present near Northstar in significant numbers during the winter. An oil spill in shallow waters could affect habitat availability for ringed seals during winter. The oil could kill ringed seal food and/or drive away mobile species such as the arctic cod. Effects of an oil spill on food supply and habitat would be locally significant for ringed seals in shallow nearshore waters in the immediate vicinity of the spill and oil slick in winter. Effects of an oil spill on marine mammal foods and habitat under other circumstances are expected to be minor.

(2) Oil Effects on Habitat Availability

The subtidal marine plants and animals associated with the Boulder Patch community of Stefansson Sound are not likely to be affected directly by an oil spill from Northstar Island, seaward of the barrier islands and farther west. The only type of oil that could reach the subtidal organisms (located in 16 to 33 ft [5 to 10 m] of water) would be highly dispersed oil created by heavy wave action and vertical mixing. Such oil has no measurable toxicity (MMS, 1996). The amount and toxicity of oil reaching the subtidal marine community is expected to be so low as to have no measurable effect. However, oil spilled under the ice during winter, if it reached the relevant habitat, could act to reduce the amount of light available to the kelp species and other organisms directly beneath the spill. This could be an indirect effect of a spill. Due to the highly variable winter lighting conditions, any reduction in light penetration resulting from an oil spill would not be expected to have a

significant impact on the growth of the kelp communities.

Depending on the timing of a spill, planktonic larval forms of organisms in arctic kelp communities such as annelids, mollusks, and crustaceans may be affected by floating oil. The contact may occur anywhere near the surface of the water column (MMS, 1996). Due to their wide distribution, large numbers, and rapid rate of regeneration, the recovery of marine invertebrate populations is expected to occur soon after the surface oil passes. Spill response activities are not likely to disturb the prey items of whales or seals sufficiently to cause more than minor effects. Additionally, the likelihood of an oil spill is expected to be very low.

In conclusion, NMFS has preliminarily determined that BP's proposed operation of the Northstar Development area is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses (where relevant).

As part of its application, BP proposed several mitigation measures in order to ensure the least practicable adverse impact on marine mammal species that may occur in the proposed project area. BP proposed different mitigation measures for the ice-covered season and for the open-water season. The proposed mitigation measures are described fully in BP's application (see **ADDRESSES**) and summarized here.

Ice-Covered Season Proposed Mitigation Measures

In order to reduce impacts to ringed seal construction of birth lairs, BP must begin winter construction activities (*e.g.,* ice road construction) on the sea ice as early as possible once weather and ice conditions permit such activities. Any ice road or other construction activities that are initiated after March 1 in previously undisturbed areas in waters deeper than 10 ft (3 m) must be surveyed, using trained dogs, in order to identify and avoid ringed seal structures by a minimum of 492 ft (150 m). If dog surveys are conducted, trained dogs shall search all floating sea ice for any ringed seal structures. Those surveys shall be done prior to the new proposed activity on the floating sea ice to provide information needed to prevent injury or mortality of young seals. Additionally, after March 1 of each year, activities should avoid, to the greatest extent practicable, disturbance of any located seal structure. It should be noted that since 2001, none of BP's activities took place after March 1 in previously undisturbed areas during late winter, so no on-ice searches were conducted.

Open-Water Season Proposed Mitigation Measures

All non-essential boat, hovercraft, barge, and air traffic shall be scheduled to avoid periods when whales (especially bowhead whales) are migrating through the area. Helicopter flights to support Northstar activities shall be limited to a corridor from Seal Island to the mainland, and, except when limited by weather or personnel safety, shall maintain a minimum altitude of 1,000 ft (305 m), except during takeoff and landing.

Impact hammering activities may occur at any time of year to repair sheet pile or dock damage due to ice impingement. Impact hammering is most likely to occur during the ice-covered season or break-up period and would not be scheduled during the fall bowhead migration. However, if such activities were to occur during the open-water or broken ice season, certain mitigation measures that are described here are proposed to be required of BP. Based on studies by Blackwell *et al.* (2004a), it is predicted that only impact driving of sheet piles or pipes that are in the water (*i.e.,* those on the dock) could produce received levels of 190 dB re 1 µPa (rms) and then only in immediate proximity to the pile. The impact pipe driving in June and July 2000 did not produce received levels as high as 180 dB re 1 µPa (rms) at any location in the water. This was attributable to attenuation by the gravel and sheet pile walls (Blackwell *et al.,* 2004a). BP anticipates that received levels for any pile driving that might occur within the sheet pile walls of the island in the future would also be less than 180 dB (rms) at all locations in the water around the island. If impact pile driving were planned in areas outside the sheet pile walls, it is possible that received levels underwater might exceed the 180 dB re 1 µPa (rms) level.

NMFS has established acoustic thresholds that identify the received sound levels above which hearing impairment or other injury could potentially occur, which are 180 and 190 dB re 1 µPa (rms) for cetaceans and pinnipeds, respectively (NMFS, 1995, 2000). The established 180- and 190-dB re 1 µPa (rms) criteria are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before additional TTS measurements for marine mammals became available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. To prevent or at least minimize exposure to sound levels that might cause hearing impairment, a safety zone shall be established and monitored for the presence of seals and whales. Establishment of the safety zone of any source predicted to result in received levels underwater above 180 dB (rms) will be analyzed using existing data collected in the waters of the Northstar facility (see the ''Proposed Monitoring and Reporting'' section later in this document or BP's application).

If observations and mitigation are required, a protected species observer stationed at an appropriate viewing location on the island will conduct watches commencing 30 minutes prior to the onset of impact hammering or other identified activity. The ''Proposed Monitoring and Reporting'' section later in this document contains a description of the observer program. If pinnipeds are seen within the 190 dB re 1 µPa radius (the ''safety zone''), then operations shall shut down or reduce SPLs sufficiently to ensure that received SPLs do not exceed those prescribed here. If whales are observed within the 180 dB re 1 µPa (rms) radius, operations shall shut down or reduce SPLs sufficiently to ensure that received SPLs do not exceed those prescribed here. The shutdown or reduced SPL shall be maintained until such time as the observed marine mammal(s) has been seen to have left the applicable safety zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without resighting, whichever occurs sooner.

Should any new drilling into oil-bearing strata be required during the effective period of these regulations, the drilling shall not take place during either open-water or spring-time broken ice conditions.

Oil Spill Contingency Plan

The taking by harassment, injury, or mortality of any marine mammal species incidental to an oil spill is

prohibited. However, in the unlikely event of an oil spill, BP expects to be able to contain oil through its oil spill response and cleanup protocols. An oil spill prevention and contingency response plan was developed and approved by the Alaska Department of Environmental Conservation, U.S. Department of Transportation, U.S. Coast Guard, and BOEM (formerly MMS). The plan has been amended several times since its initial approval, with the last revision occurring in July 2010. Major changes since 1999 include the following: seasonal drilling restrictions from June 1 to July 20 and from October 1 until ice becomes 18 in (46 cm) thick; changes to the response planning standard for a well blowout as a result of reductions in well production rates; and deletion of ice auguring for monitoring potential sub-sea oil pipeline leaks during winter following demonstration of the LEOS leak detection system. Future changes to the response planning standards may be expected in response to declines in well production rates and pipeline throughput. The full plan can be viewed on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.*

The plan consists of five parts. A short summary of the information contained in each part of the plan follows next. For more details, please refer to the plan itself.

Part 1 contains the Response Action Plan, which provides initial emergency response actions and oil spill response scenarios. The Response Action Plan lays out who is to be notified in the case of a spill and how many people need to be on hand and for how long depending on the size and type of spill. It also outlines different deployment strategies, which include the use of vessels, helicopters, fixed-wing aircraft, vehicles, heavy all-terrain vehicles, and air boats, and during which seasons these strategies could be used. Several response scenarios and strategies were developed in accordance with the Alaska Administrative Code (AAC). They describe equipment, personnel, and strategies that could be used to respond to an oil spill. It should be noted that the scenarios are for illustration only and assume conditions only for the purposes of describing general procedures, strategies, tactics, and selected operational capabilities. This part of the plan discusses oil spill scenarios and response strategies, including: An oil storage tank rupture; a well blowout under typical summer conditions; a well blowout under typical winter conditions; a crude oil transmission pipeline release; a well blowout during typical spring conditions; a crude oil transmission pipeline rupture during spring break-up; a crude oil transmission pipeline rupture during summer; a crude oil transmission pipeline rupture during fall; and a crude oil transmission pipeline rupture during winter.

Part 2 contains the Prevention Plan, which describes prevention measures to be implemented by facility personnel and inspection and maintenance programs. Personnel who handle oil equipment receive training in general North Slope work procedures, spill prevention, environmental protection awareness, safety, and site-specific orientation. Personnel also receive training in oil spill notification, oil spill source control, and hazardous waste operations and emergency response safety. This section of the plan also outlines fuel transfer procedures, leak detection, monitoring, and operating requirements for crude oil transmission pipelines, and management of oil storage tanks, including inspections and protection devices. This section also discusses the possibilities of corrosion and the monitoring that is conducted to manage the corrosion control programs. This section of the plan also contains a table outlining different types, causes, and sizes of spills and the actions that are taken and in place to prevent such potential discharges. Another table in this section outlines the types of inspections that occur on daily, weekly, monthly, and annual schedules at Northstar to ensure the equipment is still functioning properly and that leaks are not occurring.

Part 3 of the plan contains Supplemental Information. Part 3 provides background information on the facility, including descriptions of the facility, the receiving environment for potential spills, the incident command system, maximum response operating limitations, response resources (personnel and equipment), response training and drills, and protection of environmentally sensitive areas. The receiving environments include oil in open-water, in water and ice during the break-up or freeze-up periods, and on ice. In conditions up to approximately 30% ice, the trajectory of spilled oil would be based on the winds and currents at Northstar. Assuming a 10-knot wind from the northeast, oil spilled at Northstar could reach the barrier island shore of Long Island and if not contained, oil moving inland through the barrier island cuts could reach the Kuparuk River Delta. Oil trapped under a floating solid ice cover would rise and gather in pools or lenses at the bottom of the ice sheet and may become trapped or entrained as new ice grows beneath the oil. Based on the very slow moving currents under the ice near Northstar, oil is unlikely to spread beyond the initial point of contact. During freeze-up, the oil will most likely be entrained in the solidifying grease ice and slush present on the water surface prior to forming an ice sheet. Storm winds at this time often break up and disperse the newly forming ice, leaving the oil to spread temporarily in an open water condition until it becomes incorporated in the next freezing cycle. At break-up, ice concentrations are highly variable from hour to hour and over short distances. In high ice concentrations, oil spreading is reduced and the oil is partially contained by the ice. As the ice cover loosens, more oil could escape into larger openings as the floes move apart. Eventually, as the ice concentration decreases, the oil on the water surface behaves essentially as an open water spill, with localized patches being temporarily trapped by wind against individual floes. Oil present on the surface of individual floes will move with the ice as it responds to winds and nearshore currents. The spreading of oil on ice is similar to spreading of oil on land or snow. The rate is controlled by the density and viscosity of the oil, and the final contaminated area is dictated by the surface roughness of the ice. As the ice becomes rougher, the oil pools get smaller and thicker. Oil spilled on ice spreads much more slowly than on water and covers a smaller final area. As a result, slicks on stable solid ice tend to be much thicker than equivalent slicks on water. The effective containment provided by even a minimal degree of ice roughness (inches) translates to far less cleanup time with the need for fewer resources than would be needed to deal with the equivalent spill on open water. In the Supplemental Information section of the plan, a description of the different environments (*e.g.,* open-water, freeze-up, etc.) is provided, including when those conditions occur and the types of ice thickness that are typical during each season.

The command system, which is described in Part 3, is compatible with the Alaska Regional Response Team Unified Plan and is based on the National Incident Management System. According to the plan, oil spill removal during the freeze-up or break-up seasons can be greatly enhanced by in situ burning. The ice provides containment, increasing the encounter rate and concentrating the oil for burning and recovery. The consensus of research on

spill response in broken ice conditions is that in situ burning is an effective response technique, with removal rates exceeding 85 percent in many situations (Shell *et al.,* 1983; SL Ross, 1983; SL Ross and DF Dickins, 1987; Singsaas *et al.,* 1994). A considerable amount of research has demonstrated in situ burning in broken ice. The research includes several smaller-scale field and tank tests (SL Ross *et al.,* 2003; Shell *et al.,* 1983; Brown and Goodman, 1986; Buist and Dickins, 1987; Smith and Diaz, 1987; Bech *et al.,* 1993; Guénette and Wighus, 1996) and one large field test (Singsaas *et al.,* 1994). Most of the tests involved large volumes of oil placed in a static test field of broken ice, resulting in substantial slick thicknesses for ignition. The few tests in unrestricted ice fields or in dynamic ice have indicated that the efficacy of in situ burning is sensitive to ice concentration and dynamics and thus the tendency for the ice floes to naturally contain the oil, the thickness (or coverage) of oil in leads between floes, and the presence or absence of brash (created when larger ice features interact or degrade) or frazil (''soupy'' mixture of very small ice particles that form as seawater freezes) ice which can absorb the oil. Oil spilled on solid ice or among broken ice in concentrations equal to or greater than 6-tenths has a high probability of becoming naturally contained in thicknesses sufficient for combustion. Field experience has shown that it is the small ice pieces (*e.g.,* the brash and frazil, or slush, ice) that accumulate with the oil against the edges of larger ice features (floes) and control the concentration (*e.g.,* thickness) of oil in an area, and control the rate at which the oil subsequently thins and spreads. The plan contains a summary discussion on the current state of understanding the scientific principles and physical processes involved for in situ burning of oil on melt pools during the ice melt phase in June or on water between floes during the break-up period in July, based on SL Ross *et al.* (2003). Further discussion also covers in situ burning of thinner slicks in mobile broken ice comprised of brash or frazil ice during the freeze-up shoulder season in October. Please refer to the plan for these discussions.

Part 4 discusses Best Available Technology (BAT). This section provides a rationale for the prevention technology in place at the facility and a determination of whether or not it is the best available technology. The plan identifies two methods for regaining well control once an incident has escalated to a surface blowout scenario as described in Part 1 of the plan. The two methods are: Well-capping and relief well drilling. BP investigations indicate that well-capping constitutes the BAT for source control of a blowout. Well-capping response operations are highly dependent on the severity of the well control situation. BP has the ability to move specialized personnel and equipment, *e.g.,* capping stack or cutting tools, to North Slope locations upon declaration of a well control event. The materials to execute control (*e.g.,* junk shots, hot tapping, freezing, or crimping), are small enough that they can be quickly made available to remote locations, even by aircraft, as necessary. BP has an inventory of well control firefighting equipment permanently warehoused on the North Slope. This equipment includes two 6,000 gallons per minute (gpm) fire pumps, associated piping, lighting, transfer pumps, Athey wagons, specialized nozzles, and fire monitor shacks. Maintaining this equipment on the North Slope minimizes the time to mobilize and transport well control response equipment in an actual blowout event. Relief well drilling technology is compatible to North Slope drilling operations although it may be sensitive to both the well location and well types; however, it can be a timely process. Onshore North Slope relief well durations are often estimated in the 40- to 90-day range. While BP has determined that well capping constitutes BAT for well source control, BP has deemed it prudent to also activate a separate team to pursue a relief well plan parallel to and independent of the primary well capping plan.

The pipeline source control procedures, required by the AAC, involve the placement of automatic shutdown valves at each terminus and at the shore crossing to stop the flow of oil or product/gas into the Northstar pipelines. Additionally, the oil pipeline across the Putuligayuk River includes a manual valve on both sides of the river. There are two technology options for the valves: Automatic ball valves and automatic gate valves. Both valve options, when installed in new condition, are similar in terms of availability, transferability, cost, compatibility, and feasibility. In terms of effectiveness, ball valves typically have slightly faster closure times than gate valves. For Northstar, automatic ball valves (block and bleed type) are used. As required by 18 AAC 75.055(b), the flow of oil or product/gas can be completely stopped by these valves within one hour after a discharge has been detected. The valve closure time for these types of valves is usually on the order of 2 to 3 minutes.

Part 5 outlines the Response Planning Standard, which provides calculations of the applicable response planning standards for Northstar, including a detailed basis for the calculation reductions to be applied to the response planning standards.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the mitigation measures proposed above provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance. Proposed measures to ensure availability of such species or stock for taking for certain subsistence uses is discussed later in this document (see ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

The proposed rule comment period will afford the public an opportunity to submit recommendations, views, and/or concerns regarding this action and the proposed mitigation measures. While NMFS has determined preliminarily that the proposed mitigation measures presented in this document will effect the least practicable adverse impact on the affected species or stocks and their habitat, NMFS will consider all public comments to help inform our final decision. Consequently, the proposed mitigation measures may be refined, modified, removed, or added to prior to the issuance of the final rule based on public comments received, and where appropriate, further analysis of any additional mitigation measures.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must, where applicable, set forth ''requirements pertaining to the monitoring and reporting of such taking''. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

The monitoring program proposed by BP in its application and described here is based on the continuation of previous monitoring conducted at Northstar. Information on previous monitoring can be found in the ''Previous Activities and Monitoring'' section found later in this document. The proposed monitoring program may be modified or supplemented based on comments or new information received from the public during the public comment period or from the peer review panel (see the ''Monitoring Plan Peer Review'' section later in this document).

The monitoring proposed by BP focuses on ringed seals and bowhead whales, as they are the most prevalent species found in the Northstar Development area. No monitoring is proposed specifically for bearded or spotted seals or for gray or beluga whales, as their occurrence near Northstar is limited. Few, if any, observations of these species were made during the intensive monitoring from 1999 to 2004. However, if sightings of these (or other) species are made, those observations will be included in the monitoring reports (described later in this document) that will be prepared.

Annual Monitoring Plans

BP proposes to continue the long-term observer program, conducted by island personnel, of ringed seals during the spring and summer. This program is intended to assess the continued long-term stability of ringed seal abundance and habitat use near Northstar as indexed by counts obtained on a regular and long-term basis. The proposed approach is to continue the Northstar seal count that is conducted during the period May 15–July 15 each year from the 108 ft (33 m) high process module by Northstar staff following a standardized protocol since 2005. Counts are made on a daily basis (weather permitting), between 11:00–19:00, in an area of approximately 3,117 ft (950 m) around the island, for a duration of approximately 15 minutes. Counts will only be made during periods with visibility of 0.62 mi (1 km) or more and with a cloud ceiling of more than 295 ft (90 m).

BP proposes to continue monitoring the bowhead migration in 2011 and subsequent years for approximately 30 days each September through the recording of bowhead calls. BP proposes to deploy a Directional Autonomous Seafloor Acoustic Recorder (DASAR; Greene *et al.,* 2004) or similar recorder about 9.3 mi (15 km) north of Northstar, consistent with a location used in past years (as far as conditions allow). The data of the offshore recorder can provide information on the total number of calls detected, the temporal pattern of calling during the recording period, possibly the bearing to calls, and call types. These data can be compared with corresponding data from the same site in previous years. If substantially higher or lower numbers of calls are recorded than were recorded at that site in previous years, further analyses and additional monitoring will be considered in consultation with NMFS and North Slope Borough (NSB) representatives. A second DASAR, or similar recorder, will be deployed at the same location to provide a reasonable level of redundancy.

In addition to the DASAR already mentioned, BP proposes to install an acoustic recorder about 1,476 ft (450 m) north of Northstar, in the same area where sounds have been recorded since 2001. This recorder will be installed for approximately 30 days each September, corresponding with the deployment of the offshore DASAR (or similar recorder). The near-island recorder will be used to record and quantify sound levels emanating from Northstar. If island sounds are found to be significantly stronger or more variable than in the past, and if it is expected that the stronger sounds will continue in subsequent years, then further consultation with NMFS and NSB representatives will occur to determine if more analyses or changes in monitoring strategy are appropriate. A second acoustic recorder will be deployed to provide a reasonable level of redundancy.

Contingency Monitoring Plans

If BP needs to conduct an activity (*i.e.,* pile driving) capable of producing pulsed underwater sound with levels ≥180 or ≥190 dB re 1 μPa (rms) at locations where whales or seals could be exposed, BP proposes to monitor safety zones defined by those levels. [The safety zones were described in the ''Proposed Mitigation'' section earlier in this document.] One or more on-island observers, as necessary to scan the area of concern, will be stationed at location(s) providing an unobstructed view of the predicted safety zone. The observer(s) will scan the safety zone continuously for marine mammals for 30 minutes prior to the operation of the sound source. Observations will continue during all periods of operation. If whales and seals are detected within the (respective) 180 or 190 dB distances, a shutdown or other appropriate mitigation measure (as described earlier in this document) shall be implemented. The sound source will be allowed to operate again when the marine mammals are observed to leave the safety zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without resighting, whichever occurs sooner. The observer will record the: (1) Species and numbers of marine mammals seen within the 180 or 190 dB zones; (2) bearing and distance of the marine mammals from the observation point; and (3) behavior of marine mammals and any indication of disturbance reactions to the monitored activity.

If BP initiates significant on-ice activities (*e.g.,* construction of new ice roads, trenching for pipeline repair, or projects of similar magnitude) in previously undisturbed areas after March 1, trained dogs, or a comparable method, will be used to search for seal structures. If such activities do occur after March 1, a follow-up assessment must be conducted in May of that year to determine the fate of all seal structures located during the March monitoring. This monitoring must be conducted by a qualified biological researcher approved in advance by NMFS after a review of the observer's qualifications.

BP will conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds with expected source levels of 90 dBA or greater created by on-ice activity at Northstar that have not been measured in previous years. In addition, BP will conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds for sources on Northstar Island with expected received levels at the water's edge that exceed 90 dBA that have not been measured in previous years. These data will be collected in order to assist in the development of future monitoring and mitigation measures.

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)).

NMFS established an independent peer review panel to review BP's proposed monitoring plan associated with the MMPA application for these proposed regulations. The panel met in early March 2011. After completion of the peer review, NMFS will consider all recommendations made by the panel, incorporate appropriate changes into the monitoring requirements of the final rule and subsequent LOAs, and publish the panel's findings and recommendations in the final rule.

Reporting Measures

An annual report on marine mammal monitoring and mitigation will be submitted to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office, on June 1 of each year. The first report will cover the period from the effective date of the LOA through October 31, 2011. Subsequent reports will cover activities from November 1 of one year through October 31 of the following year. Ending each annual report with October 31 coincides with the end of the fall bowhead whale migration westward through the Beaufort Sea.

The annual reports will provide summaries of BP's Northstar activities. These summaries will include the following: (1) Dates and locations of ice-road construction; (2) on-ice activities; (3) vessel/hovercraft operations; (4) oil spills; (5) emergency training; and (6) major repair or maintenance activities that might alter the ambient sounds in a way that might have detectable effects on marine mammals, principally ringed seals and bowhead whales. The annual reports will also provide details of ringed seal and bowhead whale monitoring, the monitoring of Northstar sound via the nearshore DASAR, descriptions of any observed reactions, and documentation concerning any apparent effects on accessibility of marine mammals to subsistence hunters.

If specific mitigation and monitoring are required for activities on the sea ice initiated after March 1 (requiring searches with dogs for lairs), during the operation of strong sound sources (requiring visual observations and shutdown procedures), or for the use of new sound sources that have not previously been measured, then a preliminary summary of the activity, method of monitoring, and preliminary results will be submitted within 90 days after the cessation of that activity. The complete description of methods, results, and discussion will be submitted as part of the annual report.

In addition to annual reports, BP proposes to submit a draft comprehensive report to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office, no later than 240 days prior to the expiration of these regulations. This comprehensive technical report will provide full documentation of methods, results, and interpretation of all monitoring during the first four and a quarter years of the LOA. Before acceptance by NMFS as a final comprehensive report, the draft comprehensive report will be subject to review and modification by NMFS scientists.

Any observations concerning possible injuries, mortality, or an unusual marine mammal mortality event will be transmitted to NMFS, Office of Protected Resources, and the Alaska Stranding and Disentanglement Program, within 48 hours of the discovery. At a minimum, reported information should include: (1) The time, date, and location (latitude/longitude) of the animal(s); (2) the species identification or description of the animal(s); (3) the fate of the animal(s), if known; and (4) photographs or video footage of the animal (if equipment is available).

Adaptive Management

The final regulations governing the take of marine mammals incidental to operation of the Northstar facility in the U.S. Beaufort Sea will contain an adaptive management component. In accordance with 50 CFR 216.105(c), regulations for the proposed activity must be based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review. The use of adaptive management will allow NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate for subsequent LOAs.

The following are some of the possible sources of applicable data:

- Results from BP's monitoring from the previous year;
- Results from general marine mammal and sound research; or
- Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

If, during the effective dates of the regulations, new information is presented from monitoring, reporting, or research, these regulations may be modified, in whole, or in part after notice and opportunity of public review, as allowed for in 50 CFR 216.105(c). In addition, LOAs shall be withdrawn or suspended if, after notice and opportunity for public comment, the Assistant Administrator finds, among other things, the regulations are not being substantially complied with or the taking allowed is having more than a negligible impact on the species or stock or an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses, as allowed for in 50 CFR 216.106(e). That is, should substantial changes in marine mammal populations in the project area occur or monitoring and reporting show that operation of the Northstar facility is having more than a negligible impact on marine mammals or an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses, then NMFS reserves the right to modify the regulations and/or withdraw or suspend a LOA after public review.

Previous Activities and Monitoring

The ''Background on the Northstar Development Facility'' section earlier in this document discussed activities that have occurred at Northstar since construction began in the winter of 1999/2000. Activities that occurred at Northstar under the current regulations (valid April 6, 2006, through April 6, 2011) include transportation (*e.g.,* helicopter, hovercraft, tracked vehicles, and vessels), production activities (*e.g.,* power generation, pipe driving, etc.), construction and maintenance activities, and monitoring programs.

Under those regulations and annual LOAs, BP has been conducting marine mammal monitoring within the action area to satisfy monitoring requirements set forth in MMPA authorizations. The monitoring programs have focused mainly on bowhead whales and ringed seals, as they are the two most common

marine mammal species found in the Northstar Development area. Monitoring conducted by BP during this time period included: (1) Underwater and in-air noise measurements; (2) monitoring of ringed seal lairs; (3) monitoring of hauled out ringed seals in the spring and summer months; and (4) acoustic monitoring of the bowhead whale migration. Additionally, although it was not a requirement of the regulations or associated LOAs, BP has also incorporated work done by Michael Galginaitis. Since 2001, Galginaitis has observed and characterized the fall bowhead whale hunts at Cross Island.

As required by the regulations and annual LOAs, BP has submitted annual reports, which describe the activities and monitoring that occurred at Northstar. BP also submitted a draft comprehensive report, covering the period 2005–2009. The comprehensive report concentrates on BP's Northstar activities and associated marine mammal and acoustic monitoring projects from 2005–2009. However, monitoring work prior to 2004 is summarized in that report, and activities in 2010 at Northstar were described as well. The annual reports and draft comprehensive report (Richardson [ed.], 2010) are available on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* A summary of the monitoring can be found here and elsewhere in this document. This section summarizes some of the key objectives and findings; however, specific results and findings of some of the monitoring work that has been conducted at Northstar over the past decade are also described in sections throughout this document.

Prior to the start of construction (1997–1999) and during the first few years of Northstar construction and operation (2000–2002), BP conducted aerial surveys to study the distribution and abundance of seals around Northstar. In addition to aerial surveys, specially-trained dogs were also used to locate seal lairs during the ice-covered seasons of 1999–2000 and 2000–2001. It was determined that such intensive monitoring was not required after 2002; however, BP continued to observe and count seals near Northstar in order to determine if seals continued to use the area, and, if so, if that usage was similar to that found in previous years. The current monitoring consists of someone making counts from a platform between May 15 and July 15 each year, although there is some variation in the number of days observations are made during that period from year-to-year. Counts ranged from a low of three seals counted during 57 observation days in 2007 to a high of 811 seals counted during 61 observation days in 2009 (Richardson [ed.], 2010). Based on the counts that have been conducted, ringed seals continue to haul out around Northstar.

The LOAs also contained requirements to conduct underwater measurements of sounds produced by Northstar-related industrial activities. To obtain these measurements, BP deployed DASARs both near and offshore of Northstar. The exact distances and configurations are contained in Richardson [ed.] (2010). Median levels of sound were found to be low offshore of Northstar (95.4–103.1 dB re 1 μPa when measured 9.2 mi [14.9 km] away). Also, industrial sounds were found to contribute less of the sound in the 10–450 Hz band during 2005–2009 than it did during the period of 2001–2004.

Since 2001, BP has also been conducting acoustic monitoring to study the fall westward migration of bowhead whales through the Beaufort Sea and to determine whether or not sounds from Northstar are affecting that migration. The DASARs are also used for this monitoring effort. BP has studied the rate of calls per year and has also worked to localize the calls. Some of the key findings from this work showed that in 8 out of 9 seasons during the 2001–2009 period, bearings to whale calls detected at the same DASAR site 9.2 mi (14.9 km) offshore of Northstar were predominantly to the northeast or east-northeast of that location. Additionally, analysis of the 2008 data demonstrated that bowhead whale calls are directional, which may help to explain why fewer calls are detected west of Northstar than to the east (Richardson [ed.], 2010). In the comprehensive report (Richardson [ed.], 2010), BP compared calls from 2009 with those from 2001–2004 to try and draw conclusions about effects on the distribution of calling bowheads. BP found that from 2001–2004, the southern edge of the distribution of bowhead calls tended to be slightly but statistically significantly farther offshore when the underwater sound level near Northstar increased above baseline values. For the 2009 data, BP was unable to conclusively identify one specific relationship between offshore distances of bowhead calls and industrial sound.

The annual reports and comprehensive report (Richardson [ed.], 2010) also contain information on the fall Nuiqsut bowhead whale hunts. The information contained in these reports show that during 2005–2009, the whalers struck 3 or 4 whales (of a quota of 4) in all years except 2005 (only one whale struck and landed). The whalers did not attribute the poor harvest in 2005 to activities at Northstar. That year, there was severe local ice and very poor weather. There was some vessel interference; however, none of that was with vessels at or conducting activities for Northstar. Sealing activities were not common near the Northstar site prior to its construction, and they are not common there now. Most sealing occurs more than 20 mi (32 km) from Northstar.

During the period of validity of the current regulations, no activities have occurred after March 1 in previously undisturbed areas during late winter. Therefore, no monitoring with specially-trained dogs has been required. Also during this period, there were 82 reportable small spills (such as 0.25 gallons of hydraulic fluid, 3 gallons of power steering fluid, or other relatively small amounts of sewage, motor oil, hydraulic oil, sulfuric acid, etc.), three of which reached Beaufort water or ice. All material (for example, 0.03 gallons of hydraulic fluid) from these three spills was completely recovered.

NMFS has determined that BP complied with the mitigation and monitoring requirements set forth in regulations and annual LOAs. In addition, NMFS has determined that the impacts on marine mammals and on the availability of marine mammals for subsistence uses from the activity fell within the nature and scope of those anticipated and authorized in the previous authorization (supporting the analysis in the current authorization).

Estimated Take of Marine Mammals

One of the main purposes of NMFS' effects assessments is to identify the permissible methods of taking, which involves an assessment of the following criteria: the nature of the take (*e.g.,* resulting from anthropogenic noise vs. from ice road construction, *etc.*); the regulatory level of take (*i.e.,* mortality vs. Level A or Level B harassment); and the amount of take. In the ''Potential Effects of the Specified Activity on Marine Mammals'' section earlier in this document, NMFS identified the different types of effects that could potentially result from activities at BP's Northstar facility.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral

patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].'' Take by Level B harassment is anticipated from operational sounds extending into the open-water migration paths of cetaceans and open-water areas where pinnipeds might be present, from the physical presence of personnel on the island, vehicle traffic, and by helicopter overflights. Take of hauled out pinnipeds, by harassment, could also occur as a result of in-air sound sources. Certain species may have a behavioral reaction to the sound emitted during the activities; however, hearing impairment as a result of these activities is not anticipated because of the low source levels for much of the equipment that is used. There is also a potential for take by injury or mortality of ringed seals from ice road construction activities. Because of the slow speed of hovercraft and vessels used for Northstar operations, it is highly unlikely that there would be any take from these activities.

Because BP operates the Northstar facility year-round, take of marine mammals could occur at any time of year. However, take of all marine mammal species that could potentially occur in the area is not anticipated during all seasons. This is because of the distribution and habitat preferences of certain species during certain times of the year. This is explained further in this section and BP's application (see **ADDRESSES**).

Estimated Takes in the Ice-covered Season

Potential sources of disturbance to marine mammals from the Northstar project during the ice-covered period consist primarily of vehicle traffic along the ice-road, helicopter traffic, and the ongoing production and drilling operations on the island. During the ice-covered season, the ringed seal is the only marine mammal that occurs regularly in the area of landfast ice surrounding Northstar. Spotted seals do not occur in the Beaufort Sea in the ice-covered season. Small numbers of bearded seals occur occasionally in the landfast ice in some years. Bowhead and beluga whales are absent from the Beaufort Sea in winter (or at least from the landfast ice portions of the Beaufort Sea), and in spring their eastward migrations are through offshore areas north of the landfast ice, which excludes whales from areas close to Northstar. Gray whales are also absent from this part of the Beaufort Sea during the ice-covered season. Therefore, takes of marine mammals during the ice-covered season were only estimated for ringed and bearded seals.

Potential displacement of ringed seals was more closely related to physical alteration of sea ice by industry than to exposure to detectable levels of low-frequency industrial sound during winter and spring (Williams *et al.,* 2006; Richardson *et al.,* 2008b; Moulton *et al.,* MS). The distance within which displacement of ringed seals might occur near a development like Northstar was defined as the physically affected area plus a 328 ft (100 m) buffer zone. A study from a drill site in the Canadian Beaufort Sea provided similar results (Harwood *et al.,* 2007). The Northstar ice road is typically flooded and thickened and/or cleared of snow. The physically affected ice road area is about 1,312 ft (400 m) wide, and this is extended with 328 ft (100 m) on either side to a total width of 1,969 ft (600 m) to derive the zone of displacement. This zone of displacement (or impact zone) around physically affected areas such as the ice road, work areas on the ice, and Northstar Island itself, is used to calculate the number of seals potentially affected (Richardson *et al.,* 2008b).

(1) Bearded Seal

The few bearded seals that remain in the area during winter and spring are generally found north of Northstar in association with the pack ice or the edge of the landfast ice. Bearded seals were not observed on the fast ice during the 1997 or 1998 BP/LGL surveys (G. Miller, LGL Ltd., pers. comm.), but small numbers were noted there in 1999–2002 (Moulton *et al.,* 2003b). No bearded seals were seen during spring aerial surveys from Oliktok Point to Flaxman Island (Frost *et al.,* 1997, 1998). The large size of this phocid makes it conspicuous to observers, reducing the likelihood of missing animals on the ice and hence underestimating abundance. Based on available data, and the ecology of bearded seals, it is unlikely that more than a few bearded seals (and most likely none) will be present in close proximity (<328 ft [100 m]) to the ice road and Northstar itself during the ice-covered season. The most probable number of bearded seals predicted to be potentially impacted by Northstar activities during the ice-covered season in any one year is zero. However, to allow for unexpected circumstances that might lead to take of bearded seals when they are present, BP requests take of two bearded seals per year during the ice-covered period by Level B harassment.

(2) Ringed Seal

Individual ringed seals in the Northstar area during the ice-covered season may be displaced a short distance away from the ice road corridors connecting the production islands to the mainland. However, traffic along the ice roads was at a maximum during the initial construction period in 2000, and there was no more than localized displacement of ringed seals (Williams *et al.,* 2002, 2006c; Moulton *et al.,* 2003a, 2005, MS). Seal densities near Northstar during spring were not significantly affected by industrial activities in 2000–2004 (Moulton *et al.,* 2005, MS). Seal monitoring each spring since 2005, based on visual observations from the Northstar module in the May 15–July 15 period, has shown continued occurrence of ringed seals near Northstar facilities, though with large variations within and between years (Aerts, 2009). During most of the year, all age and sex classes, except for newborn pups, could occur in the Northstar area. In late March and April, ringed seals give birth; therefore, at that time of year young pups may also be encountered.

Detailed monitoring of ringed seals near Northstar was done during spring and (in some years) winter of 1997 to 2002, including three years of Northstar construction and initial oil production (2000–2002). During the 2003–2004 and 2004–2005 ice-covered and break-up periods, no intensive ringed seal monitoring was required and seal sightings were recorded opportunistically from Northstar Island. Since 2005, these observations from Northstar have occurred in a more systematic fashion from mid-May through mid-July each year, with the main objective to document seasonal and annual variations in seals present in an area of 0.62 mi (1 km) around Northstar (Rodrigues and Williams, 2006; Rodrigues and Richardson, 2007; Aerts and Rodrigues, 2008; Aerts, 2009). BP estimated annual takes of ringed seal based on data collected from the intensive aerial monitoring program conducted in 1997–2002.

The numbers of seals present and potentially affected by Northstar activities were estimated using the 1997–2002 seal data according to the following steps (see Richardson *et al.,* 2008b for more detail):

(1) Defining a potential impact zone, *i.e.,* the area within which seals might have been affected by Northstar activities. This zone consisted of a 328 ft (100 m) buffer around the ice road, work areas on the ice, and Northstar Island and covered a total area of approximately 1.5 mi^2 (4 km^2).

(2) Defining a reference zone, *i.e.,* the area without influence of industrial

activities. This zone was defined as an area at distances of 2.5–6.2 mi (4–10 km) from the ice road, work areas on the ice, and Northstar Island. The reference zone was used to calculate the number and density of ringed seals that one would expect in the potential impact zone if there was no industrial activity. Because seal density is related to water depth, densities within the reference zone were calculated for four categories of water depth. Expected density near Northstar was a weighted average of those values (weighting by the proportions of the potential impact zone that were within each depth stratum).

(3) Calculating the expected number of seals present in the potential impact zone in the absence of industrial activities (based on data from the reference zone) for each year separately. The seal density of the reference zone was multiplied by the total area of the potential impact zone (1.5 mi^2 [4 km^2]) to obtain the maximum number of seals that could be present and potentially affected.

(4) Multiplying the number of seals calculated under step 3 with a correction factor of 2.84 (to correct for the ''detection bias'' and ''availability bias''). ''Detection bias'' refers to the fact that aerial surveyors do not see every seal that is on the ice and potentially sightable. ''Availability bias'' refers to the fact that seals are not always hauled out above the ice and snow, and thus available to be seen by aerial surveyors. Those two correction factors are based, respectively, on Frost *et al.* (1988) and Kelly and Quakenbush (1990).

Results of these calculations show that 3–8 seals could be present in the potential impact zone (Table 3 in BP's application and Table 3 in this document). The period 1997–1999 can be considered as a pre-construction period and 2000–2002 as a construction period, with the most intensive construction activities occurring in 2000 and 2001. This means that, if there was some displacement of ringed seals away from Northstar in the ice-covered season due to construction activities, BP would have expected fewer seals within the potential impact zone during 2000–2002 than in 1997–1999. That was not observed, although inter-year comparisons should be treated cautiously given the possibility of year-to-year differences in environmental conditions and sightability of seals during aerial surveys. The presence of numerous seals near the Northstar facilities during late spring of 2000, 2001 and 2002 indicates that any displacement effect was localized and, if it occurred at all, involved only a small fraction of the seals that would otherwise have been present. To allow for unexpected circumstances that might lead to take of ringed seals, BP requests take of eight ringed seals per year during the ice-covered period by Level B harassment. In the unlikely event that a ringed seal lair is crushed or flooded, BP also requests take of up to five ringed seals (including pups) by injury or mortality per year.

TABLE 3—NUMBERS OF RINGED SEALS EXPECTED TO OCCUR IN SPRING 1997–2002 WITHIN THE ''POTENTIAL IMPACT ZONE'' IN THE ABSENCE OF ANY NORTHSTAR IMPACT, BASED ON OBSERVED SEAL DENSITIES IN A REFERENCE AREA 2.5–6.2 MI (4–10 KM) AWAY FROM NORTHSTAR. THE POTENTIAL IMPACT ZONE INCLUDED AREAS WITHIN 328 FT (100 M) OF THE ICE ROAD AND NORTHSTAR/SEAL ISLAND (RICHARDSON ET AL., 2008B)

BP/LGL survey	Expected density [a] (seals/km^2)	Expected number of seals within potential impact zone	
		Uncorrected	Corrected [b]
1997	0.54	2	6
1998	0.36	1	4
1999	0.29	1	3
2000	0.59	2	7
2001	0.56	2	6
2002	0.67	3	8
Average 1997–2002	0.50	2	6

[a] This is the average uncorrected densities based on data from the zone 4–10 km away from the 2004 development zone, controlling for water depth by weighting density based on the proportions of the potential impact zone within the various depth strata.

[b] This is the ''uncorrected'' number multiplied by the 1.22 correction factor for seals hauled out but not seen by observers (Frost *et al.,* 1988), and by the 2.33 correction factor for seals not hauled out (Kelly and Quakenbush, 1990).

Estimated Takes in the Break-Up Season

Potential sources of disturbance to marine mammals from the Northstar project during the break-up period consist primarily of hovercraft and helicopter traffic, as well as the ongoing production and drilling operations on the island. Spotted seals and bowhead, gray, and beluga whales are expected to be absent from the Northstar project area during the break-up period. Therefore, take of those species during the break-up period was not estimated.

Similar to the ice-covered season, BP predicts that only very few bearded seals (and most likely none) could be present within the potential impact zone around the ice road and Northstar facilities during the break-up period. The most probable number of bearded seals predicted to be potentially impacted by Northstar activities during break-up in any one year is zero. However, to account for the possible presence of low numbers of bearded seals during this time, NMFS proposes to authorize the take of two bearded seals per year during the break-up season.

Impacts to ringed seals from Northstar activities during the break-up period are anticipated to be similar to those predicted during the ice-covered period. Additionally, the number of ringed seals present within the potential impact zone during the break-up period is expected to be similar to the number present during the ice-covered season. It is possible that some of these seals are the same individuals already counted as present during the latter stages of the ice-covered season (B. Kelly, pers. comm.). Thus, if any seals were affected during break-up, it is probable that some of these would be the same individuals. BP states that the requested Level B take of eight ringed seals per year during the ice-covered periods of 2011–2016 (see preceding subsection) is expected to also cover potentially affected seals during break-up. However, in case the same seals are taken during both periods, NMFS proposes to authorize the take of eight ringed seals by Level B harassment per year during the break-up period.

Estimated Takes in the Open-Water Season

Potential sources of disturbance to marine mammals from the Northstar project during the open-water period consist primarily of hovercraft and ACS vessels used for transfers of crew and supplies, barge and tugboat traffic, helicopter traffic, and the ongoing production and drilling operations on the island. During the open-water season all six species for which take authorization is sought can potentially be present in the Northstar area. Estimated annual numbers of potential open-water takes for each of these six species are summarized next.

(1) Spotted Seal

Pupping and mating occur in the spring when spotted seals are not in the Beaufort Sea. Hence, young pups would not be encountered in the Northstar Development area. All other sex and age classes may be encountered in small numbers during late summer/autumn. Spotted seals are most often found in waters adjacent to river deltas during the open-water season in the Beaufort Sea, and major haul-out concentrations are absent close to the project area. A small number of spotted seal haul-outs are (or were) located in the central Beaufort Sea in the deltas of the Colville River (which is more than 50 mi [80 km] from Northstar) and, previously, the Sagavanirktok River. Historically, these sites supported as many as 400–600 spotted seals, but in the late 1990s, less than 20 seals have been seen at any one site (Johnson *et al.,* 1999). In total, there are probably no more than a few tens of spotted seals along the coast of the central Alaska Beaufort Sea during summer and early fall. No spotted seals were positively identified during BP's Northstar marine mammal monitoring activities, although a few spotted seals might have been present. A total of 12 spotted seals were positively identified near the source vessel during open-water seismic programs in the central Alaskan Beaufort Sea generally near Northstar from 1996 to 2001 (Moulton and Lawson, 2002). Numbers seen per year ranged from zero (in 1998 and 2000) to four (in 1999). BP, therefore, predicts that it is unlikely that any spotted seals will be ''taken'' during Northstar operations. However, to account for the possibility that spotted seals could occur in small numbers in the proximity of Northstar, NMFS proposes to authorize the take of five spotted seals per year during the open-water period by Level B harassment.

(2) Bearded Seal

During the open-water season, bearded seals are widely and sparsely distributed in areas of pack ice and open water, including some individuals in relatively shallow water as far south as Northstar. Studies indicate that pups and other young bearded seals up to 3 years of age comprise 40–45% of the population (Nelson *et al.,* n.d.), and that younger animals tend to occur closer to shore. Therefore, although all age and sex classes could be encountered, bearded seals encountered in the Northstar project area during the open-water period are likely to be young, non-reproductive animals. Bearded seals, if present, may be exposed to noise and other stimuli from production activities and vessel and aircraft traffic on and around the island. It is possible that some individuals may be briefly disturbed or show localized avoidance, but it is not anticipated to have any significant impact on the species. BP assumes that brief reactions that do not disrupt behavioral patterns in a biologically significant manner (*i.e.,* looking at a passing vessel or helicopter) do not constitute harassment (NMFS, 2000, 2001). Given that and the low number of bearded seals potentially present, the estimated number of bearded seal ''takes'' during the open-water season is zero. However, to allow for unexpected circumstances, BP requests the take of one bearded seal per year during the open-water period.

(3) Ringed Seal

Because ringed seals are resident in the Beaufort Sea, they are the most abundant and most frequently encountered seal species in the Northstar area. During the open-water period, all sex and age classes (except neonates) could potentially be encountered. The estimated number of seals that potentially might be harassed by noise from Northstar production activities or from vessel and aircraft traffic are based on the following three assumptions:

(1) Seals present within a 0.62 mi (1 km) distance (1.2 mi^2 [3.1 km^2] area) of Northstar might be potentially disturbed by construction and other activities on the island.

(2) The density of seals within that area would be no more than 2x the density observed during boat-based surveys for seals within the general Prudhoe Bay area in 1996–2001 (0.19 seals/$km^2 \times 2$ = 0.38 seals/km^2; Moulton and Lawson, 2002).

(3) Individual seals within the affected area are replaced once for each of thirteen 7-day intervals during the open-water period (mid July to mid October).

The first of these points assumes that seals in open water are not significantly affected by passing vessels (or helicopters) that they could occasionally encounter in areas >0.62 mi (1 km) from Northstar. Passing boats and helicopters might cause startle reactions and other short-term effects.

Based on the above assumptions, BP estimated that 15 ringed seals might be present and potentially affected during the open-water season (*i.e.,* 3.1 $km^2 \times$ 0.38 seals/$km^2 \times 13$ weeks). BP notes that this estimate is subject to wide uncertainty (in either direction) given the uncertainties in each of the three assumptions listed above. There is no specific evidence that any of the seals occurring near Northstar during the 1997–2009 open-water seasons were disturbed appreciably or otherwise affected by BP's activities (Williams *et al.,* 2006a; Moulton *et al.,* 2003a, 2005; Rodrigues *et al.,* 2006; Rodrigues and Richardson, 2007; Aerts and Rodrigues, 2008; Aerts, 2009). BP requests the take of 15 ringed seals per year during the open-water season by Level B harassment.

(4) Bowhead Whale

Bowhead whales are not resident in the region of activity. During the open-water season, relatively few westward migrating bowheads occur within 6.2 mi (10 km) of Northstar during most years. However, in some years (especially years with relatively low ice cover) a larger percentage of the bowhead population migrates within 6.2–9.3 mi (10–15 km) of Northstar (Treacy, 1998; Blackwell *et al.,* 2007, 2009). The bowhead whale population in the Bering-Chukchi-Beaufort area was estimated to include approximately 10,545 animals (CV = 0.128) in 2001. To estimate the 2011 population size for purposes of calculating potential ''takes'', the annual rate of increase was assumed to be steady at 3.4% (George *et al.,* 2004). Based on these figures, the 2011 population size could be approximately 14,625 bowhead whales.

About 43.7% of the bowheads in the Bering-Chukchi-Beaufort stock are sexually mature (Koski *et al.,* 2004), and about 25% of the mature females are pregnant during autumn migration (Zeh *et al.,* 1993). About 50.5% of the whales in this stock are juveniles (excluding calves), and 5.8% are calves (Koski *et al.,* 2004). The sex ratio is close to 1:1; about half of each category would be males and half females. There are few data on the age and sex composition of bowhead whales that have been sighted near the Prudhoe Bay area. The few data

from the area and more extensive data from more easterly parts of the Alaskan Beaufort Sea in late summer/autumn (Koski and Johnson, 1987; Koski and Miller, 2002, 2009) suggest that almost all age and sex categories of bowheads could be encountered, *i.e.,* males, non-pregnant females, pregnant females, and calves (mostly 3–6 months old). Newly born calves (< 1 month old) are not likely to be encountered during the fall (Nerini *et al.,* 1984; Koski *et al.,* 1993). Koski and Miller (2009) found that, at least in the more easterly part of the Beaufort Sea, subadults were disproportionately present in water < 656 ft (200 m) deep, and that small subadult whales were the dominant group in shallow (< 66 ft [20 m]) nearshore habitats with the size of whales increasing with increasing water depth. The potential take of bowhead whales from Northstar activities would be limited to Level B harassment (including avoidance reactions and other behavioral changes). Most bowheads that could be encountered would be migrating, so it is unlikely that an individual bowhead would be harassed more than once.

The acoustic monitoring of the bowhead whale migration during the early years of Northstar operations is described in the final Comprehensive Report of 1999–2004 (Richardson [ed.], 2008: Chapters 7–12). The monitoring was designed to determine whether the southern edge of the distribution of calling bowhead whales tended to be farther offshore with increased levels of underwater sounds from Northstar construction and operational activities. If the southernmost calling bowheads detected by the acoustic monitoring system tended to be farther offshore when Northstar operations were noisy than when they were quieter, this was to be taken as evidence of a Northstar effect. The initial monitoring objectives did not call for estimating the numbers of bowhead whales that were affected based on the acoustic localization data, but this was added as an objective in an updated monitoring plan (LGL and Greeneridge, 2000) prepared subsequent to issuance of the initial 5-yr regulations in May 2000. It was anticipated that the geographic scale of any documented effect, as a function of Northstar sound level, would provide a basis for estimating the number of whales affected. As early as 2001, it was noted that—given the difficulty in separating displacement effects from effects on calling behavior—the estimates of numbers affected would concern numbers of whales whose movements and/or calling behavior were affected by Northstar activities (BPXA, 2001).

In fact, the monitoring results provided evidence ($P < 0.01$ each year) of an effect on the southern part of the migration corridor during all four of the autumn migration seasons for which detailed data were acquired, *i.e.,* 2001–2004 (McDonald *et al.,* 2008; Richardson and McDonald, 2008). In 2001, the apparent southern edge of the distribution of calling whales was an estimated 0.95 mi (1.53 km) farther offshore when sound at industrial frequencies (28–90 Hz), measured 1,444 ft (440 m) from Northstar and averaged over 45 min preceding the call, increased from 94.3 to 103.7 dB re 1 µPa. In 2002, the apparent southern edge of the call distribution was an estimated 1.46 mi (2.35 km) farther offshore during times when transient sounds associated with boat traffic were present during the preceding 2 hr. In 2003 and 2004, the apparent southern edge was estimated to be farther offshore when tones were recorded in the 10–450 Hz band just prior to the call. In 2003, the apparent offshore shift was by an estimated 0.47 mi (0.76 km) when tones were present within the preceding 15 min. In 2004, the apparent shift was 1.39 mi (2.24 km) when tones were present within the preceding 2 hr.

Based on the amount of time bowhead whales are expected to be present in the general vicinity of the Northstar Development area and the fact that most of the whales migrate past the area beyond the 120-dB sound isopleths (NMFS' threshold for Level B harassment from continuous sound sources), which typically extend out less than 1.24–2.5 mi (2–4 km) from the island, it is estimated that only a small number of bowhead whales will be taken by harassment each year as a result of BP's activities. Therefore, BP requests the take of 15 bowhead whales per year during the open-water season by Level B harassment.

(5) Gray Whale

Gray whales are uncommon in the Prudhoe Bay area, with no more than a few sightings in summer or early autumn in any one year, and usually no sightings (Miller *et al.,* 1999; Treacy, 2000, 2002a,b). During the extensive aerial survey programs funded by MMS (Bowhead Whale Aerial Survey Program surveys), only one gray whale was sighted in the central Alaskan Beaufort Sea from 1979 to 2007. Gray whales were mostly sighted around Point Barrow. Small numbers of gray whales were sighted on several occasions in the central Alaskan Beaufort, *e.g.,* in the Harrison Bay area (Miller *et al.,* 1999; Treacy, 2000), in the Camden Bay area (Christie *et al.,* 2009) and one single sighting near Northstar production island (Williams and Coltrane, 2002). Several single gray whales have been seen farther east in the Canadian Beaufort Sea (Rugh and Fraker, 1981; LGL Ltd., unpubl. data), indicating that small numbers must travel through the Alaskan Beaufort during some summers. Gray whale calls have been recorded northeast of Barrow during the winter, indicating that some whales overwinter in the western Beaufort Sea (Stafford *et al.,* 2007). Gray whales do not call very often when on their summer feeding grounds, and the infrequent calls are not very strong (M. Dahlheim and S. Moore, NMFS, pers. comm.). No gray whale calls were recognized in the data from the acoustic monitoring system near Northstar in 2000–2008. No specific data on age or sex composition are available for the few gray whales that move east into the Beaufort Sea. All sex and age classes (including pregnant females) could be found, with the exception of calves less than six months of age.

If a few gray whales occur in the Prudhoe Bay area, it is unlikely that they would be affected appreciably by Northstar sounds. Gray whales typically do not show avoidance of sources of continuous industrial sound unless the received broadband level exceeds approximately 120 dB re 1 µPa (Malme *et al.,* 1984, 1988; Richardson *et al.,* 1995b; Southall *et al.,* 2007). The broadband received level approximately 1,476 ft (450 m) seaward from Northstar did not exceed 120 dB 1 µPa in the operational period 2004–2008 (95th percentiles), except when a vessel was passing close to Northstar or the acoustic recorders (maximum levels). It is possible that one or more gray whales, if present, might have been disturbed briefly during close approach by a vessel, but no such occurrences were documented in the past. It is most likely that no gray whales will be affected by activities at Northstar during any one year. However, to account for the possibility that a low number of gray whales could occur near Northstar, BP requests the take of two gray whales per year during the open-water period by Level B harassment.

(6) Beluga Whale

The Beaufort Sea beluga population was estimated at 39,258 individuals in 1992, with a maximum annual rate of increase of 4% (Hill and DeMaster, 1998; Angliss and Allen, 2009). Assuming a continued 4% annual growth rate, the population size could be approximately 79,650 beluga whales

in 2011. However, the 4% estimate is a maximum value and does not include loss of animals due to subsistence harvest or natural mortality factors. Angliss and Allen (2009) consider the current annual rate of increase to be unknown. Thus, the population size in 2011 may be less than the estimated value. Additionally, the southern edge of the main fall migration corridor is approximately 62 mi (100 km) north of the Northstar region. A few migrating belugas were observed in nearshore waters of the central Alaskan Beaufort Sea by aerial and vessel-based surveyors during seismic monitoring programs from 1996–2001 (LGL and Greeneridge, 1996a; Miller *et al.,* 1997, 1998b, 1999). Results from aerial surveys conducted in 2006–2008 during seismic and shallow hazard surveys in the Harrison Bay and Camden Bay area also show that the majority of belugas occur along the shelf break, although there were some observations in nearshore areas (Christie *et al.,* 2009). Vessel-based surveyors observed a group of three belugas in Foggy Island Bay in July 2008, during BP's Liberty seismic survey (Aerts *et al.,* 2008) and small groups of westward traveling belugas have occasionally been sighted around Northstar and Endicott, mostly in late July to early/mid-August (John K. Dorsett, Todd Winkel, BP, pers. comm.). Any potential take of these beluga whales in nearshore waters is expected to be limited to Level B harassment. Belugas from the Chukchi stock occur in the Alaskan Beaufort Sea in summer but are even less likely than the Beaufort stock to be encountered in the nearshore areas where sounds from Northstar will be audible.

The few animals involved could include all age and sex classes. Calving probably occurs in June to August in the Beaufort Sea region and calves 1–4 months of age could be encountered in summer or autumn. Most of the few belugas that could be encountered would be engaged in migration, so it is unlikely that a given beluga would be repeatedly ''taken by harassment''.

Based on available information on the presence and abundance of beluga whales, the following data and assumptions were used to estimate the number of belugas that could be present and potentially disturbed by Northstar activities:

(1) Aerial survey data from 1979 to 2000, including both MMS and LGL surveys, were used to estimate the proportion of belugas migrating through waters ≤ 2.5 mi (4 km) seaward of Northstar. Of the belugas traveling through the surveyed waters (generally inshore of the 328-ft [100-m] contour), the overall percentage observed in waters offshore of Northstar during 1997–2000 was 0.62% (8 of 1,289 belugas). The maximum percentage for any one year was for 1996, when 6 of 153 (3.9%) were ≤ 2.5 mi (4 km) offshore of Northstar. These figures are based on beluga sightings within the area 147°00′ to 150°30′ W.

(2) Most beluga whales migrate far offshore; the proportion migrating through the surveyed area is unknown but was assumed by Miller *et al.* (1999) to be less than or equal to 20%, which is probably an overestimate.

(3) The disturbance radius for belugas exposed to construction and operational activities in the Beaufort Sea is not well defined (Richardson *et al.,* 1995a), but BPXA (1999) assumed that the potential radius of disturbance was ≤ 0.62 mi (1 km) around the island. (There are no Northstar-specific data that could be used to obtain a better estimate than this ≤ 0.62 mi [1 km] figure.) Based on the assumed 0.62 mi (1 km) radius, it is expected that no more than 20% of the belugas migrating ≤ 2.5 mi (4 km) seaward of Northstar would approach within 0.62 mi (1 km) of the Northstar Island in the absence of any industrial activity there. However, since the 0.62 mi (1 km) value was arbitrary, NMFS calculated take of beluga whales based on the 120-dB radius of 2.5 mi (4 km).

(4) Satellite-tagging data show that some members of the Chukchi Sea stock of belugas could also occur in the Beaufort Sea generally near Northstar during late summer and autumn (Suydam *et al.,* 2001, 2003). However, they (like the Beaufort belugas) tend to remain at or beyond the shelf break when in the Alaskan Beaufort Sea during that season. That, combined with the small size of the Chukchi stock, means that consideration of Chukchi belugas would not appreciably change the estimated numbers of belugas that might occur near Northstar.

From these values, the number of belugas that might approach within 2.5 mi (4 km) of Northstar (in the absence of industrial activities) during the open water season is approximately 20 belugas based on the average distribution: $0.0025 \times 0.2 \times 39{,}258$. Therefore, NMFS proposes to authorize the take of 20 beluga whales per year during the open-water period by Level B harassment.

Summary of Proposed Take

BP has requested the take of six marine mammal species incidental to operational activities at the Northstar facility. However, because some of these species only occur in the Beaufort Sea on a seasonal basis, take of all six species has not been requested for an entire year. BP broke out its take requests into three seasons: Ice-covered season; break-up period; and open-water season. Ringed and bearded seals are the only species for which take was requested in all three seasons. Take of all six species was only requested for the open-water season. With the exception of the request for five ringed seal (including pups) takes by injury or mortality per year, all requested takes are by Level B harassment.

Table 4 in this document summarizes the abundance, take estimates, and percent of population for the six species for which NMFS is proposing to authorize take.

TABLE 4—POPULATION ABUNDANCE ESTIMATES, TOTAL ANNUAL PROPOSED TAKE (WHEN COMBINING TAKES FROM THE ICE-COVERED, BREAK-UP, AND OPEN-WATER SEASONS), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES

Species	Abundance	Total annual proposed level B take	Total annual injury or mortality take	Percentage of stock or population
Ringed Seal	[1] 249,000	20	5	0.01
Bearded Seal	[1] 250,000–300,000	5	0	< 0.01
Spotted Seal	[1] 59,214	5	0	0.01
Bowhead Whale	[2] 14,625	15	0	0.1
Beluga Whale	[1] 39,258	39	0	0.1
Gray Whale	[1] 17,752	2	0	0.01

[1] Abundance estimates in NMFS 2010 Alaska SAR (Allen and Angliss, 2011).
[2] Estimate from George *et al.* (2004) with an annual growth rate of 3.4%.

Because Prudhoe Bay (and the U.S. Beaufort Sea as a whole) represents only a small fraction of the Arctic basin where these animals occur, NMFS has preliminarily determined that only small numbers of the marine mammal species or stocks in the area would be potentially affected by operation of the Northstar facility. The take estimates presented in this section of the document do not take into consideration the mitigation and monitoring measures that are proposed for inclusion in the regulations (if issued).

Negligible Impact and Small Numbers Analysis and Preliminary Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated for bearded and spotted seals or for bowhead, beluga, and gray whales. There is the potential for a small number of injuries or mortalities to ringed seals (no more than five per year) as a result of ice road construction activities during the ice-covered season. These injuries or mortalities could occur if a ringed seal lair is crushed or flooded. Additionally, animals in the area are not anticipated to incur any hearing impairment (*i.e.,* TTS, a Level B harassment, or PTS, a Level A [injury] harassment), as acoustic measurements indicate source levels below 180 dB and 190 dB, which are the thresholds used by NMFS for acoustic injury to marine mammals. All other takes are anticipated to be by Level B behavioral harassment only. Certain species may have a behavioral reaction (*e.g.,* increased swim speed, avoidance of the area, etc.) to the sound emitted during the operational activities. Table 2 in this document outlines the number of takes that are anticipated as a result of BP's proposed activities. These takes are anticipated to be of low intensity due to the low level of sound emitted by the majority of the activities themselves. Activities occur at Northstar year-round, but the majority of these activities produce low-level continuous sounds. Only on rare occasions are more high-intensity pulsed sounds emitted into the surrounding environment. The ringed seal (and possibly the bearded seal) are the only species that occur in the area year-round.

Even though activities occur throughout the year, none of the cetacean species occur near Northstar all year. Cetaceans are most likely to occur in the late summer and autumn seasons. However, even during that time, much of the populations of those species migrate past the area farther offshore than the area where Northstar sounds can be heard. Spotted seals also tend to only be present in the open-water season. Moreover, they are more common in the Colville River Delta area, which is more than 50 mi (80 km) west of the Northstar Development area, than in the waters surrounding Northstar. Ringed and bearded seals could be found in the area year-round. However, many of them remain far enough from the facility, outside of areas of harassment. Additionally, ringed seals have been observed in the area every year since the beginning of construction and into the subsequent operational years.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Even though activities occur on successive days at Northstar, none of the cetacean species are anticipated to incur impacts on successive days. In the vicinity of Northstar, cetaceans are migrating through the area. Therefore, it is unlikely that the same animals are impacted on successive days. The closest known bowhead whale feeding ground is Camden Bay, which is more than 62 mi (100 km) east of Northstar. The same individual bearded and spotted seals are also not likely to occur in the proposed project area on successive days. Individual ringed seals may occur in the proposed project area on successive days. However, monitoring results (which were discussed earlier in this document) indicate that operation of the Northstar facility has not affected activities such as resting and pupping in the area.

Of the six marine mammal species for which take authorization is proposed, only one is listed as endangered under the ESA: the bowhead whale. The bowhead whale is also considered depleted under the MMPA. As stated previously in this document, the affected bowhead whale stock has been increasing at a rate of 3.4% per year since 2001. Certain stocks or populations of gray and beluga whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. On December 10, 2010, NMFS published a notification of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notification of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. These threatened listings will likely be completed prior to the expiration of these regulations (if issued). Neither of these two ice seal species is currently considered depleted under the MMPA. There is currently no established critical habitat in the proposed project area for any of these six species.

The population estimates for the species that may potentially be taken as a result of BP's proposed activities were presented earlier in this document. For reasons described earlier in this document, the maximum calculated number of individual marine mammals for each species that could potentially be taken annually is small relative to the overall population sizes (less than 1% of each of the six populations or stocks).

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that operation of the BP Northstar facility will result in the incidental take of small numbers of marine mammals and that the total taking from BP's proposed activities will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Relevant Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from island production activities are the principal concerns related to subsistence use of the area. However, contamination of animals and traditional hunting areas by oil (in the

unlikely event that an oil spill did occur) is also a concern. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (As mentioned previously in this document, both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

Residents of the village of Nuiqsut are the primary subsistence users in the project area. The communities of Barrow and Kaktovik also harvest resources that pass through the area of interest but do not hunt in or near the Northstar area. Subsistence hunters from all three communities conduct an annual hunt for autumn-migrating bowhead whales. Barrow also conducts a bowhead hunt in spring. Residents of all three communities hunt seals. Other subsistence activities include fishing, waterfowl and seaduck harvests, and hunting for walrus, beluga whales, polar bears, caribou, and moose. Relevant harvest data are summarized in Tables 8 and 9 in BP's application (see **ADDRESSES**).

Nuiqsut is the community closest to the Northstar development (approximately 54 mi [87 km] southwest from Northstar). Nuiqsut hunters harvest bowhead whales only during the fall whaling season (Long, 1996). In recent years, Nuiqsut whalers have typically landed three or four whales per year (see Table 9 in BP's application). Nuiqsut whalers concentrate their efforts on areas north and east of Cross Island, generally in water depths greater than 66 ft (20 m; Galginaitis, 2009). Cross Island is the principal base for Nuiqsut whalers while they are hunting bowheads (Long, 1996). Cross Island is located approximately 16.8 mi (27 km) east of Northstar.

Kaktovik whalers search for whales east, north, and occasionally west of Kaktovik. Kaktovik is located approximately 124 mi (200 km) east of Northstar Island. The westernmost reported harvest location was about 13 mi (21 km) west of Kaktovik, near 70°10′ N., 144°11′ W. (Kaleak, 1996). That site is about 112 mi (180 km) east of Northstar Island.

Barrow whalers search for whales much farther from the Northstar area—about 155+ mi (250+ km) to the west. However, given the westward migration of bowheads in autumn, Barrow (unlike Kaktovik) is ''downstream'' from the Northstar region during that season. Barrow hunters have expressed concern about the possibility that bowheads might be deflected offshore by Northstar and then remain offshore as they pass Barrow.

Beluga whales are not a prevailing subsistence resource in the communities of Kaktovik and Nuiqsut. Kaktovik hunters may harvest one beluga whale in conjunction with the bowhead hunt; however, it appears that most households obtain beluga through exchanges with other communities. Although Nuiqsut hunters have not hunted belugas for many years while on Cross Island for the fall hunt, this does not mean that they may not return to this practice in the future. Data presented by Braund and Kruse (2009) indicate that only one percent of Barrow's total harvest between 1962 and 1982 was of beluga whales and that it did not account for any of the harvested animals between 1987 and 1989.

Ringed seals are available to subsistence users in the Beaufort Sea year-round, but they are primarily hunted in the winter or spring due to the rich availability of other mammals in the summer. Bearded seals are primarily hunted during July in the Beaufort Sea; however, in 2007, bearded seals were harvested in the months of August and September at the mouth of the Colville River Delta, which is more than 50 mi (80 km) from Northstar. However, this sealing area can reach as far east as Pingok Island, which is approximately 17 mi (27 km) west of Northstar. An annual bearded seal harvest occurs in the vicinity of Thetis Island (which is a considerable distance from Northstar) in July through August. Approximately 20 bearded seals are harvested annually through this hunt. Spotted seals are harvested by some of the villages in the summer months. Nuiqsut hunters typically hunt spotted seals in the nearshore waters off the Colville River Delta. The majority of the more established seal hunts that occur in the Beaufort Sea, such as the Colville delta area hunts, are located a significant distance (in some instances 50 mi [80 km] or more) from the proposed project area.

Potential Impacts to Subsistence Uses

NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as:

> * * * an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during BP's proposed drilling program have the potential to impact marine mammals hunted by Native Alaskans. Additionally, if an oil spill occurred (even though it is unlikely), there could be impacts to marine mammals hunted by Native Alaskans and to the hunts themselves. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Helicopter activity also has the potential to disturb cetaceans and pinnipeds by causing them to vacate the area. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt.

In the case of subsistence hunts for bowhead whales in the Beaufort Sea, there could be an adverse impact on the hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would have to travel greater distances to intercept westward migrating whales, thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads.

Oil spills might affect the hunt for bowhead whales. The harvest period for bowhead whales is probably the time of greatest risk that a relatively large-scale spill would reduce the availability of bowhead whales for subsistence uses. Pipeline spills are possible for the total production period of Northstar. Spills could occur at any time of the year. However, spills at most times of year would not affect bowheads, as bowheads are present near Northstar for only several weeks during late summer and early autumn. Bowheads travel along migration corridors that are far offshore of the planned production islands and pipelines during spring and somewhat offshore of those facilities

during autumn. Under the prevailing east-wind conditions, oil spills from Northstar would not move directly into the main hunting area east and north of Cross Island. However, oil spills could extend into the hunting area under certain wind and current regimes (Anderson *et al.,* 1999).

Even in the case of a major spill, it is unlikely that more than a small minority of the bowheads encountered by hunters would be contaminated by oil. However, disturbance associated with reconnaissance and cleanup activities could affect whales and thus accessibility of whales to hunters. In the very unlikely event that a major spill incident occurred during the relatively short fall whaling season, it is possible that hunting would be affected significantly.

Ringed seals are more likely than bowheads to be affected by spill incidents because they occur in the development areas throughout the year and are more likely than whales to occur close to Northstar. Small numbers of bearded seals could also be affected, especially by a spill during the open-water season. Potential effects on subsistence use of seals will still be relatively low, as the areas most likely to be affected are not areas heavily used for seal hunting. However, wind and currents could carry spilled oil west from Northstar to areas where seal hunting occurs. It is possible that oil-contaminated seals could be harvested.

Oil spill cleanup activity could exacerbate and increase disturbance effects on subsistence species, cause localized displacement of subsistence species, and alter or reduce access to those species by hunters. On the other hand, the displacement of marine mammals away from oil-contaminated areas by cleanup activities would reduce the likelihood of direct contact with oil and thus reduce the likelihood of tainting or other impacts on the mammals.

One of the most persistent effects of EVOS was the reduced harvest and consumption of subsistence resources due to the local perception that they had been tainted by oil (Fall and Utermohle, 1995). The concentrations of petroleum-related aromatic compound (AC) metabolites in the bile of harbor seals were greatly elevated in harbor seals from oiled areas of Prince William Sound (PWS). Mean concentrations of phenanthrene equivalents for oiled seals from PWS were over 70 times greater than for control areas and over 20 times higher than for presumably unoiled areas of PWS (Frost *et al.,* 1994b). Concentrations of hydrocarbons in harbor seal tissues collected in PWS 1 year after EVOS were not significantly different from seals collected in non-oiled areas; however, average concentrations of AC metabolites in bile were still significantly higher than those observed in un-oiled areas (Frost *et al.,* 1994b). The pattern of reduced consumption of marine subsistence resources by the local population persisted for at least 1 year. Most affected communities had returned to documented pre-spill harvest levels by the third year after the spill. Even then, some households in these communities still reported that subsistence resources had not recovered to pre-spill levels. Harvest levels of subsistence resources for the three communities most affected by the spill still were below pre-spill averages even after 3 years. By then, the concern was mainly about smaller numbers of animals rather than contamination. However, contamination remained an important concern for some households (Fall and Utermohle, 1995). As an example, an elder stopped eating local salmon after the spill, even though salmon is the most important subsistence resource, and he ate it every day up to that point. Similar effects could be expected after a spill on the North Slope, with the extent of the decline in harvest and use, and the temporal duration of the effect, dependent upon the size and location of the spill. This analysis reflects the local perception that oil spills pose the greatest potential danger associated with offshore oil production.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require MMPA authorization applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. BP and the Alaska Eskimo Whaling Commission (AEWC) established a conflict avoidance agreement to mitigate the noise and/or traffic impacts of offshore oil and gas production related activities on subsistence whaling. In addition, the NSB and residents from Barrow, Nuiqsut, and Kaktovik participated in the development of the Final Environmental Impact Statement (FEIS) for the Northstar project. Local residents provided traditional knowledge of the physical, biological, and human environment, which was incorporated into the Northstar FEIS. Also included in the Northstar FEIS is information gathered from the 1996 community data collection, along with relevant testimony during past public hearings in the communities of Barrow, Nuiqsut, and Kaktovik. This data collection has helped ensure that the concerns of NSB residents about marine mammals and subsistence are taken into account in the development of the project designs, permit stipulations, monitoring programs, and mitigation measures.

BP meets annually with communities on the North Slope to discuss the Northstar Development project. Stakeholder and peer review meetings convened by NMFS have been held at least annually from 1998 to the present to discuss proposed monitoring and mitigation plans, and results of completed monitoring and mitigation. Those meetings have included representatives of the concerned communities, the AEWC, the NSB, Federal, state, and university biologists, the Marine Mammal Commission, and other interested parties. One function of those meetings has been to coordinate planned construction and operational activities with subsistence whaling activity. The agreements have and likely will address the following: Operational agreement and communications procedures; when/where agreement becomes effective; general communications scheme, by season; Northstar Island operations, by season; conflict avoidance; seasonally sensitive areas; vessel navigation; air navigation; marine mammal and acoustic monitoring activities; measures to avoid impacts to marine mammals; measures to avoid impacts in areas of active whaling; emergency assistance; and dispute resolution process.

Most vessel and helicopter traffic will occur inshore of the bowhead migration corridor. BP does not often approach bowhead whales with these vessels or aircraft. Insofar as possible, BP will ensure that vessel traffic near areas of particular concern for whaling will be completed before the end of August, as the fall bowhead hunts in Kaktovik and Cross Island (Nuiqsut) typically begin around September 1 each year. Additionally, any approaches of bowhead whales by vessels or helicopters will not occur within the area where Nuiqsut hunters typically search for bowheads. Essential traffic to and from Northstar has been and will continue to be closely coordinated with the NSB and AEWC to avoid disruptions of subsistence activities. Unless limited by weather conditions, BP maintains a minimum flight altitude of 1,000 ft (305 m), except during takeoffs and landings, and all helicopter transits occur in a specified corridor from the mainland.

Unmitigable Adverse Impact Analysis and Preliminary Determination

NMFS has preliminarily determined that BP's proposed operation of the Northstar facility will not have an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses. This preliminary determination is supported by the fact that BP works closely with the NSB, AEWC, and hunters of Nuiqsut to ensure that impacts are avoided or minimized during the annual fall bowhead whale hunt at Cross Island (the closest whale hunt to Northstar). Vessel and air traffic will be kept to a minimum during the bowhead hunt in order to keep from harassing the animals, which could possibly make them more difficult to hunt. To minimize the potential for conflicts with subsistence users, marine vessels transiting between Prudhoe Bay or West Dock and Northstar Island travel shoreward of the barrier islands as much as possible and avoid the Cross Island area during the bowhead hunting season in autumn. The fall hunt at Kaktovik occurs well to the east of Northstar (approximately 124 mi [200 km] away), so there should be no impacts to hunters of that community, since the whales will reach Kaktovik well before they enter areas that may be ensonified by activities at Northstar. Barrow is more than 155 mi (250 km) west of Northstar. Even though the whales will have to pass by Northstar before reaching Barrow for the fall hunt, the community is well beyond the range of detectable noise from Northstar. In the spring, the whales will reach Barrow before Northstar. Therefore, no impacts are anticipated on the spring bowhead whale hunt for the Barrow community.

Beluga whales are not a primary target of subsistence hunts by the Beaufort Sea communities. However, Nuiqsut whalers at Cross Island have been known to take a beluga in conjunction with the fall bowhead whale hunt. Therefore, the reasons stated previously regarding no unmitigable adverse impact to bowhead hunting at Cross Island are also applicable to beluga hunts. Additionally, should Kaktovik or Barrow conduct a beluga hunt, the distance from Northstar of these two communities would ensure no unmitigable adverse impact to those hunts.

Subsistence hunts of ice seals can occur year-round in the Beaufort Sea. However, hunts do not typically occur in the direct vicinity of Northstar. Some of the more established seal hunts occur in areas more than 20–30 mi (32–48 km) from Northstar. It is not anticipated that there would be any impacts to the seals themselves that would make them unavailable to Native Alaskans. Additionally, there is not anticipated to be any adverse effects to the hunters due to conflicts with them in traditional hunting grounds.

In the unlikely event of a major oil spill that spread into Beaufort Sea ice or water, there could be major impacts on the availability of marine mammals for subsistence uses. As discussed earlier in this document, the probability of a major oil spill occurring over the life of the project is low (S.L. Ross Environmental Research Ltd., 1998). Additionally, BP developed an oil spill prevention and contingency response plan, which was approved by several Federal agencies, including the U.S. Coast Guard. BP also conducts routine inspections of and maintenance on the pipeline (as described earlier in this document; see the ''Expected Activities in 2011–2016'' section) to help reduce the likelihood of a major oil spill. To help with preparedness in the event of a major oil spill, BP conducts emergency and oil spill response training activities at various times throughout the year. Equipment and techniques used during oil spill response exercises are continually updated.

Based on the measures described in BP's POC, the proposed mitigation and monitoring measures (described earlier in this document), and the project design itself, NMFS has determined preliminarily that there will not be an unmitigable adverse impact on subsistence uses from BP's operation of the Northstar facility. Even though there could be unmitigable adverse impacts on subsistence uses from a major oil spill, because of the low probability of such an event occurring and the measures that BP implements to reduce the likelihood of a major oil spill, NMFS has preliminarily determined that there will not be an unmitigable adverse impact to subsistence uses from an oil spill at Northstar.

Endangered Species Act (ESA)

On March 4, 1999, NMFS concluded consultation with the U.S. Army Corps of Engineers on permitting the construction and operation of the Northstar site. The finding of that consultation was that construction and operation at Northstar is not likely to jeopardize the continued existence of the bowhead whale. Since no critical habitat has been established for that species, the consultation also concluded that none would be affected.

The bowhead whale is still the only species listed as endangered under the ESA found in the proposed project area. However, on December 10, 2010, NMFS published notification of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and notification of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. These species will likely be listed as threatened under the ESA prior to expiration of these regulations (if issued). Therefore, the NMFS Permits, Conservation and Education Division will consult with the NMFS Endangered Species Division on the issuance of regulations and subsequent LOAs under section 101(a)(5)(A) of the MMPA for this activity. This consultation will be concluded prior to a determination on the issuance of the final rule and will be taken into account in decision-making on the final rule and LOA.

National Environmental Policy Act (NEPA)

On February 5, 1999 (64 FR 5789), the Environmental Protection Agency noted the availability for public review and comment of a FEIS prepared by the U.S. Army Corps of Engineers under NEPA on Beaufort Sea oil and gas development at Northstar. Based upon a review of the FEIS and comments received on the Draft and Final EIS, NMFS adopted the FEIS on May 18, 2000. Because of the age of the FEIS and the availability of new scientific information, NMFS is currently conducting a new analysis, pursuant to NEPA, to determine whether or not the issuance of MMPA rulemaking and subsequent LOA(s) may have a significant effect on the human environment. This analysis will be completed prior to the issuance or denial of these proposed regulations and will be taken into account in decision-making on the final rule and LOA.

Classification

OMB has determined that this proposed rule is not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. BP Exploration (Alaska) Inc. is the only entity that would be subject to the requirements in these proposed regulations. BP Exploration (Alaska) Inc. is an upstream strategic performance

unit of the BP Group. Globally, BP ranks among the 10 largest oil companies and is the fourth largest corporation. In 2008, BP Exploration (Alaska) Inc. had 2,000 employees alone, and, as of December 31, 2009, BP Group had more than 80,000 employees worldwide. Therefore, it is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (see **ADDRESSES**).

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: June 23, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. Subpart O is added to part 217 to read as follows:

Subpart O—Taking of Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

Sec.

Subpart O—Taking of Marine Mammals Incidental to Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

§ 217.140 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to BP Exploration (Alaska) Inc. (BP) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to operation of offshore oil and gas facilities in the U.S. Beaufort Sea, Alaska, in the Northstar Development Area.

(b) The taking of marine mammals by BP may be authorized in a Letter of Authorization only if it occurs in the geographic region that encompasses the Northstar Oil and Gas Development area within state and/or Federal waters in the U.S. Beaufort Sea.

§ 217.141 Effective dates.

Regulations in this subpart become effective upon issuance of the final rule.

§ 217.142 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 217.148 of this chapter, the Holder of the Letter of Authorization (hereinafter ''BP'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.140(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 217.140(a) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 217.140(a) is limited to the following species and by the indicated method and amount of take:

(1) Level B Harassment:

(i) Cetaceans:

(A) Bowhead whale (*Balaena mysticetus*)—75 (an average of 15 annually)

(B) Gray whale (*Eschrichtius robustus*)—10 (an average of 2 annually)

(C) Beluga whale (*Delphinapterus leucas*)—100 (an average of 20 annually)

(ii) Pinnipeds:

(A) Ringed seal (*Phoca hispida*)—155 (an average of 31 annually)

(B) Bearded seal (*Erignathus barbatus*)—25 (an average of 5 annually)

(C) Spotted seal (*Phoca largha*)—25 (an average of 5 annually)

(2) Level A Harassment and Mortality: Ringed seal—25 (an average of 5 annually)

§ 217.143 Prohibitions.

Notwithstanding takings contemplated in § 217.140 and authorized by a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter, no person in connection with the activities described in § 217.140 may:

(a) Take any marine mammal not specified in § 217.142(c);

(b) Take any marine mammal specified in § 217.142(c) other than by incidental take as specified in §§ 217.142(c)(1) and (c)(2);

(c) Take a marine mammal specified in § 217.172(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal;

(d) Take a marine mammal specified in § 217.172(c) if such taking results in an unmitigable adverse impact on the species or stock for taking for subsistence uses; or

(e) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

§ 217.144 Mitigation.

(a) When conducting the activities identified in § 217.140(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 217.148 must be implemented. These mitigation measures include but are not limited to:

(1) Ice-covered Season:

(i) In order to reduce the taking of ringed seals to the lowest level practicable, BP must begin winter construction activities, principally ice roads, as soon as possible once weather and ice conditions permit such activity.

(ii) Any ice roads or other construction activities that are initiated after March 1, in previously undisturbed areas in waters deeper than 10 ft (3 m), must be surveyed, using trained dogs in order to identify and avoid ringed seal

structures by a minimum of 492 ft (150 m).

(iii) After March 1 of each year, activities should avoid, to the greatest extent practicable, disturbance of any located seal structure.

(2) Open-water Season:

(i) BP will establish and monitor, during all daylight hours, a 190 dB re 1 μPa (rms) safety zone for seals around the island for all activities with sound pressure levels (SPLs) that are expected to exceed that level in waters beyond the Northstar facility on Seal Island.

(ii) BP will establish and monitor, during all daylight hours, a 180 dB re 1 μPa (rms) safety zone for whales around the island for all activities with SPLs that are expected to exceed that level in waters beyond the Northstar facility at Seal Island.

(iii) If any marine mammals are observed within the relevant safety zone, described in § 217.144(a)(2)(i) or (ii), the activity creating the noise will shutdown or reduce its SPL sufficiently to ensure that received SPLs do not exceed those prescribed SPL intensities at the affected marine mammal. The shutdown or reduced SPL shall be maintained until such time as the observed marine mammal(s) has been seen to have left the applicable safety zone or until 15 minutes have elapsed in the case of a pinniped or odontocete or 30 minutes in the case of a mysticete without resighting, whichever occurs sooner.

(iv) The entire safety zones prescribed in § 217.144(a)(2)(i) or (ii) must be visible during the entire 30-minute pre-activity monitoring time period in order for the activity to begin.

(v) New drilling into oil-bearing strata shall not take place during either open-water or spring-time broken ice conditions.

(vi) All non-essential boats, barge, and air traffic will be scheduled to avoid periods when bowhead whales are migrating through the area where they may be affected by noise from these activities.

(3) Helicopter flights to support Northstar activities must be limited to a corridor from Seal Island to the mainland, and, except when limited by weather or personnel safety, must maintain a minimum altitude of 1,000 ft (305 m), except during takeoff and landing.

(4) Additional mitigation measures as contained in a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(b) [Reserved]

§ 217.145 Measures to ensure availability of species for subsistence uses.

When applying for a Letter of Authorization pursuant to § 217.147 or a renewal of a Letter of Authorization pursuant to § 217.149, BP must submit a Plan of Cooperation that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammal species or stocks for taking for subsistence uses. A plan shall include the following:

(a) A statement that the applicant has notified and met with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding timing and methods of operation;

(b) A description of what measures BP has taken and/or will take to ensure that the proposed activities will not interfere with subsistence whaling or sealing; and

(c) What plans BP has to continue to meet with the affected communities to notify the communities of any changes in operation.

§ 217.146 Requirements for monitoring and reporting.

(a) BP must notify the Alaska Regional Office, NMFS, within 48 hours of starting ice road construction, cessation of ice road usage, and the commencement of icebreaking activities for the Northstar facility.

(b) BP must designate qualified, on-site individuals, approved in advance by NMFS, to conduct the mitigation, monitoring, and reporting activities specified in the Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(c) Monitoring measures during the ice-covered season shall include, but are not limited to, the following:

(1) After March 1, trained dogs must be used to detect seal lairs in previously undisturbed areas that may be potentially affected by on-ice construction activity, if any. Surveys for seal structures should be conducted to a minimum distance of 492 ft (150 m) from the outer edges of any disturbance.

(2) If ice road construction occurs after March 1, conduct a follow-up assessment in May of that year of the fate of all seal structures located during monitoring conducted under § 217.146(c)(1) near the physically disturbed areas.

(3) BP shall conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds with expected source levels of 90 dBA or greater created by on-ice activity at Northstar that have not been measured in previous years. In addition, BP shall conduct acoustic measurements to document sound levels, characteristics, and transmissions of airborne sounds for sources on Northstar Island with expected received levels at the water's edge that exceed 90 dBA that have not been measured in previous years.

(d) Monitoring measures during the open-water season shall include, but are not limited to, the following:

(1) Acoustic monitoring of the bowhead whale migration.

(2) BP shall monitor the safety zones of activities capable of producing pulsed underwater sound with levels ≥180 or ≥190 dB re 1 μPa (rms) at locations where whales or seals could be exposed. At least one on-island observer shall be stationed at a location providing an unobstructed view of the predicted safety zone. The observer(s) shall scan the safety zone continuously for marine mammals for 30 minutes prior to the operation of the sound source. Observations shall continue during all periods of operation. The observer shall record the: Species and numbers of marine mammals seen within the 180 or 190 dB zones; bearing and distance of the marine mammals from the observation point; and behavior of marine mammals and any indication of disturbance reactions to the monitored activity.

(e) BP shall conduct any additional monitoring measures contained in a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(f) BP shall submit an annual report to NMFS within the time period specified in a Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter.

(g) If specific mitigation and monitoring are required for activities on the sea ice initiated after March 1 (requiring searches with dogs for lairs), during the operation of strong sound sources (requiring visual observations and shutdown procedures), or for the use of new sound sources that have not previously been measured, then a preliminary summary of the activity, method of monitoring, and preliminary results shall be submitted to NMFS within 90 days after the cessation of that activity. The complete description of methods, results, and discussion shall be submitted as part of the annual report.

(h) BP shall submit a draft comprehensive report to NMFS, Office of Protected Resources, and NMFS, Alaska Regional Office (specific contact information to be provided in Letter of Authorization), no later than 240 days prior to the expiration of these regulations. This comprehensive technical report shall provide full

documentation of methods, results, and interpretation of all monitoring during the first four and a quarter years of the LOA. Before acceptance by NMFS as a final comprehensive report, the draft comprehensive report shall be subject to review and modification by NMFS scientists.

(i) Any observations concerning possible injuries, mortality, or an unusual marine mammal mortality event shall be transmitted to NMFS, Office of Protected Resources, and the Alaska Stranding and Disentanglement Program (specific contact information to be provided in Letter of Authorization), within 48 hours of the discovery. At a minimum, reported information shall include: The time, date, and location (latitude/longitude) of the animal(s); the species identification or description of the animal(s); the fate of the animal(s), if known; and photographs or video footage of the animal (if equipment is available).

§ 217.147 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103) conducting the activity identified in § 217.140(a) (*i.e.,* BP) must apply for and obtain either an initial Letter of Authorization in accordance with § 217.148 or a renewal under § 217.149.

(b) [Reserved]

§ 217.148 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.,* mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s) and will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

§ 217.149 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 and § 217.148 of this chapter for the activity identified in § 217.140(a) shall be renewed upon request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under § 217.147 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS recieves the monitoring reports required under § 217.146(f) and (g); and

(3) NMFS determines that the mitigation, monitoring and reporting measures required under §§ 217.144 and 217.146 and the Letter of Authorization issued under §§ 216.106 and 217.148 of this chapter were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If either a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 217.149 of this chapter or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) *Adaptive Management*—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with BP regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from BP's monitoring from the previous year;

(2) Results from general marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

§ 217.150 Modifications of Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§ 216.106 and 217.148 of this chapter and subject to the provisions of this subpart, shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.149, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.142(c), a Letter of Authorization issued pursuant to §§ 216.106 and 217.148 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

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Part VI

International Trade Commission

19 CFR Parts 201, 206, 207 *et al.*
Practice and Procedure: Rules of General Application, Safeguards, Antidumping and Countervailing Duty, and Adjudication and Enforcement; Filing Procedures; Proposed Rule and Notice

INTERNATIONAL TRADE COMMISSION

19 CFR Parts 201, 206, 207, and 210

Practice and Procedure: Rules of General Application, Safeguards, Antidumping and Countervailing Duty, and Adjudication and Enforcement

AGENCY: International Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States International Trade Commission (''Commission'') proposes to amend its rules of practice and procedure concerning rules of general application, safeguards, antidumping and countervailing duty, and adjudication and enforcement. The amendments are necessary to implement a new Commission requirement for electronic filing of most documents with the agency. The intended effects of the proposed amendments are to increase efficiency in processing documents filed with the Commission, reduce Commission expenditures, and conform agency processes to Federal Government initiatives.

DATES: To be assured of consideration, written comments must be received by 5:15 p.m. on August 5, 2011.

ADDRESSES: You may submit comments, identified by docket number MISC–036, by any of the following methods:

—*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

—*Agency Web Site: https://edis.usitc.gov.* Follow the instructions for submitting comments on the Web site.

—*Mail:* For paper submission. U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436.

—*Hand Delivery/Courier:* U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436, from the hours of 8:45 a.m. to 5:15 p.m.

Instructions: All submissions received must include the agency name and docket number (MISC–036), along with a cover letter stating the nature of the commenter's interest in the proposed rulemaking. All comments received will be posted without change to *https://edis.usitc.gov,* including any personal information provided. For paper copies, a signed original and 14 copies of each set of comments should be submitted to James R. Holbein, Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436. *Docket:* For access to the docket to read background documents or comments received, go to *https://edis.usitc.gov* and/or the U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary, telephone (202) 205–2000 or Gracemary Roth-Roffy, telephone (202) 205–3117, Office of the General Counsel, United States International Trade Commission. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: The preamble below is designed to assist readers in understanding these proposed amendments to the Commission's Rules. This preamble provides background information, a regulatory analysis of the proposed amendments, and a section-by-section explanation of the proposed amendments. The Commission encourages members of the public to comment on the proposed amendments as well as on whether the language of the proposed amendments is sufficiently clear for users to understand.

If the Commission decides to proceed with this rulemaking after reviewing the comments filed in response to this notice, the proposed rule revisions will be promulgated in accordance with the procedures provided for in the Administrative Procedure Act (5 U.S.C. 553), and will be codified in 19 CFR parts 201, 206, 207, and 210.

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. This rulemaking seeks to improve provisions of the Commission's existing Rules of Practice and Procedure. The Commission proposes amendments to its rules covering proceedings such as investigations and reviews conducted under title VII and section 337 of the Tariff Act of 1930 (19 U.S.C. 1337, 1671 *et seq.*), sections 202, 406, 421, 422 of the Trade Act of 1974 (19 U.S.C. 2252, 2436, 2451, 2451a), and sections 302 and 312 of the North American Free Trade Agreement Implementation Act (19 U.S.C. 3352, 3372). The Commission invites the public to comment on all of these proposed rule amendments. In any comments, please consider addressing whether the language of the proposed amendments is sufficiently clear for users to understand. In addition please consider addressing how the proposed rule amendments could be improved, and/or offering specific constructive alternatives where appropriate.

Consistent with its ordinary practice, the Commission is issuing these proposed amendments in accordance with provisions of section 553 of the APA (5 U.S.C. 553), although such provisions are not mandatory with respect to this rulemaking. The APA procedure entails the following steps: (1) Publication of a notice of proposed rulemaking; (2) solicitation of public comments on the proposed amendments; (3) Commission review of public comments on the proposed amendments; and (4) publication of final amendments at least thirty days prior to their effective date.

The Commission proposes to require that most filings with the agency be made by electronic means. When a filing is made by electronic means, the electronic version will constitute the official record document and any paper form of the document must be a true copy and identical to the electronic version. The Commission's Electronic Document Information System (EDIS) already accepts electronic filing of certain documents, and will be the mechanism by which participants in Commission proceedings electronically file their documents in the future. Whereas submitters have only been permitted to file public documents into EDIS, the proposed rule amendments would provide for the electronic filing of documents containing confidential business information and business proprietary information into EDIS. A Handbook on Filing Procedures will supersede the Commission's current Handbook on Electronic Filing Procedures, and will provide more detailed information on the filing process. The Commission plans to seek public comment concerning the new handbook in a separate notice. Persons seeking to file documents will be required to comply with the revised rules and the Handbook on Filing Procedures.

The Commission estimates that electronic filing of most documents will significantly reduce the cost to the agency of processing documents. These costs include labor costs for scanning paper documents into EDIS, storage costs for paper documents, and costs for continuity of operations. Electronic filing also is expected to improve the efficiency and effectiveness of the filing

process by entering documents into EDIS more rapidly. Electronic filing also accords with government-wide initiatives encouraging agencies to do business electronically.

Although the Commission intends to require electronic filing of most documents, documents generally will also be submitted in paper form. Moreover, witness testimony and hearing materials in import injury investigations and reviews would be submitted only in paper form, and public versions of testimony would be accepted at the relevant conference or hearing. The proposed rules would provide the Secretary to the Commission with the authority to establish exceptions and modifications to the requirement to electronically file documents.

The proposed changes to the filing process are not intended to affect the current practice with respect to the filing of responses to Commission questionnaires in import injury investigations and reviews.

Regulatory Analysis of Proposed Amendments to the Commission's Rules

The Commission has determined that the final rules do not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and thus do not constitute a significant regulatory action for purposes of the Executive Order.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is inapplicable to this rulemaking because it is not one for which a notice of final rulemaking is required under 5 U.S.C. 553(b) or any other statute. Although the Commission has chosen to publish a notice of proposed rulemaking, these proposed regulations are ''agency rules of procedure and practice,'' and thus are exempt from the notice requirement imposed by 5 U.S.C. 553(b).

These proposed rules do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, Aug. 4, 1999).

No actions are necessary under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) because the proposed rules will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and will not significantly or uniquely affect small governments.

The proposed rules are not major rules as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). Moreover, they are exempt from the reporting requirements of the Contract With America Advancement Act of 1996 (Pub. L. 104–121) because they concern rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

The amendments are not subject to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), because the amendments would impose no new collection of information under the statute.

Section-by-Section Analysis

Section 201.8 generally provides the requirements for filing documents with the Commission. The Commission proposes to revise paragraphs (c) and (d) of § 201.8 to clarify document specification requirements, and to revise paragraph (f) to set out requirements for filing of documents, including the general requirement that documents be filed electronically. Paragraphs (d) and (f) would be reversed to present information in a clearer order.

Section 201.12 sets out requirements for action requests in a nonadjudicative investigation. The Commission proposes to revise the section to require that requests be filed electronically and submitted in paper form on the same business day.

Section 201.14 sets out requirements for requests for additional hearings, postponements, continuances, and extensions of time. The Commission proposes to revise paragraph (b)(3) to require that requests be filed electronically and submitted in paper form on the same business day.

Section 201.16 sets out the general requirements for service of process and other documents. The Commission proposes to revise paragraph (b) of § 201.16 to remove language concerning service on the Secretary of paper documents.

Section 206.2 identifies types of petitions or requests in certain Commission proceedings. The Commission proposes to add that petitions and requests filed under part 206 of the Commission's rules must be filed in paper form and to require the submission of all exhibits, appendices, and attachments to the petition or request on certain approved electronic media.

Section 206.8 covers service, filing, and certification of documents in certain proceedings. The Commission proposes to add a paragraph specifying that briefs filed in such proceedings are to be filed electronically and also submitted in paper form on the same business day.

Section 206.17 provides procedures for limited disclosure of certain confidential business information under administrative protective order. The Commission proposes to revise paragraph (a)(2) of the section to provide for electronic filing of administrative protective order applications.

Section 207.7 provides procedures for limited disclosure of certain business proprietary information under administrative protective order. The Commission proposes to revise paragraph (a)(2) of the section to provide for electronic filing of administrative protective order applications.

Section 207.10 addresses the filing of petitions in title VII proceedings. The Commission proposes to revise the language of § 207.10(a) to specify that petitions are to be filed in paper form and to require the submission of all exhibits, appendices, and attachments to the petition on certain approved electronic media.

Section 207.15 addresses written briefs and conferences in title VII proceedings. The Commission proposes to revise § 207.15 to require electronic filing of briefs and submission of a requisite number of paper copies on the same business day. The proposed rule also would provide for the filing of witness testimony at the conference.

Section 207.23 addresses prehearing briefs in title VII proceedings. The Commission proposes to revise § 207.23 to require electronic filing of the prehearing brief and submission of a requisite number of paper copies on the same business day.

Section 207.24 addresses hearing procedures in title VII proceedings. The Commission proposes to revise paragraph (b) of § 207.24 to permit a party to file witness testimony at the hearing.

Section 207.25 addresses posthearing briefs in title VII proceedings. The Commission proposes to revise § 207.25 to require electronic filing of briefs and submission of a requisite number of paper copies on the same business day.

Section 207.28 addresses anticircumvention under title VII. The Commission proposes to revise § 207.28 to require electronic filing of statements and submission of a requisite number of paper copies on the same business day.

Section 207.30 addresses comments on information in certain title VII proceedings. The Commission proposes to revise paragraph (b) of § 207.30 to require electronic filing of comments and submission of a requisite number of paper copies on the same business day.

Section 207.61 addresses responses to notices of institution. The Commission proposes to add paragraph (e) of § 207.61 to require electronic filing of responses and submission of a requisite number of paper copies on the same business day.

Section 207.62 concerns rulings on adequacy and nature of Commission review in certain title VII proceedings. The Commission proposes to revise paragraph (b)(2) of § 207.62 to require electronic filing of comments and submission of a requisite number of paper copies on the same business day.

Section 207.65 addresses prehearing briefs in certain title VII proceedings. The Commission proposes to revise § 207.65 to require electronic filing of briefs and submission of a requisite number of paper copies on the same business day.

Section 207.67 addresses posthearing briefs and statements in certain title VII proceedings. The Commission proposes to revise paragraph (a) of § 207.67 to require electronic filing of briefs and submission of a requisite number of paper copies on the same business day.

Section 207.68 covers final comments on information in certain title VII proceedings. The Commission proposes to revise paragraph (b) of § 207.68 to require electronic filing of comments and submission of a requisite number of paper copies on the same business day.

Section 210.4 sets out procedures for written submissions, representations, and sanctions in section 337 proceedings. The Commission proposes to revise paragraph (f) of § 210.4 to require electronic filing of certain documents. Additionally, the Commission proposes to require electronic filing of all other written submissions and the submission of paper copies of these submissions by noon on the next business day.

Section 210.8 sets out the filing procedures for complaints and motions for temporary relief in section 337 proceedings. The Commission proposes to revise paragraph (a) of § 210.8 to require paper filing of complaints and filing of exhibits, appendices, and attachments to complaints on certain approved electronic media.

List of Subjects in 19 CFR Parts 201, 206, 207, and 210

Administrative practice and procedure, Business and industry, Customs duties and inspection, Imports, Investigations.

For the reasons stated in the preamble, the United States International Trade Commission proposes to amend 19 CFR parts 201, 206, 207, and 210 as follows:

PART 201—RULES OF GENERAL APPLICATION

1. The authority citation for part 201 continues to read as follows:

Authority: Sec. 335 of the Tariff Act of 1930 (19 U.S.C. 1335), and sec. 603 of the Trade Act of 1974 (19 U.S.C. 2482), unless otherwise noted.

Subpart B—Initiation and Conduct of Investigations

2. Amend § 201.8 by revising paragraphs (c), (d), and (f) to read as follows:

§ 201.8 Filing of documents.

* * * * *

(c) *Specifications for documents.* Each document filed under this chapter shall be signed, double-spaced, clear and legible, except that a document of two pages or less in length need not be double-spaced. All submissions shall be in letter-sized format (8.5 × 11 inches), except copies of documents prepared for another agency or a court (e.g. patent file wrappers or pleadings papers), and single sided. The name of the person signing the original shall be typewritten or otherwise reproduced on each copy.

(d) *Filing.* (1) Except as provided in paragraphs (d)(2) through (7) and (f) of this section, all documents filed with the Commission shall be filed electronically, and shall be submitted in paper form by 12 noon eastern time on the next business day. A paper copy provided for in this section must be a true and identical copy of the electronic version of the document. All filings shall comply with the procedures set forth in the Commission's Handbook on Filing Procedures, which is available from the Secretary and on the Commission's World Wide Web site at *https://edis.usitc.gov*. Failure to comply with the requirements of this chapter and the Handbook on Filing Procedures in the filing of a document may result in the rejection of the document as improperly filed.

(2) Briefs, statements, responses, comments, and requests filed pursuant to § 201.12, § 201.14, § 206.8, § 207.15, § 207.23, § 207.25, § 207.28, § 207.30, § 207.61, § 207.62, § 207.65, § 207.67, or § 207.68 of this chapter shall be filed electronically and the requisite number of true paper copies of these documents shall be submitted to the Commission in accordance with the provisions of the applicable section.

(3) Petitions, complaints, requests, or motions filed under § 206.2, § 207.10, § 210.4, § 210.8, § 210.75, § 210.76, or § 210.79 of this chapter shall be filed in paper form and exhibits, appendices, and attachments to the documents shall be filed in electronic form on CD–ROM, DVD or other portable electronic media approved by the Secretary in accordance with the provisions of the applicable section. Submitted media will be retained by the Commission, except that media may be returned to the submitter if a document is not accepted for filing.

(4) Certain documents filed under § 210.4 shall be filed electronically in accordance with the provisions of that section, and copies of certain of those documents shall also be submitted in paper form as provided in that section.

(5) Supplementary material and witness testimony provided for under § 201.13, § 207.15, or § 207.24 of this chapter shall be filed in paper form in accordance with the provisions of the applicable section.

(6) Certain documents filed under § 201.4 of this chapter and applications for administrative protective orders filed under §§ 206.17 and 207.7 of this chapter shall only be filed electronically; no paper copies will be required.

(7) The Secretary may provide for exceptions and modifications to the filing requirements set out in this chapter. A person seeking an exception should consult the Handbook on Filing Procedures.

* * * * *

(f) *Nonconfidential copies.* In the event that confidential treatment of a document is requested under § 201.6(b), a nonconfidential version of the document shall be filed, in which the confidential business information shall have been deleted and which shall have been conspicuously marked ''nonconfidential'' or ''public inspection.'' The nonconfidential version shall be filed electronically, and four (4) true paper copies shall be submitted on the same business day. In the event that confidential treatment is not requested for a document under § 201.6(b), the document shall be conspicuously marked ''No confidential version filed,'' and the document shall be filed in accordance with paragraph (d) of this section. The name of the person signing the original shall be typewritten or otherwise reproduced on each copy.

3. Revise § 201.12 to read as follows:

§ 201.12 Requests.

Any party to a nonadjudicative investigation may request the Commission to take particular action with respect to that investigation. Such requests shall be made by letter addressed to the Secretary, shall be placed by him in the record, and shall be served on all other parties. Such request shall be filed electronically and

two (2) true paper copies shall be submitted on the same business day. The Commission shall take such action or make such response as it deems appropriate.

4. Amend § 201.14 by revising paragraph (b)(3) to read as follows:

§ 201.14 Computation of time, additional hearings, postponements, continuances, and extensions of time.

* * * * *

(b) * * *

(3) A request that the Commission take any of the actions described in this section shall be filed with the Secretary and served on all parties to the investigation. Such request shall be filed electronically and two (2) true paper copies shall be submitted on the same business day.

5. Amend § 201.16 by revising paragraph (b) to read as follows:

§ 201.16 Service of process and other documents.

* * * * *

(b) *By a party other than the Commission.* Except when service by another method shall be specifically ordered by the Commission, the service of a document of a party shall be effected:

(1) By mailing or delivering copies of a nonconfidential version of the document to each party, or, if the party is represented by an attorney before the Commission, by mailing or delivering a nonconfidential version thereof to such attorney; or

(2) By leaving copies thereof at the principal office of each other party, or, if a party is represented by an attorney before the Commission, by leaving copies at the office of such attorney.

(3) When service is by mail, it is complete upon mailing of the document.

(4) When service is by mail, it shall be by first class mail, postage prepaid. In the event the addressee is outside the United States, service shall be by first class airmail, postage prepaid.

* * * * *

PART 206—INVESTIGATIONS RELATING TO GLOBAL AND BILATERAL SAFEGUARD ACTIONS, MARKET DISRUPTION, TRADE DIVERSION, AND REVIEW OF RELIEF ACTIONS

6. The authority citation for part 206 continues to read as follows:

Authority: 19 U.S.C. 1335, 2251–2254, 2451–2451a, 3351–3382; secs. 103, 301–302, Pub. L. 103–465, 108 Stat. 4809.

7. Revise § 206.2 to read as follows:

§ 206.2 Identification of type of petition or request and petition filing procedures.

An investigation under this part 206 may be commenced on the basis of a petition, request, resolution, or motion as provided in section 202(a)(1), 204(c)(1), 406(a)(1), 421(b) or (o), or 422(b) of the Trade Act of 1974 or section 302(a)(1) or 312(c)(1) of the North American Free Trade Agreement Implementation Act. Each petition or request, as the case may be, filed by an entity representative of a domestic industry under this part 206 shall state clearly on the first page thereof ''This is a [petition or request] under section [202, 204(c), 406, 421(b) or (o), or 422(b) of the Trade Act of 1974, or section 302 or 312(c) of the North American Free Trade Agreement Implementation Act] and Subpart [B, C, D, E, F, or G] of part 206 of the rules of practice and procedure of the United States International Trade Commission.'' A paper original and eight (8) true paper copies of a petition, request, resolution, or motion shall be filed. One copy of any exhibits, appendices, and attachments to the document shall be filed in electronic form on CD–ROM, DVD, or other portable electronic format approved by the Secretary.

8. Amend § 206.8 by adding paragraph (d) to read as follows:

§ 206.8 Service, filing, and certification of documents.

* * * * *

(d) *Briefs.* All briefs filed in proceedings subject to this part shall be filed electronically, and eight (8) true paper copies shall be filed on the same business day.

9. Amend § 206.17 by revising paragraph (a)(2) to read as follows:

§ 206.17 Limited disclosure of certain confidential business information under administrative protective order.

(a) * * *

(2) Application. An application under paragraph (a)(1) of this section must be made by an authorized applicant on a form adopted by the Secretary or a photocopy thereof. A signed application shall be filed electronically. An application on behalf of an authorized applicant must be made no later than the time that entries of appearance are due pursuant to § 201.11 of this chapter. In the event that two or more authorized applicants represent one interested party who is a party to the investigation, the authorized applicants must select one of their number to be lead authorized applicant. The lead authorized applicant's application must be filed no later than the time that entries of appearance are due. Provided that the application is accepted, the lead authorized applicant shall be served with confidential business information pursuant to paragraph (f) of this section. The other authorized applicants representing the same party may file their applications after the deadline for entries of appearance but at least five days before the deadline for filing posthearing briefs in the investigation, and shall not be served with confidential business information.

* * * * *

PART 207—INVESTIGATIONS OF WHETHER INJURY TO DOMESTIC INDUSTRIES RESULTS FROM IMPORTS SOLD AT LESS THAN FAIR VALUE OR FROM SUBSIDIZED EXPORTS TO THE UNITED STATES

10. The authority citation for part 207 continues to read as follows:

Authority: 19 U.S.C. 1336, 1671–1677n, 2482, 3513.

11. Amend § 207.7 by revising paragraph (a)(2) to read as follows:

§ 207.7 Limited disclosure of certain business proprietary information under administrative protective order.

(a) * * *

(2) Application. An application under paragraph (a)(1) of this section must be made by an authorized applicant on a form adopted by the Secretary or a photocopy thereof. A signed application shall be filed electronically. An application on behalf of a petitioner, a respondent, or another party must be made no later than the time that entries of appearance are due pursuant to § 201.11 of this chapter. In the event that two or more authorized applicants represent one interested party who is a party to the investigation, the authorized applicants must select one of their number to be lead authorized applicant. The lead authorized applicant's application must be filed no later than the time that entries of appearance are due. Provided that the application is accepted, the lead authorized applicant shall be served with business proprietary information pursuant to paragraph (f) of this section. The other authorized applicants representing the same party may file their applications after the deadline for entries of appearance but at least five days before the deadline for filing posthearing briefs in the investigation, or the deadline for filing briefs in the preliminary phase of an investigation, or the deadline for filing submissions in a remanded investigation, and shall not be served with business proprietary information.

* * * * *

12. Amend § 207.10 by revising paragraph (a) to read as follows:

§ 207.10 Filing of petition with the Commission.

(a) *Filing of the petition.* Any interested party who files a petition with the administering authority pursuant to section 702(b) or section 732(b) of the Act in a case in which a Commission determination under title VII of the Act is required, shall file copies of the petition, including all exhibits, appendices, and attachments thereto, pursuant to 201.8 of this chapter, with the Secretary on the same day the petition is filed with the administering authority. A paper original and eight (8) true paper copies of a petition shall be filed. One copy of all exhibits, appendices, and attachments to the petition shall be filed in electronic form on CD–ROM, DVD, or other portable electronic format approved by the Secretary. If the petition complies with the provisions of § 207.11, it shall be deemed to be properly filed on the date on which the requisite number of copies of the petition is received by the Secretary, provided that, if the petition is filed with the Secretary after 12:00 noon, eastern time, the petition shall be deemed filed on the next business day. The Secretary shall notify the administering authority of that date. Notwithstanding § 201.11 of this chapter, a petitioner need not file an entry of appearance in the investigation instituted upon the filing of its petition, which shall be deemed an entry of appearance.

* * * * *

13. Revise § 207.15 to read as follows:

§ 207.15 Written briefs and conference.

Each party may submit to the Commission on or before a date specified in the notice of investigation issued pursuant to 207.12 a written brief containing information and arguments pertinent to the subject matter of the investigation. Briefs shall be signed, shall include a table of contents, and shall contain no more than fifty (50) double-spaced and single-sided pages of textual material, and shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day (on paper measuring 8.5 × 11 inches, double-spaced and single-sided). Any person not a party may submit a brief written statement of information pertinent to the investigation within the time specified and the same manner specified for the filing of briefs. In addition, the presiding official may permit persons to file within a specified time answers to questions or requests made by the Commission's staff. If he deems it appropriate, the Director shall hold a conference. The conference, if any, shall be held in accordance with the procedures in § 201.13 of this chapter, except that in connection with its presentation a party may provide written witness testimony at the conference; if written testimony is provided, eight (8) true paper copies shall be submitted. The Director may request the appearance of witnesses, take testimony, and administer oaths.

14. Revise § 207.23 to read as follows:

§ 207.23 Prehearing brief.

Each party who is an interested party shall submit to the Commission, no later than five (5) business days prior to the date of the hearing specified in the notice of scheduling, a prehearing brief. Prehearing briefs shall be signed and shall include a table of contents and shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. The prehearing brief should present a party's case concisely and shall, to the extent possible, refer to the record and include information and arguments which the party believes relevant to the subject matter of the Commission's determination under section 705(b) or section 735(b) of the Act. Any person not an interested party may submit a brief written statement of information pertinent to the investigation within the time specified and the same manner specified for filing of prehearing briefs.

15. Amend § 207.24 by revising paragraph (b) to read as follows:

§ 207.24 Hearing.

* * * * *

(b) *Procedures.* Any hearing shall be conducted after notice published in the **Federal Register.** The hearing shall not be subject to the provisions of 5 U.S.C. subchapter II, chapter 5, or to 5 U.S.C. 702. Each party shall limit its presentation at the hearing to a summary of the information and arguments contained in its prehearing brief, an analysis of the information and arguments contained in the prehearing briefs described in § 207.23, and information not available at the time its prehearing brief was filed. Unless a portion of the hearing is closed, presentations at the hearing shall not include business proprietary information. Notwithstanding § 201.13(f) of this chapter, in connection with its presentation, a party may provide witness testimony at the hearing; if written testimony is provided, eight (8) true paper copies shall be submitted. In the case of testimony to be presented at a closed session held in response to a request under § 207.24(d), confidential and non-confidential versions shall be filed in accordance with § 207.3. Any person not a party may make a brief oral statement of information pertinent to the investigation.

* * * * *

16. Revise § 207.25 to read as follows:

§ 207.25 Posthearing briefs.

Any party may file a posthearing brief concerning the information adduced at or after the hearing with the Secretary within a time specified in the notice of scheduling or by the presiding official at the hearing. A posthearing brief shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. No such posthearing brief shall exceed fifteen (15) pages of textual material, double-spaced and single-sided, when printed out on paper measuring 8.5 × 11 inches. In addition, the presiding official may permit persons to file answers to questions or requests made by the Commission at the hearing within a specified time. The Secretary shall not accept for filing posthearing briefs or answers which do not comply with this section.

17. Revise § 207.28 to read as follows:

§ 207.28 Anticircumvention.

Prior to providing advice to the administering authority pursuant to section 781(e)(3) of the Act, the Commission shall publish in the **Federal Register** a notice that such advice is contemplated. Any person may file one written submission concerning the matter described in the notice no later than fourteen (14) days after publication of the notice. Such a statement shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. The statement shall contain no more than fifty (50) double-spaced and single-sided pages of textual material, when printed out on paper measuring 8.5 × 11 inches. The Commission shall by notice provide for additional statements as it deems necessary.

18. Amend § 207.30 by revising paragraph (b) to read as follows:

§ 207.30 Comment on information.

* * * * *

(b) The parties shall have an opportunity to file comments on any information disclosed to them after they have filed their posthearing brief pursuant to § 207.25. A comment shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. Comments shall only concern such information, and

shall not exceed 15 pages of textual material, double-spaced and single-sided, when printed out on paper measuring 8.5 × 11 inches. A comment may address the accuracy, reliability, or probative value of such information by reference to information elsewhere in the record, in which case the comment shall identify where in the record such information is found. Comments containing new factual information shall be disregarded. The date on which such comments must be filed will be specified by the Commission when it specifies the time that information will be disclosed pursuant to paragraph (a) of this section. The record shall close on the date such comments are due, except with respect to investigations subject to the provisions of section 771(7)(G)(iii) of the Act, and with respect to changes in bracketing of business proprietary information in the comments permitted by § 207.3(c).

19. Amend § 207.61 by adding paragraph (e) to read as follows:

§ 207.61 Responses to notice of institution.

* * * * *

(e) A document filed under this section shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day.

20. Amend § 207.62 by revising paragraph (b)(2) to read as follows:

§ 207.62 Rulings on adequacy and nature of Commission review.

* * * * *

(b) * * *

(2) Comments shall be submitted within the time specified in the notice of institution. In a grouped review, only one set of comments shall be filed per party. Comments shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. Comments shall not exceed fifteen (15) pages of textual material, double spaced and single sided, when printed out on paper measuring 8.5 × 11 inches. Comments containing new factual information shall be disregarded.

* * * * *

21. Revise § 207.65 to read as follows:

§ 207.65 Prehearing briefs.

Each party to a five-year review may submit a prehearing brief to the Commission on the date specified in the scheduling notice. A prehearing brief shall be signed and shall include a table of contents. A prehearing brief shall be filed electronically, and eight (8) true paper copies shall be submitted (on paper measuring 8.5 × 11 inches and single-sided) on the same business day. The prehearing brief should present a party's case concisely and shall, to the extent possible, refer to the record and include information and arguments which the party believes relevant to the subject matter of the Commission's determination.

22. Amend § 207.67 by revising paragraph (a) to read as follows:

§ 207.67 Posthearing briefs and statements.

(a) Briefs from parties. Any party to a five-year review may file with the Secretary a posthearing brief concerning the information adduced at or after the hearing within a time specified in the scheduling notice or by the presiding official at the hearing. A posthearing brief shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. No such posthearing brief shall exceed fifteen (15) pages of textual material, double spaced and single sided, when printed out on paper measuring 8.5 × 11 inches and single-sided. In addition, the presiding official may permit persons to file answers to questions or requests made by the Commission at the hearing within a specified time. The Secretary shall not accept for filing posthearing briefs or answers which do not comply with this section.

* * * * *

23. Amend § 207.68 by revising paragraph (b) to read as follows:

§ 207.68 Final comments on information.

* * * * *

(b) The parties shall have an opportunity to file comments on any information disclosed to them after they have filed their posthearing brief pursuant to § 207.67. Comments shall be filed electronically, and eight (8) true paper copies shall be submitted on the same business day. Comments shall only concern such information, and shall not exceed 15 pages of textual material, double spaced and single-sided, when printed out on paper measuring 8.5 × 11 inches and single-sided. A comment may address the accuracy, reliability, or probative value of such information by reference to information elsewhere in the record, in which case the comment shall identify where in the record such information is found. Comments containing new factual information shall be disregarded. The date on which such comments must be filed will be specified by the Commission when it specifies the time that information will be disclosed pursuant to paragraph (a) of this section. The record shall close on the date such comments are due, except with respect to changes in bracketing of business proprietary information in the comments permitted by § 207.3(c).

PART 210—ADJUDICATION AND ENFORCEMENT

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

Authority: 19 U.S.C. 1333, 1335, and 1337.

25. Amend § 210.4 by revising paragraphs (f)(1) and (2) and adding paragraph (f)(4) to read as follows:

§ 210.4 Written submissions; representations; sanctions.

* * * * *

(f) *Specifications; filing of documents.* (1)(i) Written submissions that are addressed to the Commission during an investigation or a related proceeding shall comply with § 201.8 of this chapter and the Commission's Handbook on Filing Procedures. Responses to a complaint, briefs, comments and responses thereto, compliance reports, motions and response or replies thereto, petitions and replies thereto, prehearing statements, and proposed findings of fact and conclusions of law and responses thereto provided for under 210.4(d), 210.13, 210.14, 210.15, 210.16, 210.17, 210.18, 210.19, 210.20, 210.21, 210.23, 210.24, 210.25, 210.26, 210.33, 210.34, 210.35, 210.36, 210.40, 210.43, 210.45, 210.46, 210.47, 210.50, 210.52, 210.53, 210. 57, 210.59, or 210.71; and submissions pursuant to an order of the presiding administrative law judge shall be filed electronically, and true paper copies of such submissions shall be filed by 12 noon, eastern time, on the next business day. Except for the above-listed documents and complaints, petitions, and requests filed under § 210.8, § 210.75, § 210.76, or § 210.79, all other documents shall be filed electronically, and no paper copies will be required. If paper copies are required under this section, the required number of paper copies shall be governed by paragraph (f)(2) of this section. Typed matter shall not exceed 6.5 × 9.5 inches using 11-point or larger type and shall be double-spaced between each line of text using the standard of 6 lines of type per inch. Text and footnotes shall be in the same size type. Quotations more than two lines long in the text or footnotes may be indented and single-spaced. Headings and footnotes may be single-spaced.

(ii) The administrative law judge may impose any specifications he deems appropriate for submissions that are addressed to the administrative law judge.

(2) Unless the Commission or this part specifically states otherwise:

(i) The original and two (2) true paper copies of each submission shall be filed if the investigation or related proceeding is before an administrative law judge; and

(ii) The original and eight (8) true paper copies of each submission shall be filed if the investigation or related proceeding is before the Commission, except that a submitter shall file the original and 6 copies of any exhibits filed with a request or petition for related proceedings under § 210.75, § 210.76, or § 210.79.

* * * * *

(4) A complaint, petition, or request filed under § 210.75, § 210.76, or § 210.79 shall be filed in paper form. An original and eight (8) true paper copies shall filed in accordance with this paragraph (f). All exhibits, appendices, and attachments to the document shall be filed in electronic form on CD–ROM, DVD, or other portable electronic media approved by the Secretary.

* * * * *

26. Amend § 210.8 by revising paragraph (a) to read as follows:

§ 210.8 Commencement of preinstitution proceedings.

* * * * *

(a)(1) A complaint filed under this section shall be filed in paper form. An original and eight (8) true paper copies shall filed in accordance with § 201.8(c). All exhibits, appendices, and attachments to the complaint shall be filed in electronic form on CD–ROM, DVD, or other portable electronic media approved by the Secretary.

(2) If the complainant is seeking temporary relief, the complainant must also file an original and eight paper (8) copies of the motion for temporary relief in accordance with § 201.8(c). All exhibits, appendices, and attachments to the motion shall be filed in electronic form on CD–ROM, DVD, or other portable electronic media approved by the Secretary.

* * * * *

Issued: June 24, 2011.

By order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–16360 Filed 7–5–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Filing Procedures

AGENCY: International Trade Commission.

ACTION: Notice of proposed Handbook on Filing Procedures.

SUMMARY: The United States International Trade Commission (''Commission'') proposes to issue a Handbook on Filing Procedures to replace its Handbook on Electronic Filing Procedures. The revision is necessary to implement a new Commission requirement for electronic filing of most documents with the agency. The intended effects of the proposed change are to increase efficiency in processing documents filed with the Commission, reduce Commission expenditures, and conform agency processes to federal government initiatives.

DATES: To be assured of consideration, written comments must be received by 5:15 p.m. on August 5, 2011.

ADDRESSES: You may submit comments, identified by docket number MISC–036, by any of the following methods:

—*Agency Web Site: https://edis.usitc.gov.* Follow the instructions for submitting comments on the Web site.

—*Mail:* For paper submission. U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436.

—*Hand Delivery/Courier:* U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436, from the hours of 8:45 a.m. to 5:15 p.m.

Instructions: All submissions received must include the agency name and docket number (MISC–036), along with a cover letter stating the nature of the commenter's interest in the proposed rulemaking. All comments received will be posted without change to *https://edis.usitc.gov*, including any personal information provided. For paper copies, a signed original and 14 copies of each set of comments should be submitted to James R. Holbein, Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436. *Docket:* For access to the docket to read background documents or comments received, go to *https://edis.usitc.gov* and/or the U.S. International Trade Commission, 500 E Street, SW., Room 112A, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary, telephone (202) 205–2000 or Gracemary R. Roth-Roffy, telephone (202) 205–3117, Office of the General Counsel, United States International Trade Commission. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*.

SUPPLEMENTARY INFORMATION: The Commission proposes to require that most filings with the agency be made by electronic means. The Commission's Electronic Document Information System (EDIS) already accepts electronic filing of certain documents, and will be the mechanism by which investigation participants electronically file their documents in the future. Persons seeking to file documents will be required to comply with the revised Handbook on Filing Procedures, which will supersede the Commission's current Handbook on Electronic Filing Procedures. The Commission plans to seek public comment concerning proposed related amendments to its Rules of Practice and Procedure in a separate notice.

Although the Commission intends to require electronic filing through EDIS of most documents, that requirement will be modified for certain documents. Notably, documents such as briefs filed in import injury proceedings will need to be filed electronically and in paper form on the same business day. Certain other documents, such as petitions for review in intellectual property-related import investigations, will need to be filed electronically, and in paper form by noon the next business day.

The agency anticipates that some documents will not be electronically filed through EDIS. Parties filing petitions in import injury proceedings, and complaints and motions for temporary relief in intellectual property-related import investigations will continue to file those documents in paper form, but will be required to file the exhibits, attachments thereto in electronic form on portable media approved by the Secretary. Materials intended to be used at certain conferences and hearings will not need to be filed electronically.

In addition, the Secretary will have the authority to allow for modifications of the requirements for the filing of documents specified in the rules and the Handbook. In particular, the Commission understands that some investigation participants may encounter difficulties in filing electronically. For example, some participants may not have full access to the internet. A person or firm that believes it will have difficulty filing electronically will have the opportunity to file a request for an exemption from the normal filing requirement. The Secretary will grant such requests if the submitter of the document provides a reasonable explanation for the request.

The Commission seeks public comment on the proposed Handbook on Filing Procedures. The agency will consider these comments in preparing to issue a final version of the Handbook.

I. Introduction

A. This Handbook provides instructions for persons filing documents with the United States International Trade Commission (Commission).

B. In any conflict between the Commission's Rules of Practice and Procedure (rules) and this Handbook, the rules shall govern. This Handbook is designed to be read in conjunction with the rules. This Handbook does not alter or waive any provisions in the rules governing the filing of documents with entities and/or persons other than the Commission, including but not limited to the United States Secretary, NAFTA Secretariat.

C. If you plan to file a document with the Commission, you must comply with the relevant provisions of the rules governing such filing. The Commission generally provides for two types of filing, electronic filing and filing in paper form. The general rule set out in § 201.8 of the rules requires electronic filing, but special requirements apply to certain types of documents, and the Secretary is authorized to make exceptions and modifications to the general rule. Certain exceptions and modifications are set out below. The Commission generally does not permit filing by means other than paper filing or electronic filing. Thus, for example, unless provided for by the rules, filing by facsimile and by electronic mail (i.e., sending a document to a Commission electronic mail address) is not permitted.

II. Filing Procedures

A. Definitions and Instructions

(1) ''*EFP*'' means the Commission's Electronic Filing Procedures.

(2) ''*Secretary*'' means the Secretary to the Commission (500 E Street, SW., Room 112A, Washington, DC 20436, telephone 202 205 2000). The EFP are administered by the Secretary and any questions about EFP should be directed to the Secretary.

(3) ''*Business days''* refers to the days that the Commission is open. ''Business hours'' refers to the hours that the Commission is open on a given business day (i.e., from 8:45 a.m. to 5:15 p.m., Washington, DC local time, Monday through Friday, excepting Saturdays, Sundays, Federal legal holidays and other days and times when the Commission is closed for other reasons).

(4) ''*EDIS''* refers to the Commission's Electronic Document Information System, a web-based software system which will receive and store electronic transmissions of filing information and filed documents.

(5) The ''*EDIS Web site''* refers to the Commission's Web site which provides access to EDIS via the World Wide Web at *https://edis.usitc.gov*.

(6) ''*Document''* refers to the filing information and associated files that all filers must provide pursuant to § 201.8 of the rules.

(7) ''*Cover sheet''* refers to the EDIS cover sheet that all filers must complete when making a paper filing pursuant to § 201.8(g) of the rules. EDIS cover sheets are generated online at the EDIS Web site and must contain all necessary metadata about a filing.

(8) ''*Electronic receipt''* means that an electronic transmission of a document to EDIS via the EDIS Web site has been successfully completed in its entirety. As discussed below, the electronic transmission and receipt of a document does not mean that the document has been accepted for filing.

(9) ''*Electronic filing''* means the electronic transmission of a document and the Secretary's acceptance of the document for filing.

(10) ''*Registered user''* means a person that registers for an account within EDIS via the EDIS Web site, enabling their ability to file documents with the Commission.

(11) ''*E-mail address of record''* means the electronic mail address of a registered user which he or she has provided to the Secretary.

(12) ''*Notice of electronic receipt''* will be provided in two forms: (a) An on screen notice of receipt once the electronic transmission of the document is complete; and (b) an e-mail sent to the registered user's e-mail address of record. The notice of electronic receipt only conveys that the document is physically present at the Commission and does not mean that the document has been accepted by the Secretary for filing in EDIS.

(13) ''*PDF''* means portable document format.

B. Registration as an EFP User and Assignment of Passwords

(1) To file electronically, you must first become a ''registered user'' of EDIS. To register, a user must fill out the EDIS user registration form online at the EDIS Web site. Anonymous user access is not supported by EDIS to either file or search for a document. The online registration process will require identification of the user's name, firm affiliation, address, telephone number and e-mail address of record. Users must have and maintain a working e-mail address to be a registered user.

(a) Users must select their applicable association in the Firm/Organization drop-down field. If a user's affiliation in the Firm/Organization field is not listed, select 'Not Listed' if you intend on filing a document. You will be presented with an electronic pop-up form to provide the relevant information to have your firm included in the list. The new firm will be added by USITC staff after your registration has been submitted and your account will be updated to reflect your association to the new firm.

(b) All users must designate a user ID and password, and select and answer two unique security questions on the registration form as forms of authentication for accessing EDIS. Registered users may access EDIS for electronic filing without any additional approval from the Secretary.

(c) The user's registration information is used when filing a document to populate the document submission fields of 'Filed By' and 'Firm/Organization.'

(2) Every registered user shall be responsible for keeping his/her registration information current.

(a) Users who leave their registered firm or organization must re-register with a new user ID and password to file documents so that an accurate filing history can be maintained.

(b) Changes to user information other than the Firm/Organization should be requested by contacting the Commission's EDIS Helpdesk at 202–205–2000 or via e-mail at *EDIS3Help@usitc.gov*.

(c) Password and security questions can only be changed or re-set by the registered user when logged in to EDIS.

(3) A registered user may authorize another person to file a document with the Commission using the user ID and password of the registered user; however, the registered user assumes responsibility for any authorized use of his/her user ID and password. The registered user and all persons who participate in the preparation of or are signatories to a document shall retain responsibility with respect to any duties and obligations pertaining to the document under the rules. A registered user must comply with applicable limitations on disclosure of confidential business information (''CBI'') and business proprietary information (''BPI'') pursuant to 19 CFR 201.6, 206.17, 207.7, and 210.5. As provided in paragraph II(J)(2), a document filed using a registered user's user ID and password will be deemed signed by that registered user.

(4) Upon learning of the potential compromise of the confidentiality of his/her password, a registered user shall immediately change the password via the EDIS Web site. No later than the next business day, the registered user must also notify the Secretary of the perceived compromise and the period of compromise.

(5) A registered user who has provided his/her password to an employee of the registered user's firm, such as a paralegal, legal assistant, or secretary, must change the password upon the employee's departure from the firm. Unless there is a perceived breach of confidentiality, in such instances, no notification to the Secretary is needed.

(6) You may not electronically file documents with the Commission unless you have registered with the Commission pursuant to the procedures set forth in paragraph II(B)(1) above.

C. Filing Requirements

(1) Unless otherwise specified in this Handbook, in the Commission's rules, or in other instructions from the Secretary, you must file all documents electronically through EDIS using EFP.

(2) Specific instructions are set out below for certain types of documents.

(a) Import Injury: Antidumping and countervailing duty investigations and reviews under Title VII of the Tariff Act of 1930; safeguard and market disruption investigations under sections 204, 406, 421, and 422 of the Trade Act of 1974; investigations under section 302 of the NAFTA implementation Act of 1994; investigations under section 22 of the Agricultural Adjustment Act.

(i) You must file a petition, request, or motion under 19 CFR 206.2 or 207.10 in paper form. An original and eight (8) true paper copies must to be filed. You must file all exhibits, appendices, and attachments in PDF format on CD–ROM, DVD, or other form of portable electronic media approved by the Secretary.

(ii) You must file briefs, statements, responses, and comments provided for under 19 CFR 201.12, 201.14, 206.8, 207.15, 207.23, 207.25, 207.28, 207.30, 207.61, 207.62, 207.65, 207.67, 207.68

electronically, and submit eight (8) true paper copies on the same business day.

(iii) If you file supplementary material or witness testimony provided for under 19 CFR 201.13, 207.15, or 207.24, you must submit eight (8) true paper copies at the hearing or the conference.

(iv) If you request confidential treatment of a document, you must file a nonconfidential version electronically and submit four (4) true paper copies on the same business day.

(v) You must file applications provided for under 19 CFR 206.17 or 207.7 electronically; no paper copies will be required.

(b) Intellectual Property-Based Import Investigations: Investigations under section 337 of the Tariff Act of 1930.

(i) You must file a complaint, petition, request, or motion for temporary relief under 19 CFR 210.8, 210.75, 210.76, or 210.79 in paper form. An original and eight (8) true paper copies must be filed. You must file all exhibits, appendices, and attachments in PDF format on CD–ROM, DVD, or other form of portable electronic media approved by the Secretary.

(ii) You must file the following documents electronically, and submit true paper copies by 12:00 noon eastern time the next business day. If the matter is before the administrative law judge, you must submit two (2) true paper copies of a written submission. If the matter is before the Commission, you must submit eight (8) true paper copies.

1. Responses to a complaint under 19 CFR 210.13;

2. Briefs under 19 CFR 210.40 or 210.45;

3. Comments and responses to comments under 19 CFR 210.50;

4. Compliance reports under 19 CFR 210.71;

5. Motions (other than those under C(2)(b)(i) above) and responses or replies thereto under 19 CFR 210.12, 210.14, 210.15, 210.16, 210.17, 210.18, 210.19, 210.20, 210.21, 210.24, 210.25, 210.26, 210.33, 210.34, 210.52, 210.53, 210.57, or 210.59;

6. Petitions and replies thereto under 19 CFR 210.43, 210.46, or 210.47;

7. Pre-hearing statements and briefs under 19 CFR 210.35 or 210.36;

8. Proposed fact findings and conclusions of law and responses thereto under 19 CFR 210.40;

9. Submissions pursuant to orders of an administrative law judge.

(iii) You must file all other written submissions (those documents that not listed in sections C(2)(b)(i) and (ii) above, including but not limited to discovery statements, notices of appearance, exhibit objections, notices of prior art, notices of withdrawal, witness lists, and expert reports) electronically.

(c) You must file documents in other proceedings, including investigations under section 332 of the Tariff Act of 1930, electronically, and submit eight (8) true paper copies by 12:00 noon eastern time on the next business day; except that, if you file supplementary material or witness testimony provided for under 19 CFR 201.13, you must file eight (8) true paper copies with the Secretary at the hearing.

(3) The Secretary may provide for exceptions and modifications to the filing requirements set out in the rules and the Handbook. Certain exceptions are described below.

(a) You may request authorization from the Secretary to file a document or documents in a particular form in a proceeding by electronic mail to *secretary@usitc.gov,* by facsimile to 202–205–2104 or by telephone to 202–205–2000. The Secretary may grant your request if you provide a reasonable explanation as to why you cannot file in the required form, such as a lack of adequate access to computer or internet resources. If the request is granted, the Secretary will promptly inform you and provide instructions on how to file your documents. Your documents will be accepted for filing only if they comply with the Secretary's instructions, the rules, and the Handbook. If the request for waiver is granted, the submitter should in a cover letter cite the reason(s) for the request and indicate that the Secretary approved the request. Service of the document must comply with 19 CFR 201.16.

(b) The Secretary, on his or her own motion, will allow the filing of certain documents in paper form. Such documents may include, but are not limited to, letters submitted by Members of Congress, officials of other U.S. agencies, state and local government officials, and foreign government officials who do not represent an interested party in a proceeding before the Commission.

(4) If the EDIS Web site is unable to accept electronic filings continuously or intermittently over the course of any period of time greater than one hour after 12 noon Washington, DC local time, on a business day, the Secretary shall deem the EDIS Web site to be subject to a technical failure on that day. If you are unable to file a document electronically by the deadline imposed by the Commission because the EDIS Web site is experiencing a technical failure, you should immediately report the technical failure to the Secretary and request authorization to file your document after the deadline. The Secretary will promptly grant or deny the authorization. When you file your document subject to the authorization, you should also file an unsworn declaration provided for in 28 U.S.C. 1746 stating (i) the dates and times of the attempted filing (ii) the fact that the Web site's technical failure prevented you from making a timely filing, (iii) your contacts with the Secretary to report the Web site's technical failure, and (iv) the Secretary's granting of authorization for you to file after the deadline. If you are making a late filing for reasons unrelated to the operating status of the EDIS Web site, you should follow the normal procedures in the rules for requests for late filings.

(5) If you discover that the version of the document available for viewing on EDIS does not conform to the document that you transmitted, please immediately contact the Office of Docket Services, 202–205–1802 for further assistance.

D. Where Documents Are To be Filed

(1) To file a document electronically, you should visit the EDIS Web site at *https://edis.usitc.gov* and follow the instructions for submitting a document electronically to EDIS. The instructions will include the applicable hardware and software requirements for electronic filing.

(2) To file or submit a document in paper form or on portable electronic media, you should file it with the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, room 112A.

E. Notice of Electronic Receipt

(1) Upon completion of the electronic transmission of your document and upload at the Commission, EDIS will generate and send an e-mail notice of electronic receipt of an electronic document to the official e-mail address associated with your user ID. The notice of electronic receipt contains information from EDIS in order to facilitate tracking. A notice of electronic receipt does not constitute acknowledgment by the Commission that the document has been properly filed pursuant to the rules or this Handbook. Moreover, such notification does not constitute service of the document on the parties to an investigation.

(2) If you do not receive a notice of electronic receipt following transmission of a document for filing, please call 202–205–3347, the EDIS Helpline, to confirm that your document was in fact not properly transmitted. If your transmission failed, you must attempt to (i) re-transmit the document

electronically until such a notice is received, or (ii) seek authorization to file late or in paper form, in accordance with the provisions of section II(C) above.

(3) If the document is electronically received by EDIS during business hours, then the effective filing date and time of the document is the date and time that the document has been electronically received by EDIS. If the document is electronically received by EDIS outside of business hours and is accepted for filing, the effective filing date and time of the document will be the next business day.

(4) Subsequent to the notice of electronic receipt, the Secretary will send you a second notice (notice of validation of document) notifying you that the document has undergone initial review and, if public, is now available for viewing on the EDIS Web site.

F. Deadline for Electronic Filing of Documents

(1) When the Commission has imposed a deadline on the filing of a document, the Secretary will consider the document timely filed electronically only if the user has ''clicked'' the ''Confirm'' button on the final confirmation page for electronic submission by 5:15:59 p.m., eastern time, on the day that the document is due to be filed, and received e-mail notification of receipt.

(2) If the filing is submitted prior to a Commission deadline or does not have a particular submission deadline date, you may electronically transmit a document to EDIS at any time of the day (i.e., twenty-four hours/day) and on any day of the week (including weekends and holidays). If the filing is submitted after the close of business, the filing will be deemed officially received on the next business day. You should preserve the notice of electronic receipt of the document, which states the time and date that EDIS received the document, for your records.

G. Size of Electronic Transmission

The size of an electronic transmission as a whole is not limited by the capability of EDIS. There is no limit to the number of PDF files which can be submitted as attachments so long as no one attached file exceeds 25 megabytes in size. If a filing includes an attachment that exceeds the foregoing size limitation and cannot be broken down into multiple PDF files, the Secretary may authorize filing in paper form or on CD–ROM, DVD, or other portable media approved by the Secretary, pursuant to section II(C) above. All page limits set forth in the rules and the Handbook shall remain in effect for purposes of electronic filing.

H. Format of Documents

(1) Documents filed electronically pursuant to this Handbook must be submitted in PDF. Please be aware that some special characters used in certain word processing applications may not convert easily to PDF. The conversion process to PDF may affect pagination as well as the conversion of special characters. Filers are responsible for the accuracy of the documents submitted.

The Commission prefers the submission, when practicable, of documents converted to PDF from word processed text over that of documents converted to PDF from images. Documents converted to PDF from word processed text typically have far fewer megabytes than PDF documents that have been created from images. Additionally, searches of documents converted to PDF from word processed text are more accurate within EDIS than on PDF documents created from images. Additionally, although EDIS will create a searchable text version of PDF documents created from images through an optical character recognition process, such a document may contain recognition errors.

CAUTION: Text based PDF files may permit others to retrieve ''masked'' or ''whited out'' BPI or CBI. Please remove all ''masked'' or ''whited out'' BPI or CBI before filing any electronic document with the Commission.

(2) Each page of an electronically filed document must be in letter sized format (i.e., 8.5 inches by 11 inches when printed out by the Secretary).

(3) Documents filed electronically must comply with both the page limits set forth in the §§ 207.15, 207.25, 207.28, 207.30, 207.62, 207.67, and 207.68 of the rules and the size limit set forth in section G of this handbook.

(4) When preparing PDF documents for filing, you must comply with the following requirements. PDF documents that do not comply with these requirements will be rejected by EDIS during the submission process.

(a) PDF version must be Version 1.3 or greater. (Note: Use of Adobe Acrobat is not required, but if it is used, it must be Acrobat 4 or greater. This is because only Adobe Acrobat 4 or later produces PDF version 1.3.)

(b) Documents must not have Type 3 fonts. Use of Type 1 fonts is recommended.

(c) You must use only the Roman and Cyrillic alphabets in PDF format. Documents in other foreign language alphabets must be scanned. Special characters must be checked on conversion to ensure that they were not changed during the distilling process.

(d) Do not attach any embedded files to your PDF document for electronic filing. This includes all comments (note tool, pencil tool, highlights tool, digital signature tool, embedded files, embedded sounds or other multimedia); forms actions; JavaScript actions; external cross references, web links and image alternates.

(e) Document security setting must have a PDF file security setting of ''none.''

(5) Document attachments shall follow these guidelines:

(a) Files must be attached in the proper logical sequence (i.e., motion should be followed by the exhibits).

(b) Attachments must conform to the following naming convention:

(i) All attachments relating to a single filing must have the same root name, which would be the ''document name'' given by the filer.

(ii) Each attachment shall constitute a separate PDF file and must be numbered sequentially in the order that it appears within the document, followed by the total number of attachments (e.g., A Post-hearing Brief Part 1 of 13). The filer shall also add descriptive language identifying the PDF file attachments (e.g. Post-hearing Brief Part 1—Ex. 1–10).

(c) Use logical break points in creating attachments. Avoid breaking attachments in the middle of a section (e.g., main textual document, exhibit, or appendix) of the filing. An entire attachment(s) shall be contained in a single PDF file if possible.

(d) A single document of less than the file size limit should not be broken into multiple attachments.

(e) The main textual document (e.g., brief, petition, motion) should be contained in a separate attachment from material appended to the filing (e.g., exhibits), unless the entire document is less than the file size limit. Cover letters shall not be filed separately from the main textual document.

(f) Material appended to the main textual document (e.g., exhibits, appendices) shall be combined into a single attachment, as long as the entire attachment does not exceed the file size limit.

(6) When redacting BPI or CBI from a document, you should use redaction methodology that does not change the pagination of the public version, when compared with the BPI or CBI version.

I. Use of Electronic Media

(1) Documents such as exhibits to complaints or petitions must be filed on CD–ROM, DVD, or other portable

electronic media approved by the Secretary. Other documents, such as briefs and motions, may be voluminous and because of the file size and network speed e-filing of these documents may be difficult. Pursuant to section II(C) above, the Secretary may authorize you to file a document on portable electronic media. Each document submitted on portable electronic media must conform to the same formatting rules as those submitted electronically. Please refer to the EDIS 3 User Guide for Submitting Electronic Media for complete instructions on the use of electronic media.

(2) At this time, CD–ROM and DVD are the only accepted media. Devices that would require drivers to attach to a USITC workstation to be read will not be permitted unless approved by the Secretary. Submitted media will be retained by the USITC and only available for return to the submitter if an error is found prohibiting acceptance into EDIS.

J. Signatures

(1) A document filed with the Commission electronically shall be deemed to be signed by the registered user when the document identifies the user as a signatory and the filing complies with paragraphs (2) and (3) below. When the document is filed with the Commission in accordance with any of these methods, the filing shall bind the signatory as if the document were physically signed and filed, and shall function as the registered user's signature whether for the purpose of complying with the Commission's rules, to attest to the truthfulness of an affidavit or declaration, or for any other purpose.

(2) In the case of a signatory who is a registered user as described in paragraph II(B)(1), such document shall be deemed signed provided that such document is filed using the user ID and password of the signatory and contains the physical signature of the registered user using an optical scan format or a typed ''electronic signature,'' e.g., ''/s/ Jane Doe.''

(3) In the case of a document to be signed by two or more persons, the following procedure shall be used:

(a) The filing person shall initially confirm that the content of the document is acceptable to all persons required to sign the document. The filing person then shall attest that original signatures have been obtained from each of the other signatories on a paper copy of the document. If the filing person complies with the foregoing requirements, the Commission shall presume that the filing person has the authority to file the document on behalf of all other persons required to sign such document.

(b) The filing person shall then file the document electronically, indicating the original signatures that have been obtained, e.g., ''/s/Jane Doe,'' ''/s/John Doe,'' etc., or by providing a signature page of the actual physical signatures using an optical scan format.

(c) The filing person must retain the hard copy of the document containing the original signatures until the earlier of (i) the Commission deadline for the destruction of APO materials, if applicable; or (ii) one year after the conclusion of the investigation and resulting appeals.

(d) For a document that requires a signature in the presence of a notary public (e.g., affidavits), the document instead should contain an unsworn declaration clause to be signed by the signatory under penalty of perjury. The language for unsworn declarations under penalty of perjury is provided in 28 U.S.C. 1746.

K. Limitation on Service of Electronic Documents Between the Parties

Persons who have filed documents electronically with the Commission must comply with the rules in effecting service of the electronically filed document on parties in accordance with 19 CFR 201.16. All electronically filed documents must be accompanied by a certificate of service. Documents filed electronically in all pending matters before the Commission, except for proceedings under section 337 of the Tariff Act of 1930, are not to be served electronically on other parties without the prior agreement of the Secretary. In the case of proceedings before an administrative law judge under section 337 of the Tariff Act of 1930, the presiding administrative law judge shall determine whether electronic service of documents as between the parties will be permitted in that proceeding. Parties may only effectuate electronic service on recipients who have provided written consent thereto to the Secretary or the presiding administrative law judge.

L. Copyright and Other Proprietary Rights

(1) The EDIS Web site shall bear a prominent notice as follows: ''The contents of each filing in EDIS may be subject to copyright and other proprietary rights (with the exception of the notices, orders, and opinions of the ITC). It is the user's obligation to determine and satisfy copyright or other use restrictions when publishing or otherwise distributing material found in EDIS. Transmission or reproduction of protected items beyond that allowed by fair use requires the written permission of the copyright owners. Users must make their own assessments of rights in light of their intended use.''

(2) By filing any material with the Commission electronically, a person shall be deemed to consent to all uses of such materials by all parties to the action solely in connection with and for the purposes of the action, including the electronic filing in the action (by a party who did not originally file or produce such materials) of portions, excerpts, quotations, or selected exhibits from such filed materials as part of motion papers, pleadings or other filings with the Commission.

(3) Any dispute that arises among persons regarding the use of materials subject to copyright and other proprietary rights must be resolved among the persons themselves, without the Commission's involvement.

M. Official Record of Commission Proceedings

The electronic version of any document filed by a party in a Commission proceeding will be considered the ''official version'' for purposes of compiling the record in a Commission proceeding. Materials referenced by hyperlink in an electronic document and relied on by the submitter will not be considered part of the document or of the record in a Commission proceeding unless the portions of the materials relied on are included as an attachment to the document. The filer, however, must take into consideration section II(L) when reproducing such materials. Please note that any hyperlinked material contained in the electronic version of a document must be printed in the corresponding paper copy, in conformance with all applicable page limits under the rules.

III. Duration

A. This Handbook is effective as of the date specified in a notice published in the **Federal Register.** These filing procedures shall remain in effect until superseded or rescinded.

B. The Secretary shall amend this Handbook as necessary.

Authority: 19 CFR 201.8(d).

Appendix I to Handbook on Filing Procedures: Matrix of Instructions

The following matrix summarizes instructions for certain documents commonly submitted to the Commission. If there is a discrepancy with the rules, the rules control.

Document type	File through EDIS on day 1?	File on CD or DVD on day 1?	File in paper on day 1? (No. of copies)	File in paper noon day 2? (No. of copies)
Import injury petition	No	No	Yes, 8	No
Exhibits and appendices to import injury petition.	No	Yes	No	No
Import injury briefs, statements, comments	Yes	No	Yes, 8	No
Requests under 201.12 and 201.14(b)	Yes	No	Yes, 8	No
Applications under 206.17 and 207.7	Yes	No	No	No
Hearing and conference testimony and supplementary material.	No	No	Yes, 8	No
Section 337 complaint, motion for temporary relief.	No	No	Yes, 8	No
Exhibits and appendices to section 337 complaint, motion for temporary relief.	No	Yes	No	No
Section 337 documents such as briefs and petitions, if matter is before ALJ.	Yes	No	No	Yes, 2
Section 337 documents such as briefs and petitions, if matter is before Commission.	Yes	No	No	Yes, 8
Other section 337 submissions	Yes	No	No	No
Section 332, 131, 1205 submissions	Yes	No	No	Yes, 8
Nonconfidential version of confidential document.	Yes	No	Yes, 4	No
Submissions granted waiver by Secretary	No	TBD	TBD	No

Notes: 1. ''Day 1'' refers to the date on which a submission is due; in the case of a petition or complaint, it is the date on which the document is first submitted.

2. ''Day 2'' refers to the next business day after Day 1; a submission on Day 2 is due by noon.

3. ''TBD'' means ''to be determined'' by the Secretary, who will issue appropriate instructions.

Issued: June 24, 2011.

By Order of the Commission.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–16359 Filed 7–5–11; 8:45 am]

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Federal Register

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

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Airport and Airway Extension Act of 2011, Part III (June 29, 2011; 125 Stat. 233)

S. 349/P.L. 112–22

To designate the facility of the United States Postal Service located at 4865 Tallmadge Road in Rootstown, Ohio, as the ''Marine Sgt. Jeremy E. Murray Post Office''. (June 29, 2011; 125 Stat. 236)

S. 655/P.L. 112–23

To designate the facility of the United States Postal Service located at 95 Dogwood Street in Cary, Mississippi, as the ''Spencer Byrd Powers, Jr. Post Office''. (June 29, 2011; 125 Stat. 237)

Last List June 28, 2011

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